# Exhibit 5

Crown in any given circumstances could depend not upon the terms of the statute but upon matters extraneous thereto, namely the relevant common law rights of the Crown at the time. Such a result would, in my view, be wholly illogical.

LORD LOWRY. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Keith of Kinkel. I agree with it and for the reasons which he gives I, too, would allow both appeals and restore the interlocutors of the Lord Ordinary, under deletion of the orders for interdict.

*Appeals allowed with costs.*

*Solicitors: Treasury Solicitor for Solicitor for Secretary of State for Scotland; Dunlavey-Rosin for Allan McDougall & Co., S.S.C., Edinburgh, and for Simpson & Marwick, W.S., Edinburgh.*

C. T. B.

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[HOUSE OF LORDS]

CAPARO INDUSTRIES PLC. . . . . RESPONDENTS

AND

DICKMAN AND OTHERS . . . . . APPELLANTS

1989 Nov. 16, 20, 22, 23, 27, 28; 1990 Feb. 8 — Lord Bridge of Harwich, Lord Roskill, Lord Ackner, Lord Oliver of Aylmerton and Lord Jauncey of Tullichettle

*Negligence—Duty of care to whom?—Auditor—Appointment by company to audit and certify company's accounts—Statutory duty to make report to shareholders—Another company making take-over bid by initial purchase of shares—Claim that subsequent completion of take-over by purchase of total issued shares made in reliance on negligently made audit—Whether auditor owing duty of care to shareholders—Whether duty owed to non-shareholding investor—Companies Act 1985 (c. 6), ss. 236(1)(2), 237(1)*

The plaintiffs, a public limited company, which had accomplished the take-over of F. Plc., brought an action against its directors alleging fraudulent misrepresentation and against its auditors claiming that they were negligent in carrying out the audit and making their report, which they were required to do within the terms of sections 236 and 237 of the Companies Act

1985. In the statement of claim the plaintiffs alleged that they had begun purchasing shares in F. Plc. a few days before the annual accounts had been published to shareholders, that in reliance on those accounts they made further purchases of shares so as to take over the company, and that the auditors owed both shareholders and potential investors a duty of care in respect of the certification of the accounts and should have known that as F. Plc.'s profits were not as high as projected and its share price had fallen significantly, that it was susceptible to a take-over bid and that reliance on the accuracy of the accounts would be placed by any potential bidder such as the plaintiffs. On the trial of a preliminary issue against the auditors, on the facts as alleged, the judge determined that the auditors did not owe the plaintiffs a duty of care at common law either as a shareholder of F. Plc. or as an investor holding no shares. On appeal by the plaintiffs the Court of Appeal, by a majority, held that a duty of care was owed to the plaintiffs as shareholders but not as investors.

On appeal by the auditors and cross-appeal by the plaintiffs:—

*Held*, allowing the appeal and dismissing the cross-appeal, that liability for economic loss due to negligent mis-statement was confined to cases where the statement or advice had been given to a known recipient for a specific purpose of which the maker was aware and upon which the recipient had relied and acted to his detriment; that since the purpose of the statutory requirement for an audit of public companies under the Act of 1985 was the making of a report to enable shareholders to exercise their class rights in general meeting and did not extend to the provision of information to assist shareholders in the making of decisions as to future investment in the company, and since, additionally, there was no reason in policy or principle why auditors should be deemed to have a special relationship with non-shareholders contemplating investment in the company in reliance on the published accounts, even when the affairs of the company were known to be such as to render it susceptible to an attempted take-over, the auditors had not owed any duty of care to the plaintiffs in respect of their purchase of F. Plc.'s shares (post, pp. 621D–G, 623D, 626C–E, F—627D, E–G, 628H—629A, E, 631E–G, 638C–E, 649H—650C, 654B–F, 658F–G, 661H—662F).

*Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465, H.L.(E.) and *Smith v. Eric S. Bush* [1990] 1 A.C. 831, H.L.(E.) applied.

Dicta of Denning L.J. in *Candler v. Crane, Christmas & Co.* [1951] 2 K.B. 164, 179–182 and *Al Saudi Banque v. Clarke Pixley* [1990] Ch. 313 approved.

*Scott Group Ltd. v. McFarlane* [1978] N.Z.L.R. 553 considered.

*JEB Fasteners Ltd. v. Marks, Bloom & Co.* [1981] 3 All E.R. 289 and *Twomax Ltd. v. Dickson, McFarlane & Robinson*, 1982 S.C. 113 distinguished.

*Per* Lord Bridge of Harwich, Lord Roskill, Lord Ackner and Lord Oliver of Aylmerton. Whilst recognising the importance of the underlying general principles common to the whole field of negligence, the law has now moved in the direction of attaching greater significance to the more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of

A care which the law imposes (post, pp. 618C–D, 628D–F, 629E, 633E–G, 635B–C).

Dicta of Brennan J. in *Sutherland Shire Council v. Heyman* (1985) 60 A.L.R. 1, 43–44 considered.

Decision of the Court of Appeal [1989] Q.B. 653; [1989] 2 W.L.R. 316; [1989] 1 All E.R. 798 reversed in part.

B The following cases are referred to in their Lordships' opinions:

*Al Saudi Banque v. Clarke Pixley* [1990] Ch. 313; [1990] 2 W.L.R. 344; [1989] 3 All E.R. 361

*Anns v. Merton London Borough Council* [1978] A.C. 728; [1977] 2 W.L.R. 1024; [1977] 2 All E.R. 492, H.L.(E.)

*Candler v. Crane, Christmas & Co.* [1951] 2 K.B. 164; [1951] 1 All E.R. 426, C.A.

C *Candlewood Navigation Corporation Ltd. v. Mitsui O.S.K. Lines Ltd.* [1986] A.C. 1; [1985] 3 W.L.R. 381; [1985] 2 All E.R. 935, P.C.

*Cann v. Willson* (1888) 39 Ch.D. 39

*Cattle v. Stockton Waterworks Co.* (1875) L.R. 10 Q.B. 453

*Clayton v. Woodman & Son (Builders) Ltd.* [1962] 2 Q.B. 533; [1961] 3 W.L.R. 987; [1961] 3 All E.R. 249; [1962] 1 W.L.R. 585; [1962] 2 All E.R. 33, Salmon J. and C.A.

D *Donoghue v. Stevenson* [1932] A.C. 562, H.L.(Sc.)

*Dorset Yacht Co. Ltd. v. Home Office* [1970] A.C. 1004; [1970] 2 W.L.R. 1140; [1970] 2 All E.R. 294, H.L.(E.)

*Elliott Steam Tug Co. Ltd. v. Shipping Controller* [1922] 1 K.B. 127, C.A.

*Glanzer v. Shepard* (1922) 135 N.E. 275

*Grant v. Australian Knitting Mills Ltd.* [1936] A.C. 85, P.C.

*Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465; [1963] 3 W.L.R. 101; [1963] 2 All E.R. 575, H.L.(E.)

E *Hill v. Chief Constable of West Yorkshire* [1989] A.C. 53; [1988] 2 W.L.R. 1049; [1988] 2 All E.R. 238, H.L.(E.)

*JEB Fasteners Ltd. v. Marks, Bloom & Co.* [1981] 3 All E.R. 289

*Junior Books Ltd. v. Veitchi Co. Ltd.* [1983] 1 A.C. 520; [1982] 3 W.L.R. 477; [1982] 3 All E.R. 201, H.L.(Sc.)

*Leigh and Sillavan Ltd. v. Aliakmon Shipping Co. Ltd.* [1986] A.C. 785; [1986] 2 W.L.R. 902; [1986] 2 All E.R. 145, H.L.(E.)

F *Le Lievre v. Gould* [1893] 1 Q.B. 491, C.A.

*McLoughlin v. O'Brian* [1983] 1 A.C. 410; [1982] 2 W.L.R. 982; [1982] 2 All E.R. 298, H.L.(E.)

*Ministry of Housing and Local Government v. Sharp* [1970] 2 Q.B. 223; [1970] 2 W.L.R. 802; [1970] 1 All E.R. 1009, C.A.

*Mutual Life and Citizens' Assurance Co. Ltd. v. Evatt* [1971] A.C. 793; [1971] 2 W.L.R. 23; [1971] 1 All E.R. 150, P.C.

G *Peabody Donation Fund (Governors of) v. Sir Lindsay Parkinson & Co. Ltd.* [1985] A.C. 210; [1984] 3 W.L.R. 953; [1984] 3 All E.R. 529, H.L.(E.)

*Perl (P.) (Exporters) Ltd. v. Camden London Borough Council* [1984] Q.B. 342; [1983] 3 W.L.R. 769; [1983] 3 All E.R. 161, C.A.

*Rondel v. Worsley* [1969] 1 A.C. 191; [1967] 3 W.L.R. 1666; [1967] 3 All E.R. 993, H.L.(E.)

H *Ross v. Caunters* [1980] Ch. 297; [1979] 3 W.L.R. 605; [1979] 3 All E.R. 580

*Rowling v. Takaro Properties Ltd.* [1988] A.C. 473; [1988] 2 W.L.R. 418; [1988] 1 All E.R. 163, P.C.

*Scott Group Ltd. v. McFarlane* [1978] 1 N.Z.L.R. 553

*Smith v. Eric S. Bush* [1990] 1 A.C. 831; [1989] 2 W.L.R. 790; [1989] 2 All E.R. 514, H.L.(E.)

*Smith v. Littlewoods Organisation Ltd.* [1987] A.C. 241; [1987] 2 W.L.R. 480; [1987] 1 All E.R. 710, H.L.(Sc.)

*Sutherland Shire Council v. Heyman* (1985) 60 A.L.R. 1

*Twomax Ltd. v. Dickson, McFarlane & Robinson,* 1982 S.C. 113

*Ultramares Corporation v. Touche* (1931) 174 N.E. 441; 255 N.Y. 170

*Wagon Mound, The* [1961] A.C. 388; [1961] 2 W.L.R. 126; [1961] 1 All E.R. 404, P.C.

*Yuen Kun Yeu v. Attorney-General of Hong Kong* [1988] A.C. 175; [1987] 3 W.L.R. 776; [1987] 2 All E.R. 705, P.C.

The following additional cases were cited in argument:

*Allen, Craig and Co. (London) Ltd., In re* [1934] Ch. 483

*Aswan Engineering Establishment Co. (M/S) v. Lupdine Ltd.* [1987] 1 W.L.R. 1; [1987] 1 All E.R. 135, C.A.

*Blue Bell Inc. v. Peat Marwick, Mitchell & Co.* (1986) 715 S.W.2d 408

*Clarke v. Bruce Lance & Co.* [1988] 1 W.L.R. 881; [1988] 1 All E.R. 364, C.A.

*Clay v. A. J. Crump & Sons Ltd.* [1964] 1 Q.B. 533; [1963] 3 W.L.R. 866; [1963] 3 All E.R. 687, C.A.

*Credit Alliance Corporation v. Arthur Andersen & Co.* (1985) 483 N.E.2d 110

*Customs and Excise Commissioners v. Hedon Alpha Ltd.* [1981] Q.B. 818; [1981] 2 W.L.R. 791; [1981] 2 All E.R. 697, C.A.

*Dutton v. Bognor Regis Urban District Council* [1972] 1 Q.B. 373; [1972] 2 W.L.R. 299; [1972] 1 All E.R. 462, C.A.

*Farr v. Butters Brothers and Co.* [1932] 2 K.B. 606, C.A.

*Haig v. Bamford* (1976) 72 D.L.R. (3d) 68

*Hickman v. Kent or Romney Marsh Sheepbreeders' Association* [1915] 1 Ch. 881

*McInerny v. Lloyds Bank Ltd.* [1974] 1 Lloyd's Rep. 246, C.A.

*Otto v. Bolton and Norris* [1936] 2 K.B. 46

*Pacific Associates Inc. v. Baxter* [1990] 1 Q.B. 993; [1989] 3 W.L.R. 1150; [1989] 2 All E.R. 159, C.A.

*Prudential Assurance Co. Ltd. v. Newman Industries Ltd. (No. 2)* [1982] Ch. 204; [1982] 2 W.L.R. 31; [1982] 1 All E.R. 354, C.A.

*Rosenblum (H.) Inc. v. Adler* (1983) 461 A.2d 138

*S.C.M. (United Kingdom) Ltd. v. W. J. Whittal and Son Ltd.* [1971] 1 Q.B. 337; [1970] 3 W.L.R. 694; [1970] 3 All E.R. 245, C.A.

*Spartan Steel & Alloys Ltd. v. Martin & Co. (Contractors) Ltd.* [1973] Q.B. 27; [1972] 3 W.L.R. 502; [1972] 3 All E.R. 557, C.A.

*Toro Co. v. Krouse, Kern & Co. Inc.* (1987) 827 F.2d 155

APPEAL from the Court of Appeal.

This was an appeal by the third defendants, Touche Ross & Co., a firm of accountants, and a cross-appeal by the plaintiffs, Caparo Industries Plc., in respect of the trial of a preliminary issue in an action by the plaintiffs against the first and second defendants, Steven Graham Dickman and Robert Anthony Dickman, two directors of Fidelity Plc., alleging fraudulent misrepresentation, and against the third defendants alleging negligence in the carrying out of an audit of the accounts of Fidelity for the year ended 31 March 1984, whereby (1) the third

defendants appealed against that part of the order of the Court of Appeal (Bingham and Taylor L.JJ., O'Connor L.J. dissenting) [1989] Q.B. 653 allowing the plaintiffs' appeal against the decision of Sir Neil Lawson, sitting as a judge of the Queen's Bench Division [1988] B.C.L.C. 387, that the third defendants did not owe a duty of care to the plaintiffs as shareholders of Fidelity; and (2) the plaintiffs cross-appealed against that part of the order of the Court of Appeal dismissing their appeal against the decision of Sir Neil Lawson that the third defendants did not owe them a duty of care as non-shareholding buyers.

The facts are set out in the opinion of Lord Bridge of Harwich.

*Peter Goldsmith Q.C.* and *Stephen Moriarty* for the auditors. Three elements are needed for a duty of care to exist: there must be reasonable foreseeability, a close and direct relationship of "proximity" between the parties and it must be fair, just and reasonable to impose liability. No duty of care was owed to Caparo as a potential acquirer of shares because of lack of proximity and because it would not be fair, just and reasonable. If so, Caparo's ability to recover is not improved by the fortuity of ownership of shares because: (i) its loss is qua potential investor; (ii) Caparo was not a relevant shareholder at the relevant time; and (iii) in any event, auditors owe no duty of care to an individual shareholder because of lack of proximity and because it would not be fair, just and reasonable.

Foreseeability can be assumed in the present case, and so is not in issue. However, suggestions based on the well-known passage from the speech of Lord Wilberforce in *Anns v. Merton London Borough Council* [1978] A.C. 728, 751, that, subject only to a public policy test, foreseeability of damage is enough to give rise to a duty of care, can no longer be supported. [Reference was made to *Yuen Kun Yeu v. Attorney-General of Hong Kong* [1988] A.C. 175; *Hill v. Chief Constable of West Yorkshire* [1989] A.C. 53; *Governors of Peabody Donation Fund v. Sir Lindsay Parkinson & Co. Ltd.* [1985] A.C. 210 and *Rowling v. Takaro Properties Ltd.* [1988] A.C. 473.]

As to proximity, it may be difficult to define exhaustively, but it clearly involves more than the mere facts that a defendant has acted in performance of a contract between himself and a person other than the plaintiff in circumstances where reliance by, and harm to, the plaintiff was reasonably foreseeable. The requirement cannot be satisfied by the assumed facts of this case. In the context of a claim for economic loss flowing from a negligent statement proximity has been strictly required both in economic claims generally and negligent statement claims specifically so as, importantly, to avoid liability being imposed upon a person which is out of all proportion to culpability, the fee earned or the ability to insure against the consequence of any negligence. To do otherwise would be to expose defendants to "liability in an indeterminate amount, for an indeterminate time, to an indeterminate class": *Ultramares Corporation v. Touche* (1931) 174 N.E. 441, 444, *per* Cardozo C.J. *Candlewood Navigation Corporation Ltd. v. Mitsui O.S.K. Lines Ltd.* [1986] A.C. 1; *Leigh and Sillavan Ltd. v. Aliakmon Shipping Co. Ltd.* [1986] A.C. 785; *S.C.M. (United Kingdom) Ltd. v. W. J. Whittal and*

*Son Ltd.* [1971] 1 Q.B. 337 and *Spartan Steel & Alloys Ltd. v. Martin & Co. (Contractors) Ltd.* [1973] Q.B. 27 all show that the courts have sought to limit economic loss on policy grounds.

In the case of a negligent statement it is even more important to be circumspect about imposing liability: see *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465, 534 *per* Lord Pearce. In negligent statement cases proximity will not be established unless at least the following conditions are satisfied. Usually, the plaintiff must be (i) the person directly intended by the maker of the statement to act upon the statement (ii) in a specific transaction of which the maker knows and (iii) for the purpose for which the statement is made. Exceptionally, conditions (i) and (iii) may be relaxed provided the plaintiff is a person of whose actual existence (if not name) the maker knows, to whom he knows the statement will be communicated, and who it is likely with a high degree of certainty will act upon the statement in a specific transaction of which the maker knows. Probably, in such a case, there should be satisfied a further requirement that there be some factor more closely linking the maker of the statement to the plaintiff: for example, the payment, to the knowledge of the valuers, by the intending purchasers in *Smith v. Eric S. Bush* [1990] 1 A.C. 831 of their valuation fee. [Reference was made to the judgment of Denning L.J. in *Candler v. Crane, Christmas & Co.* [1951] 2 K.B. 164; *Al Saudi Banque v. Clarke Pixley* [1990] Ch. 313; *Clarke v. Bruce Lance & Co.* [1988] 1 W.L.R. 881; *Ross v. Caunters* [1980] Ch. 297; *Ultramares Corporation v. Touche*, 174 N.E. 441; *Credit Alliance Corporation v. Arthur Andersen & Co.* (1985) 483 N.E.2d 110; *Toro Co,. v. Krouse, Kern & Co. Inc.* (1987) 827 F. 2d 155; *H. Rosenblum Inc. v. Adler* (1983) 461 A. 2d. 138; *Haig v. Bamford* (1976) 72 D.L.R. (3d) 68; *Scott Group Ltd. v. McFarlane* [1978] 1 N.Z.L.R. 553.] The statement of principle in *JEB Fasteners Ltd. v. Marks, Bloom & Co.* [1981] 3 All E.R. 289 goes too far and is unjustified; nor is the reasoning in *Twomax Ltd. v. Dickson, McFarlane & Robinson*, 1982 S.C. 113 supportable.

The relevant statutory provisions are to be found in the Companies Act 1985. The primary responsibility for a company's accounts lies on the company and its directors. The primary purpose of the accounts is to report on the stewardship of the directors to the shareholders as a body, rather than to provide information for the investing public.

In the light of the requirement of "proximity," the relationship between an auditor and a third party investor like Caparo who buys shares in reliance upon an audit report is not such as to give rise to a duty of care. There was no special relationship between Caparo and the auditors: the ability to inspect the accounts and the chance to buy shares are enjoyed by the world at large. Nor were the accounts audited by the auditors with a specific transaction in mind. To impose liability in such circumstances would open up the very prospect of "indeterminate liability" which it is the purpose of the proximity requirement to avoid.

Even were the proximity requirement to be satisfied on the assumed facts of this case, it could not be "fair, just or reasonable" to impose a duty of care owed to Caparo, qua investor. [Reference was made to the vulnerability of the professional man, the problems of obtaining cover in

the professional indemnity market, and the danger of overkill in imposing a duty which might lead to "defensive auditing."]

On the issue of the duty of care in relation to shareholders, if a duty of care be owed to Caparo as a shareholder at all, the scope of that duty is limited to loss suffered by it in that capacity and does not extend to losses incurred qua potential investor. There is nothing unusual in a person being owed an obligation in one capacity, in respect of which he is unable to sue in another capacity: *Hickman v. Kent or Romney Marsh Sheepbreeders' Association* [1915] 1 Ch. 881. In any event, the shareholders to whom any duty of care is owed by an auditor should be limited to those who are registered shareholders at the date the audit work in question is done, alternatively, at the date of the auditors' report; at the latest it should be those registered when the published accounts are distributed to shareholders. At none of those dates was Caparo a registered shareholder. [Reference was made to *In re Allen, Craig & Co. (London) Ltd.* [1934] Ch. 483; and to *Prudential Assurance Co. Ltd. v. Newman Industries Ltd. (No. 2)* [1982] Ch. 204.] An auditor does not owe a duty of care to the individual shareholder at all, in any event. In auditing the accounts and making his report to the shareholders, the auditor's purpose is not to give guidance to individual shareholders about their private investment decisions, nor does he have any specific transactions in mind when doing so.

*Christopher Bathurst Q.C., Michael Brindle* and *Craig Orr* for the plaintiffs, Caparo Industries Plc. The correct approach is to start with an examination of the statutory framework within which auditors operate. The Companies Act 1985 (and its predecessors) make it clear that an auditor reports to every shareholder. A duty to report must be a duty to report carefully. That duty extends to each shareholder; a duty of care to the company alone would conflict with the policy of the Act and would leave many types of loss wholly without remedy. If the duty is owed to the individual shareholder, then it cannot be purely for the purposes of "stewardship." It cannot be limited to loss by selling for too little and not extend to loss from buying for too much. Such a distinction would be illogical, since all shareholders are investors and since buying selling and retaining are all the same type of loss. It would also be undesirable in its consequences. There is a natural tendency for directors to seek to present the company in a positive way. The danger, particularly if the company is vulnerable, is that the asset value or profitability will be overstated, unless the auditors exercise due care: see *Candler v. Crane, Christmas & Co.* [1951] 2 K.B. 164, 184 as to the law failing to serve the best interests of the community. Such a distinction would also be contrary to the proper approach for determining what damages are recoverable. The essential question in considering the duty of care is whether the duty is owed *to the plaintiff*; that is then subject to the type of loss being within the scope of the duty and the type of loss being non-remote. In the instant case, buying, selling and retaining shares all fall within the scope of the duty arising from the statutory function of auditors; and the loss claimed is of a type which is a non-remote consequence of a breach of duty. Certain general probabilities may be assumed.

1. In many instances, accounts which do not give a true and fair view of the state of the company's affairs at the end of the financial year and/or of the company profit or loss for that year will not, and will be inherently unlikely to, cause any damage to the company itself. 2. Equity shareholders in a company are likely to make decisions to buy, retain or sell shares in the company in reliance on the accounts. 3. It is likely that if accounts materially understate the true and fair view, shareholders selling shares will do so at less than their true value. If they materially overstate the true and fair view, shareholders buying shares will do so at more than their true value. 4. An equity shareholder with no peculiar features is inherently much more likely to make an investment decision based on the accounts than to so make a decision to lend to, or trade with, the company. 5. A competent auditor will realise these facts. Reliance is placed on *Mutual Life and Citizens' Assurance Co. Ltd. v. Evatt* [1971] A.C. 793, 801.

As to the "timing" point raised by the auditors, the annual general meeting has always been the principal date when the auditor reports to the members. The fact that the date when the report is sent to the shareholder may *also* be relevant does not detract from that. In any event, there is no need to limit the duty to registered shareholders; a shareholding may be beneficial.

There is no single test or formula for determining what constitutes "proximity." Certain types of cases are different in principle. There are cases like *Hedley Byrne* [1964] A.C. 465 where there is no nexus between the plaintiff and defendant save a voluntary assumption of responsibility. There are cases involving public functions, where discretion is involved and a possible conflict between different interests (e.g. *Yuen Kun Yeu* [1988] A.C. 175 or *Rowling v. Takaro Properties Ltd.* [1988] A.C. 473). There are cases which attempt to "short-circuit" the contractual chain; and cases where there is an established rule of law (e.g. *Leigh and Sillavan* [1986] A.C. 785). The present case is different. The auditors are performing a statutory function designed to be for the benefit of certain classes of person. In such cases the concept of voluntary assumption of responsibility, on which the auditors founded their case in the Court of Appeal, is unhelpful. In any event, it is satisfied here, if it needs to be. The test is whether performance of the duty is required by policy in order that, inter alia, reliance can be placed on the work done. Crucial factors are that there is positive reliance which is central to the decision to buy; and that such reliance is direct and without opportunity of intermediate examination. (Another factor is that the duty creates no conflict).

Ever since *Donoghue v. Stevenson* [1932] A.C. 562 it has been established that a duty is owed where there is no reasonable likelihood of, or opportunity for, intervening examination either by the plaintiff or a third party. The rationale behind this is that where there cannot realistically be any intervening examination between the defendant's work and the plaintiff's use of that work, then the plaintiff and the defendant are proximate: *Farr v. Butters Brothers and Co.* [1932] 2 K.B. 606, 614–615, and *Otto v. Bolton and Norris* [1936] 2 K.B. 46, 57. For this purpose it makes no difference whether the work in question is

manufacture of an article, repair of a building, or the examination of a building or a company's records so as to produce a report on that building or that company. [Reference was made to *Dutton v. Bognor Regis Urban District Council* [1972] 1 Q.B. 373; *Smith v. Eric S. Bush* [1990] 1 A.C. 831, 872B–C, *per* Lord Jauncey of Tullichettle; *Pacific Associates Inc. v. Baxter* [1990] 1 Q.B. 993, 1031B–H *per* Ralph Gibson L.J.; *McInerny v. Lloyds Bank Ltd.* [1974] 1 Lloyd's Rep. 246, 254 *per* Denning M.R.] Just because a very high degree of foreseeability is a strong pointer towards proximity does not mean that our case equates proximity with foreseeability. Although there has to be a sufficiently definable class of person who is likely to be injured (as opposed to the world at large), in this limited class the *identity* of the plaintiff cannot matter: what is required is a *definable* type and class. It would be wrong to equate "limited" with "small": provided the class is definable (limited) at the time when the damage may be suffered, it does not matter that the class was potentially much larger at the time that the negligent act was committed.

Apart from shareholders, a duty is owed to unwelcome bidders. They form a special class since it is known that they will rely on the accounts and nothing else. They will not be shown other documents, as a "white knight" would be. Thus where (as here) a company is particularly vulnerable, the auditor foresees a plain risk of a bid and the virtual certainty of reliance. The degree of vulnerability is a question of fact, but the situation of Fidelity on the assumed facts was very grave. There are many cases which fall between (a) the facts in *Candler* [1951] 2 K.B. 164 and (b) the categories where Denning L.J. in that case considered that there was no duty. While it is accepted that an unwelcome bidder is not within (a), neither is he within (b). [Reference was made to *JEB Fasteners Ltd. v. Marks, Bloom & Co.* [1981] 3 All E.R. 289; *Twomax Ltd. v. Dickson, McFarlane & Robinson*, 1982 S.C. 113; *Scott Group Ltd. v. McFarlane* [1978] 1 N.Z.L.R. 553; *Ultramares Corporation v. Touche*, 174 N.E. 441; *H. Rosenblum Inc. v. Adler*, 461 A.2d 138 and *Blue Bell Inc. v. Peat Marwick, Mitchell & Co.* (1986) 715 S.W.2d 408.] The United States authorities present no coherent picture, and authority can be found for any proposition. Nonetheless the recent general tendency (save in New York) is to a test wider than that contended for by the auditors.

If the other requirements of a duty exist, public policy should only defeat that duty in rare cases where cogent reasons are plainly established. The ill-consequences for which the auditors contend are not the consequences of a duty to a bidder, but of unlimited liability, which can only be remedied by legislation. If a duty is recognised, then in respect of any set of accounts the number of plaintiffs in a potential claim will be very limited. The amount of the claim will be the amount by which the shares drop in value when the true position is revealed. Liability cannot extend beyond the "currency" of those accounts. There are cogent policy reasons in favour of a duty. It is in the interests both of the company and others that audited accounts should be and should be seen to be reliable. Without a duty such as that for which we contend over-optimistic accounts will normally not give rise to any liability.

Further, it is in the interests of shareholders that bids should be made; and thus that a bidder has accounts on which he can rely and for which he has a remedy.

*Goldsmith Q.C.* in reply referred to *Clay v. A. J. Crump & Sons Ltd.* [1964] 1 Q.B. 533 and *Aswan Engineering Establishment Co. (M/S) v. Lupdine Ltd.* [1987] 1 W.L.R. 1.

*Bathurst Q.C.* in rejoinder.

The first and second defendants did not appear and were not represented.

Their Lordships took time for consideration.

8 February 1990. LORD BRIDGE OF HARWICH. My Lords, the appellants are a well known firm of chartered accountants. At all times material to this appeal, they were the auditors of a public limited company, Fidelity Plc. ("Fidelity"), which carried on business as manufacturers and vendors of electrical equipment of various kinds and whose shares were quoted on the London Stock Exchange. On 22 May 1984 the directors of Fidelity announced the results for the year ended 31 March 1984. These revealed that profits for the year fell well short of the figure which had been predicted, and this resulted in a dramatic drop in the quoted price of the shares which had stood at 143p per share on 1 March 1984 and which, by the beginning of June 1984, had fallen to 63p. Fidelity's accounts for the year to 31 March 1984 had been audited by the appellants and had been approved by the directors on the day before the results were announced. On 12 June 1984 they were issued to the shareholders, with notice of the annual general meeting, which took place on 4 July 1984 and at which the auditor's report was read and the accounts were adopted.

Following the announcement of the result, the respondents Caparo Industries Plc. ("Caparo") began to purchase shares of Fidelity in the market. On 8 June 1984 they purchased 100,000 shares but they were not registered as members of Fidelity until after 12 June 1984 when the accounts were sent to shareholders although they had been registered in respect of at least some of the shares which they purchased by the date of the annual general meeting, which they did not attend. On 12 June 1984, they purchased a further 50,000 shares, and by 6 July 1984 they had increased their holding in Fidelity to 29.9 per cent. of the issued capital. On 4 September 1984 they made a bid for the remainder at 120p per share, that offer being increased to 125p per share on 24 September 1984. The offer was declared unconditional on 23 October 1984, and two days later Caparo announced that it had acquired 91.8 per cent. of the issued shares and proposed to acquire the balance compulsorily, which it subsequently did.

The action in which this appeal arises is one in which Caparo alleges that the purchases of shares which took place after 12 June 1984 and the subsequent bid were all made in reliance upon the accounts and that those accounts were inaccurate and misleading in a number of respects and in particular in overvaluing stock and underproviding for after-sales credits, with the result that an apparent pre-tax profit of some £1.3m.

should in fact have been shown as a loss of over £400,000. Had the true facts been known, it is alleged, Caparo would not have made a bid at the price paid or indeed at all. Caparo accordingly commenced proceedings on 24 July 1985 against two of the persons who were directors at the material time, claiming that the overvaluations were made fraudulently, and against the appellants, claiming that they were negligent in certifying, as they did, that the accounts showed a true and fair view of Fidelity's position at the date to which they related. The substance of the allegation against the appellants is contained in paragraph 16 of the statement of claim which is in the following terms:

> "Touche Ross, as auditors of Fidelity carrying out their functions as auditors and certifiers of the accounts in April and May 1984, owed a duty of care to investors and potential investors, and in particular to Caparo, in respect of the audit and certification of the accounts. In support of that duty of care Caparo will rely upon the following matters: (1) Touche Ross knew or ought to have known (a) that in early March 1984 a press release had been issued stating that profits for the financial year would fall significantly short of £2.2m., (b) that Fidelity's share price fell from 143p per share on 1 March 1984 to 75p per share on 2 April 1984, (c) that Fidelity required financial assistance. (2) Touche Ross therefore ought to have foreseen that Fidelity was vulnerable to a take-over bid and that persons such as Caparo might well rely on the accounts for the purpose of deciding whether to take over Fidelity and might well suffer loss if the accounts were inaccurate."

On 6 July 1987, Sir Neil Lawson, sitting as judge in chambers, made an order for the trial of a preliminary issue, as follows:

> "Whether on the facts set out in paragraphs 4 and 6 and in sub-paragraphs (1) and (2) of paragraph 16 of the statement of claim herein, the third defendants, Touche Ross & Co., owed a duty of care to the plaintiffs, Caparo Industries Plc., (a) as potential investors in Fidelity Plc.; or (b) as shareholders in Fidelity Plc. from 8 June 1984 and/or from 12 June 1984; in respect of the audit of the accounts of Fidelity Plc. for the year ended 31 March 1984 published on 12 June 1984."

Paragraphs 4 and 6 of the statement of claim are those paragraphs in which are set out the purchases of shares by Caparo to which I have referred and in which it is claimed that the purchases made after 12 June 1984 were made in reliance upon the information contained in the accounts. There is, however, one correction to be made. Paragraph 4 alleges that the accounts were issued on 12 June 1984 "to shareholders, including Caparo" but it is now accepted that at that date Caparo, although a purchaser of shares, had not been registered as a shareholder in Fidelity's register of members.

On the trial of this preliminary issue Sir Neil Lawson, sitting as a judge of the Queen's Bench Division [1988] B.C.L.C. 387, held (i) that the appellants owed no duty at common law to Caparo as investors and (ii) that, whilst auditors might owe statutory duties to shareholders as a

class, there was no common law duty to individual shareholders such as would enable an individual shareholder to recover damages for loss sustained by him in acting in reliance upon the audited accounts.

Caparo appealed to the Court of Appeal [1989] Q.B. 653 which, by a majority (O'Connor L.J. dissenting) allowed the appeal holding that, whilst there was no relationship between an auditor and a potential investor sufficiently proximate to give rise to a duty of care at common law, there was such a relationship with individual shareholders, so that an individual shareholder who suffered loss by acting in reliance on negligently prepared accounts, whether by selling or retaining his shares or by purchasing additional shares, was entitled to recover in tort. From that decision the appellants now appeal to your Lordships' House with the leave of the Court of Appeal, and the respondents cross-appeal against the rejection by the Court of Appeal of their claim that the appellants owed them a duty of care as potential investors.

In determining the existence and scope of the duty of care which one person may owe to another in the infinitely varied circumstances of human relationships there has for long been a tension between two different approaches. Traditionally the law finds the existence of the duty in different specific situations each exhibiting its own particular characteristics. In this way the law has identified a wide variety of duty situations, all falling within the ambit of the tort of negligence, but sufficiently distinct to require separate definition of the essential ingredients by which the existence of the duty is to be recognised. Commenting upon the outcome of this traditional approach, Lord Atkin, in his seminal speech in *Donoghue v. Stevenson* [1932] A.C. 562, 579–580, observed:

> "The result is that the courts have been engaged upon an elaborate classification of duties as they exist in respect of property, whether real or personal, with further divisions as to ownership, occupation or control, and distinctions based on the particular relations of the one side or the other, whether manufacturer, salesman or landlord, customer, tenant, stranger, and so on. In this way it can be ascertained at any time whether the law recognises a duty, but only where the case can be referred to some particular species which has been examined and classified. And yet the duty which is common to all the cases where liability is established must logically be based upon some element common to the cases where it is found to exist."

It is this last sentence which signifies the introduction of the more modern approach of seeking a single general principle which may be applied in all circumstances to determine the existence of a duty of care. Yet Lord Atkin himself sounds the appropriate note of caution by adding, at p. 580:

> "To seek a complete logical definition of the general principle is probably to go beyond the function of the judge, for the more general the definition the more likely it is to omit essentials or to introduce non-essentials."

Lord Reid gave a large impetus to the modern approach in *Dorset Yacht Co. Ltd. v. Home Office* [1970] A.C. 1004, 1026–1027, where he said:

> "In later years there has been a steady trend towards regarding the law of negligence as depending on principle so that, when a new point emerges, one should ask not whether it is covered by authority but whether recognised principles apply to it. *Donoghue v. Stevenson* [1932] A.C. 562 may be regarded as a milestone, and the well known passage in Lord Atkin's speech should I think be regarded as a statement of principle. It is not to be treated as if it were a statutory definition. It will require qualification in new circumstances. But I think that the time has come when we can and should say that it ought to apply unless there is some justification or valid explanation for its exclusion."

The most comprehensive attempt to articulate a single general principle is reached in the well known passage from the speech of Lord Wilberforce in *Anns v. Merton London Borough Council* [1978] A.C. 728, 751–752:

> "Through the trilogy of cases in this House—*Donoghue v. Stevenson* [1932] A.C. 562, *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465, and *Dorset Yacht Co. Ltd. v. Home Office* [1970] A.C. 1004, 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 wrongdoer 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 the class of person to whom it is owed or the damages to which a breach of it may give rise: see *Dorset Yacht* case [1970] A.C. 1004 *per* Lord Reid at p. 1027."

But since the *Anns* case a series of decisions of the Privy Council and of your Lordships' House, notably in judgments and speeches delivered by Lord Keith of Kinkel, have emphasised the inability of any single general principle to provide a practical test which can be applied to every situation to determine whether a duty of care is owed and, if so, what is its scope: see *Governors of Peabody Donation Fund v. Sir Lindsay Parkinson & Co. Ltd.* [1985] A.C. 210, 239F–241C; *Yuen Kun Yeu v. Attorney-General of Hong Kong* [1988] A.C. 175, 190E–194F; *Rowling v. Takaro Properties Ltd.* [1988] A.C. 473, 501D–G; *Hill v. Chief Constable of West Yorkshire* [1989] A.C. 53, 60B–D. What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there

should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of "proximity" or "neighbourhood" and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other. But it is implicit in the passages referred to that the concepts of proximity and fairness embodied in these additional ingredients are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope. Whilst recognising, of course, the importance of the underlying general principles common to the whole field of negligence, I think the law has now moved in the direction of attaching greater significance to the more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes. We must now, I think, recognise the wisdom of the words of Brennan J. in the High Court of Australia in *Sutherland Shire Council v. Heyman* (1985) 60 A.L.R. 1, 43–44, where he said:

> "It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable 'considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed.'"

One of the most important distinctions always to be observed lies in the law's essentially different approach to the different kinds of damage which one party may have suffered in consequence of the acts or omissions of another. It is one thing to owe a duty of care to avoid causing injury to the person or property of others. It is quite another to avoid causing others to suffer purely economic loss. A graphic illustration of the distinction is embodied in the proposition that:

> "In case of a wrong done to a chattel the common law does not recognise a person whose only rights are a contractual right to have the use or services of the chattel for purposes of making profits or gains without possession of or property in the chattel. Such a person cannot claim for injury done to his contractual right:" see *Elliott Steam Tug Co. Ltd. v. Shipping Controller* [1922] 1 K.B. 127, 139 *per* Scrutton L.J.

The proposition derives from *Cattle v. Stockton Waterworks Co.* (1875) L.R. 10 Q.B. 453. It has recently been reaffirmed in *Candlewood Navigation Corporation Ltd. v. Mitsui O.S.K. Lines Ltd.* [1986] A.C. 1 and *Leigh & Sillavan Ltd. v. Aliakmon Shipping Co. Ltd.* [1986] A.C. 785. In the former case Lord Fraser of Tullybelton, delivering the judgment of the Privy Council, said, at p. 25:

> "Their Lordships consider that some limit or control mechanism has to be imposed upon the liability of a wrongdoer towards those

A who have suffered economic damage in consequence of his negligence. The need for such a limit has been repeatedly asserted in the cases, from *Cattle's* case, L.R. 10 Q.B. 453, to *Caltex* [*Oil (Australia) Pty. Ltd. v. Dredge "Willemstad"* (1976)], 136 C.L.R. 529, and their Lordships are not aware that a view to the contrary has ever been judicially expressed."

B The damage which may be caused by the negligently spoken or written word will normally be confined to economic loss sustained by those who rely on the accuracy of the information or advice they receive as a basis for action. The question what, if any, duty is owed by the maker of a statement to exercise due care to ensure its accuracy arises typically in relation to statements made by a person in the exercise of his calling or profession. In advising the client who employs him the C professional man owes a duty to exercise that standard of skill and care appropriate to his professional status and will be liable both in contract and in tort for all losses which his client may suffer by reason of any breach of that duty. But the possibility of any duty of care being owed to third parties with whom the professional man was in no contractual relationship was for long denied because of the wrong turning taken by D the law in *Le Lievre v. Gould* [1893] 1 Q.B. 491 in overruling *Cann v. Willson* (1888) 39 Ch.D. 39. In *Candler v. Crane, Christmas & Co.* [1951] 2 K.B. 164, Denning L.J., in his dissenting judgment, made a valiant attempt to correct the error. But it was not until the decision of this House in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465 that the law was once more set upon the right path.

Consistently with the traditional approach it is to these authorities E and to subsequent decisions directly relevant to this relatively narrow corner of the field that we should look to determine the essential characteristics of a situation giving rise, independently of any contractual or fiduciary relationship, to a duty of care owed by one party to another to ensure that the accuracy of any statement which the one party makes and on which the other party may foreseeably rely to his economic F detriment.

In *Cann v. Willson*, 39 Ch.D. 39 mortgagees advanced money in reliance on a valuation of the mortgaged property supplied to them by a valuer employed by the mortgagor. On the mortgagor's default, the property, having been negligently undervalued, proved insufficient to cover the mortgage loan. The mortgagees recovered their loss from the valuer. In his judgment, Chitty J. said, at pp. 42–43:

G "In this case the document called a valuation was sent by the defendants direct to the agents of the plaintiff for the purpose of inducing the plaintiff and his co-trustee to lay out the trust money on mortgage. It seems to me that the defendants knowingly placed themselves in that position, and in point of law incurred a duty towards him to use reasonable care in the preparation of the H document called a valuation."

In *Candler v. Crane, Christmas & Co. Ltd.* [1951] 2 K.B. 164 the plaintiff invested money in a limited company in reliance on accounts of the company prepared by the company's accountants at the request of

the managing director, which were shown to the plaintiff and discussed with him by the accountants in the knowledge that he was interested as a potential investor in the company. The accounts were inaccurate and misleading and the plaintiff, having invested in the company in reliance upon them, lost his money. Denning L.J., in his dissenting judgment, held the plaintiff entitled to recover damages for the accountants' negligence.

In *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465 bankers were asked about the financial stability of a customer of the bank. They gave a favourable reference, albeit with a disclaimer of responsibility. The circumstances of the inquiry made it clear to the bankers that the party on whose behalf the inquiry was made wanted to know if they could safely extend credit to the bank's customer in a substantial sum. Acting on the reference given, the plaintiffs extended credit to the bank's customer who in due course defaulted. Although the House held that the bankers were protected by the disclaimer of responsibility, the case provided the opportunity to review the law, which led to the reinstatement of *Cann v. Willson*, the overruling of the majority decision in the *Candler* case and the approbation of the dissenting judgment of Denning L.J. in that case.

The most recent decision of the House, which is very much in point, is that of the two appeals heard together of *Smith v. Eric S. Bush* and *Harris v. Wyre Forest District Council* [1990] 1 A.C. 831. The plaintiffs in both cases were house purchasers who purchased in reliance on valuations of the properties made by surveyors acting for and on the instructions of the mortgagees proposing to advance money to the plaintiffs to enable them to effect their purchases. In both cases the surveyors' fees were paid by the plaintiffs and in both cases it turned out that the inspections and valuations had been negligently carried out and that the property was seriously defective so that the plaintiffs suffered financial loss. In the case of *Smith* the mortgagees were a building society, the surveyors who carried out the inspection and valuation were a firm employed by the building society and their report was shown to the plaintiff. In the case of *Harris* the mortgagees were the local authority who employed a member of their own staff to carry out the inspection and valuation. His report was not shown to the plaintiff, but the plaintiff rightly assumed from the local authority's offer of a mortgage loan that the property had been professionally valued as worth at least the amount of the loan. In both cases the terms agreed between the plaintiff and the mortgagee purported to exclude any liability on the part of the mortgagee or the surveyor for the accuracy of the mortgage valuation. The House held that in both cases the surveyor making the inspection and valuation owed a duty of care to the plaintiff house purchaser and that the contractual clauses purporting to exclude liability were struck down by section 2(2) and section 11(3) of the Unfair Contract Terms Act 1977.

The salient feature of all these cases is that the defendant giving advice or information was fully aware of the nature of the transaction which the plaintiff had in contemplation, knew that the advice or information would be communicated to him directly or indirectly and

knew that it was very likely that the plaintiff would rely on that advice or information in deciding whether or not to engage in the transaction in contemplation. In these circumstances the defendant could clearly be expected, subject always to the effect of any disclaimer of responsibility, specifically to anticipate that the plaintiff would rely on the advice or information given by the defendant for the very purpose for which he did in the event rely on it. So also the plaintiff, subject again to the effect of any disclaimer, would in that situation reasonably suppose that he was entitled to rely on the advice or information communicated to him for the very purpose for which he required it. The situation is entirely different where a statement is put into more or less general circulation and may foreseeably be relied on by strangers to the maker of the statement for any one of a variety of different purposes which the maker of the statement has no specific reason to anticipate. To hold the maker of the statement to be under a duty of care in respect of the accuracy of the statement to all and sundry for any purpose for which they may choose to rely on it is not only to subject him, in the classic words of Cardozo C.J. to "liability in an indeterminate amount for an indeterminate time to an indeterminate class:" see *Ultramares Corporation v. Touche* (1931) 174 N.E. 441, 444; it is also to confer on the world at large a quite unwarranted entitlement to appropriate for their own purposes the benefit of the expert knowledge or professional expertise attributed to the maker of the statement. Hence, looking only at the circumstances of these decided cases where a duty of care in respect of negligent statements has been held to exist, I should expect to find that the "limit or control mechanism . . . imposed upon the liability of a wrongdoer towards those who have suffered economic damage in consequence of his negligence"* rested in the necessity to prove, in this category of the tort of negligence, as an essential ingredient of the "proximity" between the plaintiff and the defendant, that the defendant knew that his statement would be communicated to the plaintiff, either as an individual or as a member of an identifiable class, specifically in connection with a particular transaction or transactions of a particular kind (e.g. in a prospectus inviting investment) and that the plaintiff would be very likely to rely on it for the purpose of deciding whether or not to enter upon that transaction or upon a transaction of that kind.

I find this expectation fully supported by the dissenting judgment of Denning L.J. in *Candler v. Crane, Christmas & Co.* [1951] 2 K.B. 164, 179, 180–181, 182–184 in the following passages:

> "Let me now be constructive and suggest the circumstances in which I say that a duty to use care in statement does exist apart from a contract in that behalf. First, what persons are under such duty? My answer is those persons such as accountants, surveyors, valuers and analysts, whose profession and occupation it is to examine books, accounts, and other things, and to make reports on which other people—other than their clients—rely in the ordinary course of business."

* *Reporter's note. Candlewood Navigation Corporation Ltd. v. Mitsui O.S.K. Lines Ltd.* [1986] A.C. 1, 25.

"Secondly, to whom do these professional people owe this duty? I will take accountants, but the same reasoning applies to the others. They owe the duty, of course, to their employer or client; and also I think to any third person to whom they themselves show the accounts, or to whom they know their employer is going to show the accounts, so as to induce him to invest money or take some other action on them. But I do not think the duty can be extended still further so as to include strangers of whom they have heard nothing and to whom their employer without their knowledge may choose to show their accounts. Once the accountants have handed their accounts to their employer they are not, as a rule, responsible for what he does with them without their knowledge or consent. . . . The test of proximity in these cases is: did the accountants know that the accounts were required for submission to the plaintiff and use by him?"

"Thirdly, to what transactions does the duty of care extend? It extends, I think, only to those transactions for which the accountants knew their accounts were required. For instance, in the present case it extends to the original investment of £2,000. which the plaintiff made in reliance on the accounts, because the accountants knew that the accounts were required for his guidance in making that investment; but it does not extend to the subsequent £200. which he made after he had been two months with the company. This distinction, that the duty only extends to the very transaction in mind at the time, is implicit in the decided cases. . . . It will be noticed that I have confined the duty to cases where the accountant prepares his accounts and makes his report for the guidance of the very person in the very transaction in question. That is sufficient for the decision of this case. I can well understand that it would be going too far to make an accountant liable to any person in the land who chooses to rely on the accounts in matters of business, for that would expose him to 'liability in an indeterminate amount for an indeterminate time to an indeterminate class': see *Ultramares Corporation v. Touche*, *per* Cardozo C.J. Whether he would be liable if he prepared his accounts for the guidance of a specific class of persons in a specific class of transactions, I do not say. I should have thought he might be, just as the analyst and lift inspector would be liable in the instances I have given earlier. It is perhaps worth mentioning that Parliament has intervened to make the professional man liable for negligent reports given for the purposes of a prospectus: see sections 40 and 43 of the Companies Act 1948. That is an instance of liability for reports made for the guidance of a specific class of persons—investors, in a specific class of transactions—applying for shares. That enactment does not help, one way or the other, to show what result the common law would have reached in the absence of such provisions; but it does show what result it ought to reach. My conclusion is that a duty to use care in statement is recognised by English law, and that its recognition does not create any dangerous precedent when it is

A remembered that it is limited in respect of the persons by whom and to whom it is owed and the transactions to which it applies."

It seems to me that this masterly analysis, if I may say so with respect, requires little, if any, amplification or modification in the light of later authority and is particularly apt to point the way to the right conclusion in the present appeal.

B Some of the speeches in the *Hedley Byrne* case derive a duty of care in relation to negligent statements from a voluntary assumption of responsibility on the part of the maker of the statements. In his speech in *Smith v. Eric S. Bush* [1990] 1 A.C. 831, 862, Lord Griffiths emphatically rejected the view that this was the true ground of liability and concluded that:

C "The phrase 'assumption of responsibility' can only have any real meaning if it is understood as referring to the circumstances in which the law will deem the maker of the statement to have assumed responsibility to the person who acts upon the advice."

I do not think that in the context of the present appeal anything turns upon the difference between these two approaches.

D These considerations amply justify the conclusion that auditors of a public company's accounts owe no duty of care to members of the public at large who rely upon the accounts in deciding to buy shares in the company. If a duty of care were owed so widely, it is difficult to see any reason why it should not equally extend to all who rely on the accounts in relation to other dealings with a company as lenders or merchants extending credit to the company. A claim that such a duty E was owed by auditors to a bank lending to a company was emphatically and convincingly rejected by Millett J. in *Al Saudi Banque v. Clarke Pixley* [1990] Ch. 313. The only support for an unlimited duty of care owed by auditors for the accuracy of their accounts to all who may foreseeably rely upon them is to be found in some jurisdictions in the United States of America where there are striking differences in the law in different states. In this jurisdiction I have no doubt that the creation F of such an unlimited duty would be a legislative step which it would be for Parliament, not the courts, to take.

The main submissions for Caparo are that the necessary nexus of proximity between it and the appellants giving rise to a duty of care stems (1) from the pleaded circumstances indicating the vulnerability of Fidelity to a take-over bid and from the consequent probability that G another company, such as Caparo, would rely on the audited accounts in deciding to launch a take-over bid, or (2) from the circumstance that Caparo was already a shareholder in Fidelity when it decided to launch its take-over bid in reliance on the accounts. In relation to the first of these two submissions, Caparo applied, in the course of the hearing, for leave to amend paragraph 16(2) of the statement of claim by adding the words "or alternatively that it was highly probable that such persons H would rely on the accounts for that purpose."

The case which gives most assistance to Caparo in support of this submission is *Scott Group Ltd. v. McFarlane* [1978] 1 N.Z.L.R. 553. The audited consolidated accounts of a New Zealand public company