and its subsidiaries overstated the assets of the group because of an admitted accounting error. Under the relevant New Zealand legislation its accounts were, as in England, accessible to the public. The circumstances of the group's affairs were such as to make it highly probable that it would atttract a take-over bid. The plaintiffs made such a bid successfully and when the accounting error was discovered claimed from the auditors in respect of the shortfall in the assets. Quilliam J. held that the auditors owed the plaintiffs no duty of care. The majority of the New Zealand Court of Appeal (Woodhouse and Cooke JJ.) held that the duty of care arose from the probability that the company would attract a take-over bid and the bidder would rely on the audited accounts, although Cooke J. held that the shortfall in the assets below that erroneously shown in the accounts did not amount to a loss recoverable in tort. Richmond P. held that no duty of care was owed. He said, at p. 566:

> "All the speeches in *Hedley Byrne* seem to me to recognise the need for a 'special' relationship: a relationship which can properly be treated as giving rise to a special duty to use care in statement. The question in any given case is whether the nature of the relationship is such that one party can fairly be held to have assumed a responsibility to the other as regards the reliability of the advice or information. I do not think that such a relationship should be found to exist unless, at least, the maker of the statement was, or ought to have been, aware that his advice or information would in fact be made available to and be relied on by a particular person or class of persons for the purposes of a particular transaction or type of transaction. I would especially emphasise that to my mind it does not seem reasonable to attribute an assumption of responsibility unless the maker of the statement ought in all the circumstances, both in preparing himself for what he said and in saying it, to have directed his mind, and to have been able to direct his mind, to some particular and specific purpose for which he was aware that his advice or information would be relied on. In many situations that purpose will be obvious. But the annual accounts of a company can be relied on in all sorts of ways and for many purposes."

I agree with this reasoning, which seems to me to be entirely in line with the principles to be derived from the authorities to which I have earlier referred and not to require modification in any respect which is relevant for present purposes by reference to anything said in this House in *Smith v. Eric S. Bush* [1990] 1 A.C. 831. I should in any event be extremely reluctant to hold that the question whether or not an auditor owes a duty of care to an investor buying shares in a public company depends on the degree of probability that the shares will prove attractive either en bloc to a take-over bidder or piecemeal to individual investors. It would be equally wrong, in my opinion, to hold an auditor under a duty of care to anyone who might lend money to a company by reason only that it was foreseeable as highly probable that the company would borrow money at some time in the year following publication of its

A audited accounts and that lenders might rely on those accounts in deciding to lend. I am content to assume the high probability of a take-over bid in reliance on the accounts which the proposed amendment of the statement of claim would assert but I do not think it assists Caparo's case.

The only other English authority to which I need refer in this context in *JEB Fasteners Ltd. v. Marks, Bloom & Co.* [1981] 3 All E.R. 289, a B decision at first instance of Woolf J. This was another case where the plaintiffs, who had made a successful take-over bid for a company in reliance on audited accounts which had been negligently prepared, sued the accountants for damages. Woolf J. held that the auditors owed the plaintiffs a duty of care in the preparation of the accounts. He relied on both the *Anns* case [1978] A.C. 728 and *Scott Group Ltd. v. McFarlane* C [1978] 1 N.Z.L.R. 553, in reaching the conclusion that the duty could be derived from foreseeability alone. For the reasons already indicated, I do not agree with this. It may well be, however, that the particular facts in the *JEB* case were sufficient to establish a basis on which the necessary ingredient of proximity to found a duty of care could be derived from the actual knowledge on the part of the auditors of the specific purpose for which the plaintiffs intended to use the accounts.

D The position of auditors in relation to the shareholders of a public limited liability company arising from the relevant provisions of the Companies Act 1985 is accurately summarised in the judgment of Bingham L.J. in the Court of Appeal [1989] Q.B. 653, 680–681:

> "The members, or shareholders, of the company are its owners. But they are too numerous, and in most cases too unskilled, to E undertake the day to day management of that which they own. So responsibility for day to day management of the company is delegated to directors. The shareholders, despite their overall powers of control, are in most companies for most of the time investors and little more. But it would of course be unsatisfactory and open to abuse if the shareholders received no report on the financial stewardship of their investment save from those to whom F the stewardship had been entrusted. So provision is made for the company in general meeting to appoint an auditor (section 384 of the Companies Act 1985), whose duty is to investigate and form an opinion on the adequacy of the company's accounting records and returns and the correspondence between the company's accounting records and returns and its accounts: section 237. The auditor has G then to report to the company's members (among other things) whether in his opinion the company's accounts give a true and fair view of the company's financial position: section 236. In carrying out his investigation and in forming his opinion the auditor necessarily works very closely with the directors and officers of the company. He receives his remuneration from the company. He naturally, and rightly, regards the company as his client. But he is H employed by the company to exercise his professional skill and judgment for the purpose of giving the shareholders an independent report on the reliability of the company's accounts and thus on their investment. 'No doubt he is acting antagonistically to the directors

in the sense that he is appointed by the shareholders to be a check upon them:' *In re Kingston Cotton Mill Co.* [1896] 1 Ch. 6, 11, *per* Vaughan Williams J. The auditor's report must be read before the company in general meeting and must be open to inspection by any member of the company: section 241. It is attached to and forms part of the company's accounts: sections 238(3) and 239. A copy of the company's accounts, including the auditor's report, must be sent to every member: section 240. Any member of the company, even if not entitled to have a copy of the accounts sent to him, is entitled to be furnished with a copy of the company's last accounts on demand and without charge: section 246."

No doubt these provisions establish a relationship between the auditors and the shareholders of a company on which the shareholder is entitled to rely for the protection of his interest. But the crucial question concerns the extent of the shareholder's interest which the auditor has a duty to protect. The shareholders of a company have a collective interest in the company's proper management and in so far as a negligent failure of the auditor to report accurately on the state of the company's finances deprives the shareholders of the opportunity to exercise their powers in general meeting to call the directors to book and to ensure that errors in management are corrected, the shareholders ought to be entitled to a remedy. But in practice no problem arises in this regard since the interest of the shareholders in the proper management of the company's affairs is indistinguishable from the interest of the company itself and any loss suffered by the shareholders, e.g. by the negligent failure of the auditor to discover and expose a misappropriation of funds by a director of the company, will be recouped by a claim against the auditors in the name of the company, not by individual shareholders.

I find it difficult to visualise a situation arising in the real world in which the individual shareholder could claim to have sustained a loss in respect of his existing shareholding referable to the negligence of the auditor which could not be recouped by the company. But on this part of the case your Lordships were much pressed with the argument that such a loss might occur by a negligent undervaluation of the company's assets in the auditor's report relied on by the individual shareholder in deciding to sell his shares at an undervalue. The argument then runs thus. The shareholder, qua shareholder, is entitled to rely on the auditor's report as the basis of his investment decision to sell his existing shareholding. If he sells at an undervalue he is entitled to recover the loss from the auditor. There can be no distinction in law between the shareholder's investment decision to sell the shares he has or to buy additional shares. It follows, therefore, that the scope of the duty of care owed to him by the auditor extends to cover any loss sustained consequent on the purchase of additional shares in reliance on the auditor's negligent report.

I believe this argument to be fallacious. Assuming without deciding that a claim by a shareholder to recover a loss suffered by selling his shares at an undervalue attributable to an undervaluation of the

company's assets in the auditor's report could be sustained at all, it would not be by reason of any reliance by the shareholder on the auditor's report in deciding to sell; the loss would be referable to the depreciatory effect of the report on the market value of the shares before ever the decision of the shareholder to sell was taken. A claim to recoup a loss alleged to flow from the purchase of overvalued shares, on the other hand, can only be sustained on the basis of the purchaser's reliance on the report. The specious equation of "investment decisions" to sell or to buy as giving rise to parallel claims thus appears to me to be untenable. Moreover, the loss in the case of the sale would be of a loss of part of the value of the shareholder's existing holding, which, assuming a duty of care owed to individual shareholders, it might sensibly lie within the scope of the auditor's duty to protect. A loss, on the other hand, resulting from the purchase of additional shares would result from a wholly independent transaction having no connection with the existing shareholding.

I believe it is this last distinction which is of critical importance and which demonstrates the unsoundness of the conclusion reached by the majority of the Court of Appeal. It is never sufficient to ask simply whether A owes B a duty of care. It is always necessary to determine the scope of the duty by reference to the kind of damage from which A must take care to save B harmless. "The question is always whether the defendant was under a duty to avoid or prevent that damage, but the actual nature of the damage suffered is relevant to the existence and extent of any duty to avoid or prevent it:" see *Sutherland Shire Council v. Heyman*, 60 A.L.R. 1, 48, *per* Brennan J. Assuming for the purpose of the argument that the relationship between the auditor of a company and individual shareholders is of sufficient proximity to give rise to a duty of care, I do not understand how the scope of that duty can possibly extend beyond the protection of any individual shareholder from losses in the value of the shares which he holds. As a purchaser of additional shares in reliance on the auditor's report, he stands in no different position from any other investing member of the public to whom the auditor owes no duty.

I would allow the appeal and dismiss the cross-appeal.

LORD ROSKILL. My Lords, I have had the advantage of reading in draft the speeches prepared by three of your Lordships. I agree with them and would allow the appeal and dismiss the cross-appeal for the reasons there given. I only add some observations of my own out of respect for the two Lords Justices from whom your Lordships are differing and because of the importance of this case in relation to the vexed question of the extent of liability of professional men, especially accountants, for putting into circulation allegedly incorrect statements whether oral or in writing which are claimed to have been negligently made or prepared and which have been acted on by a third party to that third party's detriment.

That liability for such negligence if established can exist has been made clear ever since the decision of this House in *Hedley Byrne & Co. v. Heller & Partners Ltd.* [1964] A.C. 465 in which the well known

dissenting judgment of Denning L.J. in *Candler v. Crane, Christmas & Co.* [1951] 2 K.B. 164 was held to have stated the law correctly. Thenceforth it was clear that such a duty of care could be owed by a professional man to third parties in cases where there was no contractual relationship between them, a view of the law long denied as the result of a succession of late 19th century cases of which this House then took the opportunity of disapproving.

But subsequent attempts to define both the duty and its scope have created more problems than the decisions have solved. My noble and learned friends have traced the evolution of the decisions from *Anns v. Merton London Borough Council* [1977] A.C. 728 until and including the most recent decisions of your Lordships' House in *Smith v. Eric S. Bush* [1990] 1 A.C. 831. I agree with your Lordships that it has now to be accepted that there is no simple formula or touchstone to which recourse can be had in order to provide in every case a ready answer to the questions whether, given certain facts, the law will or will not impose liability for negligence or in cases where such liability can be shown to exist, determine the extent of that liability. Phrases such as "foreseeability," "proximity," "neighbourhood," "just and reasonable," "fairness," "voluntary acceptance of risk," or "voluntary assumption of responsibility" will be found used from time to time in the different cases. But, as your Lordships have said, such phrases are not precise definitions. At best they are but labels or phrases descriptive of the very different factual situations which can exist in particular cases and which must be carefully examined in each case before it can be pragmatically determined whether a duty of care exists and, if so, what is the scope and extent of that duty. If this conclusion involves a return to the traditional categorisation of cases as pointing to the existence and scope of any duty of care, as my noble and learned friend Lord Bridge of Harwich, suggests, I think this is infinitely preferable to recourse to somewhat wide generalisations which leave their practical application matters of difficulty and uncertainty. This conclusion finds strong support from the judgment of Brennan J. in *Sutherland Shire Council v. Heyman*, 60 A.L.R. 1, 43–44 in the High Court of Australia in the passage cited by my noble and learned friends.

My Lords, I confess that like my noble and learned friend, Lord Griffiths, in *Smith v. Eric S. Bush* [1990] 1 A.C. 831, 862, I find considerable difficulty in phrases such as "voluntary assumption of responsibility" unless they are to be explained as meaning no more than the existence of circumstances in which the law will impose a liability upon a person making the allegedly negligent statement to the person to whom that statement is made; in which case the phrase does not help to determine in what circumstances the law will impose that liability or indeed, its scope. The submission that there is a virtually unlimited and unrestricted duty of care in relation to the performance of an auditor's statutory duty to certify a company's accounts, a duty extending to anyone who may use those accounts for any purpose such as investing in the company or lending the company money, seems to me untenable. No doubt it can be said to be foreseeable that those accounts may find their way into the hands of persons who may use them for such purposes

A or indeed other purposes and lose money as a result. But to impose a liability in those circumstances is to hold, contrary to all the recent authorities, that foreseeability alone is sufficient, and to ignore the statutory duty which enjoins the preparation of and certification of those accounts.

I think that before the existence and scope of any liability can be determined, it is necessary first to determine for what purposes and in B what circumstances the information in question is to be given. If a would-be investor or predator commissions a report which he will use, and which the maker of the report knows he will use, as a basis for his decision whether or not to invest or whether or not to make a bid, it may not be difficult to conclude that if the report is negligently prepared and as a result a decision is taken in reliance upon it and financial losses C then follow, a liability will be imposed upon the maker of that report. But I venture to echo the caution expressed by my noble and learned friend, Lord Oliver of Aylmerton, that because different cases may display certain common features, they are necessarily all cases in which the same consequences regarding liability or the scope of liability will follow. Moreover, there may be cases in which the circumstances in which the report was commissioned justify the inclusion of and reliance D upon a disclaimer such as succeeded in the *Hedley Byrne* case but by reason of subsequent statutory provisions failed in *Smith v. Eric S. Bush*.

My Lords it is for these reasons, in addition to those given by my noble and learned friends, that, as already stated, I would allow this appeal and dismiss the cross-appeal.

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LORD ACKNER. My Lords, I have had the advantage of reading the speeches of Lord Bridge of Harwich, Lord Roskill, Lord Oliver of Aylmerton and Lord Jauncey of Tullichettle and for the reasons they give I, too, would allow this appeal and dismiss the cross-appeal.

F LORD OLIVER OF AYLMERTON. My Lords, this appeal, having come to this House on a preliminary point, involves the making of a number of assumptions of fact which might or might not be substantiated at the trial of the action. To begin with, it is to be assumed against the appellants that they showed a lack of reasonable care in certifying that the accounts of Fidelity for the year ended 31 March 1984 gave a true and fair view of Fidelity's position. It is also to be assumed that, when G they certified the accounts, the appellants knew or would, if they had thought about it, have known that Fidelity was vulnerable to take-over bids, that a potential bidder would be likely to rely upon the accuracy of the accounts in making his bid and that investors in the market generally, whether or not already members of Fidelity, would also be likely to or might well rely upon the accounts in deciding to purchase shares in that company.

H Your Lordships are not, however, either required or entitled to make any assumption that the purpose of the certification was anything other than that of fulfilling the statutory duty of carrying out the annual audit with a view to the circulation of the accounts to persons who were

either registered shareholders or debenture-holders of Fidelity and the subsequent laying of the accounts before the annual general meeting of that company.

Thus, if and so far as the purpose for which the audit was carried out is a relevant consideration in determining the extent of any general duty in tort owed by the appellants to persons other than the company which is their immediate employer, that purpose was simply that of fulfilling the statutory requirements of the Companies Act 1985. That, in turn, raises the question—and it is one which lies at the threshold of the inquiry upon which your Lordships are invited to embark—of what is the purpose behind the legislative requirement for the carrying out of an annual audit and the circulation of the accounts. For whose protection were these provisions enacted and what object were they intended to achieve?

My Lords, the primary purpose of the statutory requirement that a company's accounts shall be audited annually is almost self-evident. The structure of the corporate trading entity, at least in the case of public companies whose shares are dealt with on an authorised Stock Exchange, involves the concept of a more or less widely distributed holding of shares rendering the personal involvement of each individual shareholder in the day-to-day management of the enterprise impracticable, with the result that management is necessarily separated from ownership. The management is confided to a board of directors which operates in a fiduciary capacity and is answerable to and removable by the shareholders who can act, if they act at all, only collectively and only through the medium of a general meeting. Hence the legislative provisions requiring the board annually to give an account of its stewardship to a general meeting of the shareholders. This is the only occasion in each year upon which the general body of shareholders is given the opportunity to consider, to criticise and to comment upon the conduct by the board of the company's affairs, to vote upon the directors' recommendation as to dividends, to approve or disapprove the directors' remuneration and, if thought desirable, to remove and replace all or any of the directors. It is the auditors' function to ensure, so far as possible, that the financial information as to the company's affairs prepared by the directors accurately reflects the company's position in order, first, to protect the company itself from the consequences of undetected errors or, possibly, wrongdoing (by, for instance, declaring dividends out of capital) and, secondly, to provide shareholders with reliable intelligence for the purpose of enabling them to scrutinise the conduct of the company's affairs and to exercise their collective powers to reward or control or remove those to whom that conduct has been confided.

The requirement of the appointment of auditors and annual audit of the accounts, now contained in sections 235 to 246 of the Companies Act 1985, was first introduced by the Companies Act 1879 (25 & 26 Vict. c. 76) in relation to companies carrying on the business of banking and was extended to companies generally by the Companies Act 1900. Section 23 of that Act required the auditors to make a report to the shareholders on the company's balance sheet laid before the company in general meeting, stating whether the balance sheet exhibited a true and

correct view of the state of the company's affairs. By the same section, the report was required to be read before the company in general meeting. Section 19 of the Companies Act 1907 substituted a new section 23 which, whilst repeating the requirement that the auditors' report should be read before the company in general meeting, added a requirement that it should be open to inspection by any shareholder, who was entitled, on payment of the fee, to be furnished with a copy of the balance sheet and report. The new section also made it an offence for any officer of the company to be party to issuing, circulating or publishing any copy of the balance sheet which did not either append or contain a reference to the auditors' report. The matter was carried one stage further by section 130 of the Companies Act 1929 (consolidating provisions contained in sections 39 and 41 of the Companies Act 1928) which required the annual balance sheet and auditors' report of a public company to be sent not less than seven days before the date of the meeting to every member of the company entitled to receive notice of the meeting and entitled any member of the company and any debenture holder to be furnished on demand and without charge with a copy of the last balance sheet and the auditors' report. Finally, for relevant purposes, section 158 of the Companies Act 1948 required the accounts and report to be sent to every member of the company and to every debenture holder not less than 21 days before the general meeting before which the accounts are to be laid.

Thus the history of the legislation is one of an increasing availability of information regarding the financial affairs of the company to those having an interest in its progress and stability. It cannot fairly be said that the purpose of making such information available is solely to assist those interested in attending general meetings of the company to an informed supervision and appraisal of the stewardship of the company's directors, for the requirement to supply audited accounts to, for instance, preference shareholders having no right to vote at general meetings and to debenture holders cannot easily be attributed to any such purpose. Nevertheless, I do not, for my part, discern in the legislation any departure from what appears to me to be the original, central and primary purpose of these provisions, that is to say, the informed exercise by those interested in the property of the company, whether as proprietors of shares in the company or as the holders of rights secured by a debenture trust deed, of such powers as are vested in them by virtue of their respective proprietary interests.

It is argued on behalf of the respondent that there is to be discerned in the legislation an additional or wider commercial purpose, namely that of enabling those to whom the accounts are addressed and circulated, to make informed investment decisions, for instance, by determining whether to dispose of their shares in the market or whether to apply any funds which they are individually able to command in seeking to purchase the shares of other shareholders. Of course, the provision of any information about the business and affairs of a trading company, whether it be contained in annual accounts or obtained from other sources, is capable of serving such a purpose just as it is capable of serving as the basis for the giving of financial advice to others, for

arriving at a market price, for determining whether to extend credit to the company, or for the writing of financial articles in the press. Indeed, it is readily foreseeable by anyone who gives the matter any thought that it might well be relied on to a greater or less extent for all or any of such purposes. It is, of course, equally foreseeable that potential investors having no proprietary interest in the company might well avail themselves of the information contained in a company's accounts published in the newspapers or culled from an inspection of the documents to be filed annually with the Registrar of Companies (which includes the audited accounts) in determining whether or not to acquire shares in the company. I find it difficult to believe, however, that the legislature, in enacting provisions clearly aimed primarily at the protection of the company and its informed control by the body of its proprietors, can have been inspired also by consideration for the public at large and investors in the market in particular.

The question is, I think, one of some importance when one comes to consider the existence of that essential relationship between the appellants and the respondent to which, in any discussion of the ingredients of the tort of negligence, there is accorded the description "proximity," for it is now clear from a series of decisions in this House that, at least so far as concerns the law of the United Kingdom, the duty of care in tort depends not solely upon the existence of the essential ingredient of the foreseeability of damage to the plaintiff but upon its coincidence with a further ingredient to which has been attached the label "proximity" and which was described by Lord Atkin in the course of his speech in *Donoghue v. Stevenson* [1932] A.C. 562, 581 as:

> "such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act."

It must be remembered, however, that Lord Atkin was using these words in the context of loss caused by physical damage where the existence of the nexus between the careless defendant and the injured plaintiff can rarely give rise to any difficulty. To adopt the words of Bingham L.J. in the instant case [1989] Q.B. 653, 686:

> "It is enough that the plaintiff chances to be (out of the whole world) the person with whom the defendant collided or who purchased the offending ginger beer."

The extension of the concept of negligence since the decision of this House in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465 to cover cases of pure economic loss not resulting from physical damage has given rise to a considerable and as yet unsolved difficulty of definition. The opportunities for the infliction of pecuniary loss from the imperfect performance of everyday tasks upon the proper performance of which people rely for regulating their affairs are illimitable and the effects are far reaching. A defective bottle of ginger beer may injure a single consumer but the damage stops there. A single statement may be repeated endlessly with or without the permission of

its author and may be relied upon in a different way by many different people. Thus the postulate of a simple duty to avoid any harm that is, with hindsight, reasonably capable of being foreseen becomes untenable without the imposition of some intelligible limits to keep the law of negligence within the bounds of common sense and practicality. Those limits have been found by the requirement of what has been called a "relationship of proximity" between plaintiff and defendant and by the imposition of a further requirement that the attachment of liability for harm which has occurred be "just and reasonable." But although the cases in which the courts have imposed or withheld liability are capable of an approximate categorisation, one looks in vain for some common denominator by which the existence of the essential relationship can be tested. Indeed it is difficult to resist a conclusion that what have been treated as three separate requirements are, at least in most cases, in fact merely facets of the same thing, for in some cases the degree of foreseeability is such that it is from that alone that the requisite proximity can be deduced, whilst in others the absence of that essential relationship can most rationally be attributed simply to the court's view that it would not be fair and reasonable to hold the defendant responsible. "Proximity" is, no doubt, a convenient expression so long as it is realised that it is no more than a label which embraces not a definable concept but merely a description of circumstances from which, pragmatically, the courts conclude that a duty of care exists.

There are, of course, cases where, in any ordinary meaning of the words, a relationship of proximity (in the literal sense of "closeness") exists but where the law, whilst recognising the fact of the relationship, nevertheless denies a remedy to the injured party on the ground of public policy. *Rondel v. Worsley* [1969] 1 A.C. 191 was such a case, as was *Hill v. Chief Constable of West Yorkshire* [1989] A.C. 53, so far as concerns the alternative ground of that decision. But such cases do nothing to assist in the identification of those features from which the law will deduce the essential relationship on which liability depends and, for my part, I think that it has to be recognised that to search for any single formula which will serve as a general test of liability is to pursue a will-o'-the wisp. The fact is that once one discards, as it is now clear that one must, the concept of foreseeability of harm as the single exclusive test—even a prima facie test—of the existence of the duty of care, the attempt to state some general principle which will determine liability in an infinite variety of circumstances serves not to clarify the law but merely to bedevil its development in a way which corresponds with practicality and common sense. In *Sutherland Shire Council v. Heyman*, 60 A.L.R. 1, 43–44, Brennan J. in the course of a penetrating analysis, observed:

> "Of course, if foreseeability of injury to another were the exhaustive criterion of a prima facie duty to act to prevent the occurrence of that injury, it would be essential to introduce some kind of restrictive qualification—perhaps a qualification of the kind stated in the second stage of the general proposition in *Anns* [1978] A.C. 728. I am unable to accept that approach. 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.'"

The same approach is, I think, reflected in that passage in the speech of Lord Devlin in the *Hedley Byrne* case [1964] A.C. 465, 524–525 in which he considered the impact of *Donoghue v. Stevenson* on the facts of that case and in which he analysed and described the method by which the law develops:

"In his celebrated speech in that case Lord Atkin did two things. He stated what he described as a 'general conception' and from that conception he formulated a specific proposition of law. In between he gave a warning 'against the danger of stating propositions of law in wider terms than is necessary, lest essential factors be omitted in the wider survey and the inherent adaptability of English law be unduly restricted.'

"What Lord Atkin called a 'general conception of relations giving rise to a duty of care' is now often referred to as the principle of proximity. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. In the eyes of the law your neighbour is a person who is so closely and directly affected by your act that you ought reasonably to have him in contemplation as being so affected when you are directing your mind to the acts or omissions which are called in question. . . .

"Now, it is not, in my opinion, a sensible application of what Lord Atkin was saying for a judge to be invited on the facts of any particular case to say whether or not there was 'proximity' between the plaintiff and the defendant. That would be a misuse of a general conception and it is not the way in which English law develops. What Lord Atkin did was to use his general conception to open up a category of cases giving rise to a special duty. It was already clear that the law recognised the existence of such a duty in the category of articles that were dangerous in themselves. What *Donoghue v. Stevenson* did may be described either as the widening of an old category or as the creation of a new and similar one. The general conception can be used to produce other categories in the same way. An existing category grows as instances of its application multiply until the time comes when the cell divides. . . .

"In my opinion, the appellants in their argument tried to press *Donoghue v. Stevenson* too hard. They asked whether the principle of proximity should not apply as well to words as to deeds. I think it should, but as it is only a general conception it does not get them very far. Then they take the specific proposition laid down by *Donoghue v. Stevenson* and try to apply it literally to a certificate or a banker's reference. That will not do, for a general conception cannot be applied to pieces of paper in the same way as to articles of commerce or to writers in the same way as to manufacturers.

An inquiry into the possibilities of intermediate examination of a certificate will not be fruitful. The real value of *Donoghue v. Stevenson* to the argument in this case is that it shows how the law can be developed to solve particular problems. Is the relationship between the parties in this case such that it can be brought within a category giving rise to a special duty? As always in English law, the first step in such an inquiry is to see how far the authorities have gone, for new categories in the law do not spring into existence overnight."

Perhaps, therefore, the most that can be attempted is a broad categorisation of the decided cases according to the type of situation in which liability has been established in the past in order to found an argument by analogy. Thus, for instance, cases can be classified according to whether what is complained of is the failure to prevent the infliction of damage by the act of the third party (such as *Dorset Yacht Co. Ltd. v. Home Office* [1970] A.C. 1004, *P. Perl (Exporters) Ltd. v. Camden London Borough Council* [1984] Q.B. 342, *Smith v. Littlewoods Organisation Ltd.* [1987] A.C. 241 and, indeed, *Anns v. Merton London Borough Council* [1978] A.C. 728 itself), in failure to perform properly a statutory duty claimed to have been imposed for the protection of the plaintiff either as a member of a class or as a member of the public (such as the *Anns* case, *Ministry of Housing and Local Government v. Sharp* [1970] 2 Q.B. 223, *Yuen Kun Yeu v. Attorney-General of Hong Kong* [1988] A.C. 175) or in the making by the defendant of some statement or advice which has been communicated, directly or indirectly, to the plaintiff and upon which he has relied. Such categories are not, of course, exhaustive. Sometimes they overlap as in the *Anns* case, and there are cases which do not readily fit into easily definable categories (such as *Ross v. Caunters* [1980] Ch. 297). Nevertheless, it is, I think, permissible to regard negligent statements or advice as a separate category displaying common features from which it is possible to find at least guidelines by which a test for the existence of the relationship which is essential to ground liability can be deduced.

The damage which may be occasioned by the spoken or written word is not inherent. It lies always in the reliance by somebody upon the accuracy of that which the word communicates and the loss or damage consequential upon that person having adopted a course of action upon the faith of it. In general, it may be said that when any serious statement, whether it takes the form of a statement of fact or of advice, is published or communicated, it is foreseeable that the person who reads or receives it is likely to accept it as accurate and to act accordingly. It is equally foreseeable that if it is inaccurate in a material particular the recipient who acts upon it may suffer a detriment which, if the statement had been accurate, he would not have undergone. But it is now clear that mere foreseeability is not of itself sufficient to ground liability unless by reason of the circumstances it itself constitutes also the element of proximity (as in the case of direct physical damage) or unless it is accompanied by other circumstances from which that element may be deduced. One must, however, be careful about seeking to find any

general principle which will serve as a touchstone for all cases, for even within the limited category of what, for the sake of convenience, I may refer to as "the negligent statement cases," circumstances may differ infinitely and, in a swiftly developing field of law, there can be no necessary assumption that those features which have served in one case to create the relationship between the plaintiff and the defendant on which liability depends will necessarily be determinative of liability in the different circumstances of another case. There are, for instance, at least four and possibly more situations in which damage or loss may arise from reliance upon the spoken or written word and it must not be assumed that because they display common features of reliance and foreseeability they are necessarily in all respects analogous. To begin with, reliance upon a careless statement may give rise to direct physical injury which may be caused either to the person who acts on the faith of the statement or to a third person. One has only to consider, for instance, the chemist's assistant who mis-labels a dangerous medicine, a medical man who gives negligent telephonic advice to a parent with regard the treatment of a sick child, or an architect who negligently instructs a bricklayer to remove the keystone of an archway (as in *Clayton v. Woodman & Sons (Builders) Ltd.* [1962] 2 Q.B. 533). In such cases it is not easy to divorce foreseeability simpliciter and the proximity which flows from the virtual inevitability of damage if the advice is followed. Again, economic loss may be inflicted upon a third party as a result of the act of the recipient of the advice or information carried out in reliance upon it (as, for instance, the testator in *Ross v. Caunters* [1980] Ch. 297 or the purchaser in *Ministry of Housing and Local Government v. Sharp* [1970] 2 Q.B. 223, both cases which give rise to certain difficulties of analysis). For present purposes, however, it is necessary to consider only those cases of economic damage suffered directly by a recipient of the statement or advice as a result of his personally having acted in reliance upon it.

In his dissenting judgment in *Candler v. Crane, Christmas & Co.* [1951] 2 K.B. 164, Denning L.J. suggested three conditions for the creation of a duty of care in tort in such cases. First, the advice must be given by one whose profession it is to give advice upon which others rely in the ordinary course of business, such as accountants, surveyors, valuers and the like: p. 179. Secondly, it must be known to the adviser that the advice would be communicated to the plaintiff in order to induce him to adopt a particular course of action: p. 180. Thirdly, the advice must be relied upon for the purpose of the particular transaction for which it was known to the advisers that the advice was required: p. 182. It is plain, however, from other passages in his judgment, that Denning L.J. did not consider these conditions as necessarily exhaustive criteria of the existence of a duty and the speeches in this House in the *Hedley Byrne* case [1964] A.C. 465, where his judgment was approved, indicate a number of directions in which such criteria are to be extended. To begin with, Lord Reid, at p. 486, would not have confined liability to statements made or advice given in the exercise of a profession involving the giving of such advice but would have extended it to:

A "all those relationships where it is plain that the party seeking information or advice was trusting the other to exercise such a degree of care as the circumstances required, where it was reasonable for him to do that, and where the other gave the information or advice when he knew or ought to have known that the inquirer was relying on him."

B Lord Morris of Borth-y-Gest, with whom Lord Hodson agreed, whilst initially, at p. 502, referring to persons "possessed of a special skill" nevertheless went on to state the conditions in which a duty of care might arise in very much wider terms, at p. 503:

"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 C give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise."

Nonetheless, the subsequent decision of the Privy Council in *Mutual Life and Citizens' Assurance Co. Ltd. v. Evatt* [1971] A.C. 793, from D which Lord Reid and Lord Morris dissented, would have confined the duty of care to cases where the advice relied upon was given in the course of a business or profession involving the giving of advice of the kind in question. For present purposes, it is unnecessary to attempt a resolution of the difference of opinion arising from the *Mutual Life* case, since there is no question here but that the certifying of the accounts was something done in the course of the ordinary business of the E appellants.

Leaving this on one side, however, it is not easy to cull from the speeches in the *Hedley Byrne* case [1964] A.C. 465 any clear attempt to define or classify the circumstances which give rise to the relationship of proximity on which the action depends and indeed Lord Hodson, at p. 514, expressly stated (and I respectfully agree) that he did not think it F possible to catalogue the special features which must be found to exist before the duty of care will arise in the given case. Lord Devlin, at p. 530, is to the same effect. The nearest that one gets to the establishment of a criterion for the creation of a duty in the case of a negligent statement is the emphasis to be found in all the speeches upon "the voluntary assumption of responsibility" by the defendant. This is a convenient phrase but it is clear that it was not intended to be a test for G the existence of the duty for, on analysis, it means no more than that the act of the defendant in making the statement or tendering the advice was voluntary and that the law attributes to it an assumption of responsibility if the statement or advice is inaccurate and is acted upon. It tells us nothing about the circumstances from which such attribution arises.

H The point that is, as it seems to me, significant in the present context, is the unanimous approval in this House of the judgment of Denning L.J. in *Candler's* case [1951] 2 K.B. 164, 181 in which he expressed the test of proximity in these words: "did the accountants know that the accounts were required for submission to the plaintiff and

use by him?" In so far as this might be said to imply that the plaintiff must be specifically identified as the ultimate recipient and that the precise purpose for which the accounts were required must be known to the defendant before the necessary relationship can be created, Denning L.J.'s formulation was expanded in the *Hedley Byrne* case, where it is clear that, but for an effective disclaimer, liability would have attached. The respondents there were not aware of the actual identity of the advertising firm for which the credit reference was required nor of its precise purpose, save that it was required in anticipation of the placing of advertising contracts. Furthermore, it is clear that "knowledge" on the part of the respondents embraced not only actual knowledge but such knowledge as would be attributed to a reasonable person placed as the respondents were placed. What can be deduced from the *Hedley Byrne* case, therefore, is that the necessary relationship between the maker of a statement or giver of advice ("the adviser") and the recipient who acts in reliance upon it ("the advisee") may typically be held to exist where (1) the advice is required for a purpose, whether particularly specified or generally described, which is made known, either actually or inferentially, to the adviser at the time when the advice is given; (2) the adviser knows, either actually or inferentially, that his advice will be communicated to the advisee, either specifically or as a member of an ascertainable class, in order that it should be used by the advisee for that purpose; (3) it is known either actually or inferentially, that the advice so communicated is likely to be acted upon by the advisee for that purpose without independent inquiry, and (4) it is so acted upon by the advisee to his detriment. That is not, of course, to suggest that these conditions are either conclusive or exclusive, but merely that the actual decision in the case does not warrant any broader propositions.

Those propositions are, I think, in accord with the two United States authorities which were referred to in the course of the speeches in the *Hedley Byrne* decision. In *Glanzer v. Shepard* (1922) 135 N.E. 275, where a public weigher negligently certified an overweight so that the purchaser of the goods paid too much for them, the identity of the recipient of the certificate was known, the purpose of the certificate was known, and the certificate was issued for the very purpose of enabling the price of the goods to be ascertained and with the knowledge that it would be acted upon by the recipient for that purpose. In *Ultramares Corporation v. Touche*, 174 N.E. 441, on the other hand—a case much nearer to the present—the action failed. There auditors, although aware generally that the certified accounts of the company would be shown to others by the company as the basis of financial dealings generally "according to the needs of the occasion," were unaware of the company's specific purpose of obtaining financial help from the plaintiff.

The most recent authority on negligent misstatement in this House—the two appeals in *Smith v. Eric S. Bush* and *Harris v. Wyre Forest District Council* [1990] 1 A.C. 831 which were heard together—does not, I think, justify any broader proposition than that already set out, save that they make it clear that the absence of a positive intention that the advice shall be acted upon by anyone other than the immediate recipient—indeed an expressed intention that it shall not be acted upon

by anyone else—cannot prevail against actual or presumed knowledge that it is in fact likely to be relied upon in a particular transaction without independent verification. Both appeals were concerned with surveyors' certificates issued to mortgagees in connection with the proposed purchases for which the mortgagees were contemplating making advances. In each case there was an express disclaimer of responsibility, but in each case it was known to the surveyor that the substance of the report (in the sense of what was important to a purchaser)—that is to say whether or not any repairs to the property were considered essential—would be made known by the mortgagee to the purchaser, the plaintiff in the action, and would be likely to be acted upon by him in entering into a contract to purchase the property. In so far as the case was concerned with the effects of the disclaimer, it does not require consideration in the present context, but there are important passages in the speeches in this House bearing upon the questions which arise on this appeal and indicative of the features which, in that case, led their Lordships to conclude that the necessary relationship of proximity existed between the surveyors and the purchasers of the respective properties. Lord Templeman deduced the relationship from a combination of factors. He said, at pp. 847–848:

> "I agree that by obtaining and disclosing a valuation, a mortgagee does not assume responsibility to the purchaser for that valuation. But in my opinion the valuer assumes responsibility to both mortgagee and purchaser by agreeing to carry out a valuation for mortgage purposes knowing that the valuation fee has been paid by the purchaser and knowing that the valuation will probably be relied upon by the purchaser in order to decide whether or not to enter into a contract to purchase the house. . . . In general I am of the opinion that in the absence of a disclaimer of liability the valuer who values a house for the purpose of a mortgage, knowing that the mortgagee will rely and the mortgagor will probably rely on the valuation, knowing that the purchaser mortgagor has in effect paid for the valuation, is under a duty to exercise reasonable skill and care and that duty is owed to both parties to the mortgage for which the valuation is made."

Lord Griffiths at p. 862, rejected the voluntary "assumption of responsibility" as a helpful formula for testing the existence of a duty of care observing that the phrase:

> "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."

He continued, at pp. 862, 864–865:

> "The essential distinction between the present case and the situation being considered in *Hedley Byrne* [1964] A.C. 465 and in the two earlier cases, is that in those cases the advice was being given with the intention of persuading the recipient to act upon it. In the present case, the purpose of providing the report is to advise

the mortgagee but it is given in circumstances in which it is highly probable that the purchaser will in fact act on its contents, although that was not the primary purpose of the report. I have had considerable doubts whether it is wise to increase the scope of the duty for negligent advice beyond the person directly intended by the giver of the advice to act upon it to those whom he knows may do so."

"I therefore return to the question in what circumstances should the law deem those who give advice to have assumed responsibility to the person who acts upon the advice or, in other words, in what circumstances should a duty of care be owed by the adviser to those who act upon his advice? I would answer—only if it is foreseeable that if the advice is negligent the recipient is likely to suffer damage, that there is a sufficiently proximate relationship between the parties and that it is just and reasonable to impose the liability. In the case of a surveyor valuing a small house for a building society or local authority, the application of these three criteria leads to the conclusion that he owes a duty of care to the purchaser. If the valuation is negligent and is relied upon damage in the form of economic loss to the purchaser is obviously foreseeable. The necessary proximity arises from the surveyor's knowledge that the overwhelming probability is that the purchaser will rely upon his valuation, the evidence was that surveyors knew that approximately 90 per cent. of purchasers did so, and the fact that the surveyor only obtains the work because the purchaser is willing to pay his fee. It is just and reasonable that the duty should be imposed for the advice is given in a professional as opposed to a social context and liability for breach of the duty will be limited both as to its extent and amount. The extent of the liability is limited to the purchaser of the house—I would not extend it to subsequent purchasers. The amount of the liability cannot be very great because it relates to a modest house. There is no question here of creating a liability of indeterminate amount to an indeterminate class. I would certainly wish to stress that in cases where the advice has not been given for the specific purpose of the recipient acting upon it, it should only be in cases when the adviser knows that there is a high degree of probability that some other identifiable person will act upon the advice that a duty of care should be imposed. It would impose an intolerable burden upon those who give advice in a professional or commercial context if they were to owe a duty not only to those to whom they give the advice but to any other person who might choose to act upon it."

Finally, in relation to the *Smith* appeal, Lord Jauncey of Tullichettle observed, at p. 871–872:

"The four critical facts are that the appellants knew from the outset: (1) that the report would be shown to Mrs. Smith; (2) that Mrs. Smith would probably rely on the valuation contained therein in deciding whether to buy the house without obtaining an independent valuation; (3) that if, in these circumstances, the

valuation was, having regard to the actual condition of the house, excessive, Mrs. Smith would be likely to suffer loss; and (4) that she had paid the building society a sum to defray the appellants' fee. In the light of this knowledge the appellants could have declined to act for the building society, but they chose to proceed. In these circumstances they must be taken not only to have assumed contractual obligations towards the building society but delictual obligations towards Mrs. Smith, whereby they became under a duty towards her to carry out their work with reasonable care and skill. It is critical to this conclusion that the appellants knew that Mrs. Smith would be likely to rely on the valuation without obtaining independent advice. In both *Candler v. Crane, Christmas & Co.* [1951] 2 K.B. 164 and *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465, the provider of the information was the obvious and most easily available, if not the only available, source of that information. It would not be difficult therefore to conclude that the person who sought such information was likely to rely upon it. In the case of an intending mortgagor the position is very different since, financial considerations apart, there is likely to be available to him a wide choice of sources of information, to wit, independent valuers to whom he can resort, in addition to the valuer acting for the mortgagee. I would not therefore conclude that the mere fact that a mortgagee's valuer knows that his valuation will be shown to an intending mortgagor of itself imposes upon him a duty of care to the mortgagor. Knowledge, actual or implied, of the mortgagor's likely reliance upon the valuation must be brought home to him. Such knowledge may be fairly readily implied in relation to a potential mortgagor seeking to enter the lower end of the housing market but non constat that such ready implication would arise in the case of a purchase of an expensive property whether residential or commercial."

Thus *Smith v. Eric S. Bush* [1990] 1 A.C. 831, although establishing beyond doubt that the law may attribute an assumption of responsibility quite regardless of the expressed intentions of the adviser, provides no support for the proposition that the relationship of proximity is to be extended beyond circumstances in which advice is tendered for the purpose of the particular transaction or type of transaction and the adviser knows or ought to know that it will be relied upon by a particular person or class of persons in connection with that transaction. The judgment of Millett J. in the recent case of *Al Saudi Banque v. Clarke Pixley* [1990] Ch. 313 (decided after the decision of the Court of Appeal in the instant case) contains an analysis of the decision of this House in *Smith v. Eric S. Bush* and concludes—and I agree—that it established a more stringent test of the requirements for proximity than that which had been applied by the Court of Appeal in the instant case. At p. 335–336 of his judgment, Millett J. gives what I find a helpful analysis of that case and of the features which distinguished it from the *Hedley Byrne* case and from the instant case:

"In each of the cases considered by the House of Lords, therefore, there was a tripartite transaction in which the valuation could realistically be regarded as provided by the valuer to the purchaser. In each of the cases the valuation was given to the mortgagee with the intention of being acted on by him in a specific transaction known to the valuer, viz: the making of a mortgage offer in connection with a specific transaction of house purchase, and in the knowledge that the valuation or the gist of the valuation would be communicated to the purchaser and would in all probability be relied upon by him in deciding whether to go ahead with the very transaction for which the mortgage offer was sought. This was a much more restricted context in which to found a duty of care than was present in the *Caparo* case, for there was in contemplation not only a particular and identified recipient of the information to whom the defendant knew that it would be communicated, but a particular and known purpose for which he could foresee that it would be relied on.

"In *Hedley Byrne* [1964] A.C. 465 and the cases which followed it, the statement was made directly to the plaintiff with the intention that the plaintiff should act upon it. The *JEB Fasteners* case [1983] 1 All E.R. 583 can be supported only on the basis that the statement was impliedly confirmed directly to the plaintiff without any such intention, but with a particular transaction in contemplation, and it was foreseeable that the plaintiff would rely upon it in that transaction. In *Caparo's* case [1989] Q.B. 653 it was made to the plaintiff without any such intention and without any particular transaction in contemplation, but it was foreseeable that the plaintiff might rely upon it in some unknown future transaction. In *Smith v. Eric S. Bush* [1990] 1 A.C. 831 it was made to a third party with the intention that he should act upon it in a known and contemplated transaction, but in the knowledge that it would be communicated to the plaintiff and would almost certainly be relied upon by him in connection with a transaction without which the transaction of the third party could not proceed."

My Lords, no decision of this House has gone further than *Smith v. Eric S. Bush*, but your Lordships are asked by the respondents to widen the area of responsibility even beyond the limits to which it was extended by the Court of Appeal in this case and to find a relationship of proximity between the adviser and third parties to whose attention the advice may come in circumstances in which the reliance said to have given rise to the loss is strictly unrelated either to the intended recipient or to the purpose for which the advice was required. My Lords, I discern no pressing reason of policy which would require such an extension and there seems to me to be powerful reasons against it. As Lord Reid observed in the course of his speech in *Hedley Byrne* [1964] A.C. 465, 483, words can be broadcast with or without the consent or foresight of the speaker or writer; and in his speech in the same case, Lord Pearce drew attention to the necessity for the imposition of some discernible limits to liability in such cases. He said, at p. 534:

A "The reason for some divergence between the law of negligence in word and that of negligence in act is clear. Negligence in word creates problems different from those of negligence in act. Words are more volatile than deeds. They travel fast and far afield. They are used without being expended and take effect in combination with innumerable facts and other words. Yet they are dangerous and can cause vast financial damage. How far they are relied on B unchecked . . . must in many cases be a matter of doubt and difficulty. If the mere hearing or reading of words were held to create proximity, there might be no limit to the persons to whom the speaker or writer could be liable."

As I have already mentioned, it is almost always foreseeable that C someone, somewhere and in some circumstances, may choose to alter his position upon the faith of the accuracy of a statement or report which comes to his attention and it is always foreseeable that a report—even a confidential report—may come to be communicated to persons other than the original or intended recipient. To apply as a test of liability only the foreseeability of possible damage without some further control would be to create a liability wholly indefinite in area, duration D and amount and would open up a limitless vista of uninsurable risk for the professional man.

On the basis of the pleaded case, as amended, it has to be assumed that the appellants, as experienced accountants, were aware or should have been aware that Fidelity's results made it vulnerable to take-over bids and that they knew or ought to have known that a potential bidder E might well rely upon the published accounts in determining whether to acquire shares in the market and to make a bid. It is not, however, suggested that the appellants, in certifying the accounts, or Parliament, in providing for such certification, did so for the purpose of assisting those who might be minded to profit from dealings in the company's shares. The respondents, whilst accepting that it is no part of the purpose of the preparation, certification and publication of the accounts F of a public company to provide information for the guidance of predators in the market, nevertheless argue that the appellants' knowledge that predators might well rely upon the accounts for this purpose sufficiently establishes between them and potential bidders that relationship of "proximity" which founds liability. On the face of it, this submission appears to equate "proximity" with mere foreseeability and to rely upon G the very misinterpretation of the effect of the decision of this House in the *Anns* case [1978] A.C. 728 which was decisively rejected in the *Governors of Peabody Donation Fund v. Sir Lindsay Parkinson & Co. Ltd.* [1985] A.C. 210 and in *Yuen Kun Yeu v. Attorney-General of Hong Kong* [1988] A.C. 175. Your Lordships have been referred, however, to three authorities, one from New Zealand and two from the United Kingdom, which do undoubtedly support the respondents' contention.

H In *Scott Group Ltd. v. McFarlane* [1978] N.Z.L.R. 553, the defendants were the auditors of a company which had been successfully taken over in reliance upon certified consolidated accounts in which, as a result of double-counting, the assets were overstated. It was admitted