

Spring v Guardian Assurance plc and others 1995
House of Lords

JUDGMENT-1:

LORD GOFF OF CHIEVELEY: My Lords, the facts of the present case are set out in the judgment of the Court of Appeal delivered by Glidewell LJ ([1993] 2 All ER 273, [1993] ICR 412), and have been summarised by my noble and learned friend Lord Keith of Kinkel. I gratefully adopt these accounts. I wish only to stress that the contract under which the plaintiff was engaged by Corinium was held by the judge to be a contract for services, as opposed to a contract of service; and that the judge held that there was no contractual relationship between the appellant and Guardian Assurance, for whom he was appointed a company representative. Although the judge's finding on this point was challenged by the plaintiff before the Court of Appeal, they did not find it necessary to express an opinion on it. The point was pursued again by the plaintiff before this House; but I too, though for rather different reasons, find it unnecessary to decide it.

The central issue in this appeal is whether a person who provides a reference in respect of another who was formerly engaged by him as a member of his staff (at this point I use a deliberately neutral term) may be liable in damages to that other in respect of economic loss suffered by him by reason of negligence in the preparation of the reference. That issue can, for the sake of convenience, be subdivided into two questions. (1) Whether the person who provided the reference *prima facie* owes a duty of care, in contract or tort, to the other in relation to the preparation of the reference. (2) If so, whether the existence of such a duty of care will nevertheless be negated because it would, if recognised, *pro tanto* undermine the policy underlying the defence of qualified privilege in the law of defamation.

I recognise, of course, that there is some interaction between these two questions. Even so, I think it is desirable to address the first question in isolation, not only for the sake of convenience, but also because the answer to that question may, in my opinion, cast light on the way in which the second question should be answered.

As will appear hereafter, I have come to the conclusion that, on the facts of the present case, both Guardian Assurance and Corinium owed a duty of care to the plaintiff in respect of the preparation of the reference in question. In my opinion, the source of duty of care lies in the principle derived from *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575, [1964] AC 465, viz an assumption of responsibility by those companies to the plaintiff in respect of the reference, and reliance by the plaintiff upon the exercise by them of due care and skill in respect of its preparation. I am however concerned by the fact that the plaintiff's case was not advanced to the Appellate Committee on the basis of that principle. In these circumstances I would ordinarily have proposed that, before the appeal could be decided on a point which had not been argued, the parties should be given the opportunity of making submissions upon it. In the present case, however, I understand that a majority of your Lordships are minded to allow the appeal in any event, proceeding upon a broader basis than the principle in *Hedley Byrne*. In these circumstances it would be pointless to delay the matter further, or to cause extra expense to the parties, by inviting further submissions. Even so, I propose to set out the reasoning upon which I, for my part, would allow the appeal. I feel it necessary to

do so because I have come to the conclusion that, if the Hedley Byrne principle cannot here be invoked, or a contractual term to that effect cannot be relied upon by the plaintiff, the appeal ought to be dismissed; because in those circumstances it would be a simple case of the defendants having negligently made a statement damaging to the plaintiff's reputation. In such a case, in agreement with the reasoning of the Court of Appeal, I do not see how there can be a liability upon the defendants in negligence consistently with the policy of the law established in the law of defamation in relation to the principle of qualified privilege which, in the absence of malice, protects from liability the maker of a statement made on the privileged occasion. Even so, I wish to stress that the view which I shall express in this opinion has been formed without the benefit of argument from counsel, and so to that extent must be regarded as being of limited authority.

Whether prima facie such a duty of care is owed, in contract or in tort

In a series of well-known cases, your Lordships' House has commended a gradual case by case approach to the development of the law of negligence, particularly in cases concerned with claims in respect of pure economic loss. Even so, one broad category of cases has been recognised in which there may be liability in negligence for loss of this kind. These are the cases which spring from, or have been gathered under the umbrella of, the landmark decision of your Lordships' House in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575, [1964] AC 465.

In *Hedley Byrne* the claim lay against a bank which had gratuitously supplied a bank reference concerning a customer of the bank. The plaintiffs claimed that the bank had been negligent in the preparation of the reference, and that they had acted in reliance on the reference and had as a result suffered loss. The question for decision was whether, in such circumstances, the bank was liable to the plaintiffs in damages. It was held by your Lordships' House that in principle a duty of care was owed by the bank to the plaintiffs in respect of the preparation of the reference, but that on the facts the bank was protected from liability because the reference had been supplied under cover of a disclaimer.

No doubt because of the facts of the case there under consideration, the case has been widely regarded as concerned with liability in damages in respect of a negligent misstatement, and also with liability in negligence for pure economic loss. This is undoubtedly true; and in both respects the decision broke new ground. But it is important not to lose sight of the principle which underlay the decision, which is of a wider importance. In his speech (with which Lord Hodson agreed) Lord Morris of Borth-y-Gest expressed himself as follows ([1963] 2 All ER 575 at 594, [1964] AC 465 at 502-503):

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

Lord Devlin spoke in the following terms ([1963] 2 All ER 575 at 610-611, [1964] AC 465 at 528-530):

'I think, therefore, that there is ample authority to justify your lordships in saying now that the categories of special relationships, which may give rise to a duty to take care in word as well as in deed, are not limited to contractual relationships or to relationships of fiduciary duty, but include also relationships which in the words of LORD SHAW in *Nocton v. Lord Ashburton* ([1914] AC 932 at 972, [1914-15] All ER Rep 45 at 62) are "equivalent to contract" that is, where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract ... I shall therefore content myself with the proposition that wherever there is a relationship equivalent to contract there is a duty of care. Such a relationship may be either general or particular. Examples of a general relationship are those of solicitor and client and of banker and customer. For the former *Nocton v. Lord Ashburton* has long stood as the authority and for the latter there is the decision of SALMON, J., in *Woods v. Martins Bank, Ltd.* ([1958] 3 All ER 166, [1959] 1 QB 55) which I respectfully approve. There may well be others yet to be established. Where there is a general relationship of this sort, it is unnecessary to do more than prove its existence and the duty follows. Where, as in the present case, what is relied on is a particular relationship created ad hoc, it will be necessary to examine the particular facts to see whether there is an express or implied undertaking of responsibility.'

The wide scope of the principle recognised in *Hedley Byrne* is reflected in the broad statements of principle which I have quoted. All the members of the Appellate Committee in this case spoke in terms of the principle resting upon an assumption or undertaking of responsibility by the defendant towards the plaintiff, coupled with reliance by the plaintiff on the exercise by the defendant of due care and skill. Lord Devlin, in particular, stressed that the principle rested upon an assumption of responsibility when he said that 'the essence of the matter in the present case and in others of the same type is the acceptance of responsibility' (see [1963] 2 All ER 575 at 612, [1964] AC 465 at 531). For the purpose of the case now before your Lordships it is, I consider, legitimate to proceed on the same basis. Furthermore, although *Hedley Byrne* itself was concerned with the provision of information and advice, it is clear that the principle in the case is not so limited and extends to include the performance of other services. As for example the professional services rendered by a solicitor to his client (see, in particular, [1963] 2 All ER 575 at 611, [1964] AC 465 at 529-530 per Lord Devlin). Accordingly where the plaintiff entrusts the defendant with the conduct of his affairs, in general or in particular, the defendant may be held to have assumed responsibility to the plaintiff, and the plaintiff to have relied on the defendant to exercise due skill and care, in respect of such conduct.

For present purposes, I wish also to refer to the nature of the 'special skill' to which Lord Morris referred in his statement of principle. It is, I consider, clear from the facts of *Hedley Byrne* itself that the expression 'special skill' is to be understood in a broad sense, certainly broad enough to embrace special knowledge. Furthermore Lord Morris himself, when speaking of the provision of a statement in the form of

information or advice, referred to the defendant's judgment or skill or ability to make careful inquiry, from which it appears that the principle may apply in a case in which the defendant has access to information and fails to exercise due care (and skill, to the extent that this is relevant) in drawing on that source of information for the purposes of communicating it to another.

The fact that the inquiry in *Hedley Byrne* itself was directed, in a case concerned with liability in respect of a negligent mis-statement (in fact a reference), to whether the maker of the statement was liable to a recipient of it who had acted in reliance upon it, may have given the impression that this is the only way in which liability can arise under the principle in respect of a mis-statement. But, having regard to the breadth of the principle as stated in *Hedley Byrne* itself, I cannot see why this should be so. Take the case of the relationship between a solicitor and his client, treated implicitly by Lord Morris and expressly by Lord Devlin as an example of a relationship to which the principle may apply. I can see no reason why a solicitor should not be under a duty to his client to exercise due care and skill when making statements to third parties, so that if he fails in that duty and his client suffers damage in consequence, he may be liable to his client in damages. The question whether a person who gives a reference to a third party may, if the reference is negligently prepared, be liable in damages not to the recipient but to the subject of the reference, did not arise in *Hedley Byrne* and so was not addressed in that case. That is the central question with which we are concerned in the present case; and I propose first to consider it in the context of an ordinary relationship between employer and employee, and then to turn to apply the relevant principles to the more complex relationships which existed in the present case.

Prima facie (ie, subject to the point on defamation, which I will have to consider later), it is my opinion that an employer who provides a reference in respect of one of his employees to a prospective future employer will ordinarily owe a duty of care to his employee in respect of the preparation of the reference. The employer is possessed of special knowledge, derived from his experience of the employee's character, skill and diligence in the performance of his duties while working for the employer. Moreover, when the employer provides a reference to a third party in respect of his employee, he does so not only for the assistance of the third party, but also, for what it is worth, for the assistance of the employee. Indeed, nowadays it must often be very difficult for an employee to obtain fresh employment without the benefit of a reference from his present or a previous employer. It is for this reason that, in ordinary life, it may be the employee, rather than a prospective future employer, who asks the employer to provide the reference; and even where the approach comes from the prospective future employer, it will (apart from special circumstances) be made with either the express or the tacit authority of the employee. The provision of such references is a service regularly provided by employers to their employees; indeed, references are part of the currency of the modern employment market. Furthermore, when such a reference is provided by an employer, it is plain that the employee relies upon him to exercise due skill and care in the preparation of the reference before making it available to the third party. In these circumstances, it seems to me that all the elements requisite for the application of the *Hedley Byrne* principle are present. I need only add that, in the context under consideration, there is no question of the circumstances in which the reference is provided being, for example, so informal as to negative an assumption of responsibility by the employer.

Where the relationship between the parties is that of employer and employee, the duty of care could be expressed as arising from an implied term of the contract of employment, ie that, if a reference is supplied by the employer for the employee, due care and skill will be exercised by him in its preparation. Such a term may be implied despite the absence of any legal obligation on the employer to provide a reference (as I understand to have been accepted by the parties in the present case), and may be expressed to apply even after the employee has left his employment with the employer. But in the present case this adds nothing to the duty of care which arises under the Hedley Byrne principle, and so may be applicable as a tortious duty, either where there is no contract between the parties, or concurrently with a contractual duty to the same effect.

I wish however to add that, in considering the duty of care owed by the employer to the employee, although it can and should be expressed in broad terms, nevertheless the central requirement is that reasonable care and skill should be exercised by the employer in ensuring the accuracy of any facts which either (1) are communicated to the recipient of the reference from which he may form an adverse opinion of the employee, or (2) are the basis of an adverse opinion expressed by the employer himself about the employee. I wish further to add that it does not necessarily follow that, because the employer owes such a duty of care to his employee, he also owes a duty of care to the recipient of the reference. The relationship of the employer with the recipient is by no means the same as that with his employee; and whether, in a case such as this, there should be held (as was prima facie held to be so on the facts of the Hedley Byrne case itself) a duty of care owed by the maker of the reference to the recipient is a point on which I do not propose to express an opinion, and which may depend on the facts of the particular case before the court.

At this point I must face the possibility that the conclusion which I have expressed may be thought to be inconsistent with the decision of the Privy Council in *Mutual Life and Citizens' Assurance Co Ltd v Evatt* [1971] 1 All ER 150, [1971] AC 793. There a claim was made against a company for damages arising from negligent advice gratuitously supplied by the company to the plaintiff in respect of a particular investment. The company was not engaged in the business of giving advice about investments; and it was held that a person who renders services gratuitously in circumstances where he is not engaged in the business or profession of rendering such services owes no duty to exercise skill or competence, or indeed care, in so doing. Quite apart however from the fact that the decision, which is not binding on your Lordships' House, has attracted serious criticism, particularly in the light of the formidable dissenting opinion of Lord Reid and Lord Morris of Borth-y-Gest (both of whom were members of the Appellate Committee in *Hedley Byrne*), I do not consider that it stands in the way of the approach which I favour in the present case, since the skill of preparing a reference in respect of an employee falls as much within the expertise of an employer as the skill of preparing a bank reference fell within the expertise of the defendant bank in *Hedley Byrne* itself.

I turn next to the particular circumstances of the present case, and I consider first the position of Guardian Assurance. It was they who provided the reference to Scottish Amicable. First, does it make any difference that the plaintiff was not their employee, but a company representative? I do not think so. I can see no material distinction from

the position which would have arisen if they had been the plaintiff's employers. In particular, they had available to them special knowledge relating to the plaintiff's performance while their representative, and the reference must have been provided by them for the assistance of the plaintiff as their agent, as well as for the assistance of the recipient of the reference. It is true that the judge found that there was no contractual relationship between them and the plaintiff; but I am nevertheless satisfied that, on the Hedley Byrne principle, a duty of care would nevertheless arise in tort.

There is however one particular matter to which I must refer. Rule 3.5 of the Lauto rules provides:

'(1) A person shall not be appointed as a company representative of a member unless the member has first taken reasonable steps to satisfy itself that he is of good character and of the requisite aptitude and competence, and those steps shall ... include ... the taking up of references relating to character and experience.

(2) A member which receives an enquiry for a reference in respect of a person whom another member or appointed representative is proposing to appoint shall make full and frank disclosure of all relevant matters which are believed to be true to the other member or the representative.'

I have to consider whether these rules militate against a duty of care owed by Guardian Assurance to the plaintiff in the present case. First of all, although the rule is, understandably, concerned with the interests of the member who receives it, and no doubt also the interests of his clients, I cannot see that this precludes a duty of care owed to the subject of the reference by the member who provides it. Indeed, the function of the second paragraph of the rule appears simply to be to ensure that disclosure is made of matters which referees are sometimes reluctant to disclose. Although the point does not directly arise in the present case, I cannot see that this duty of disclosure as between members could of itself prevent the existence of a duty of care being owed by the provider of the reference to the recipient, on the Hedley Byrne principle; and a fortiori I cannot see that it precludes a duty of care owed by the provider to the subject of the reference.

Finally, there is the point that, at the time when the reference was given, the plaintiff had ceased to be a company representative of Guardian Assurance. Again, I cannot see that this makes any difference. The plaintiff had ceased to hold this position shortly before the reference was required. I can see nothing in the circumstances to differentiate the situation from that where he was still a company representative at the relevant time.

For these reasons, subject to the point on defamation, I am satisfied that Guardian Assurance owed a duty of care to the plaintiff in respect of the preparation of the reference. It is true that the preparation of the reference was carried out not by employees of Guardian Assurance, but by their parent company, GRE Assurance (through their assistant chief compliance officer, Mrs Debra Lee-Moore, assisted by Mr Beard (a member of a GRE Assurance compliance team) and a Mr Dixon (a senior sales consultant for GRE Assurance)) acting in collaboration with Corinium (through Mr Siderfin, who had been appointed by Guardian Assurance, when they took Corinium over, to be chief executive of Corinium). I cannot see, however, how the

delegation by Guardian Assurance to others of the performance of the service, in respect of which they had assumed responsibility to the plaintiff, can absolve them from their duty to the plaintiff to exercise due skill and care in the preparation of the reference. It follows that the negligence of Mr Dixon and Mr Siderfin in the preparation of the reference, as found by the judge, resulted in a breach of that prima facie duty by Guardian Assurance.

In these circumstances, it is probably academic whether a similar duty was owed to the plaintiff by GRE Assurance or Corinium. This was however a case where three companies, all members of the same group, collaborated in the preparation of the reference. In the circumstances of the present case, I am satisfied that Corinium, which not only collaborated in the preparation of the reference but was formerly in a contractual relationship with the plaintiff under a contract for services, with which the plaintiff's position as Guardian Assurance's company representative was evidently connected, must be taken also to have assumed responsibility to the plaintiff in respect of the preparation of the reference so provided. I cannot however see any basis upon which GRE Assurance can be said to have assumed responsibility to the plaintiff in respect of the preparation of the reference, even though that company played the principal part in its preparation. In these circumstances I am prepared to hold prima facie that Corinium (as the employer of Mr Siderfin) was under a duty of care to the plaintiff together with Guardian Assurance. Furthermore, on the facts as found by the judge, it is plain that such a duty of care, if it exists, was broken by both of these defendants.

It must not however be thought that, in so holding, I am expressing any opinion upon the ordinary position where a person providing the reference simply seeks information from an outsider, and the outsider is negligent in relation to the supply to the referee of the information so requested. Indeed, in the absence of assumption of responsibility (under a contract or otherwise) by the outsider to the subject of the reference, there will, for the reasons I have already given, be great difficulty in holding that there was any greater duty imposed upon him than that arising under the law of defamation, which I now turn to consider.

If so, whether such a duty will nevertheless be negated because it would, if recognised, pro tanto undermine the policy underlying the defence of qualified privilege in the law of defamation

I think it desirable that I should first of all identify the nature of this policy objection. As I understand it, the objection is as follows. First of all, reference is made to the description of the policy underlying the defence of qualified privilege given by Lord Diplock in *Horrocks v Lowe* [1974] 1 All ER 662 at 669-670, [1975] AC 135 at 149, in the course of which he said:

'The public interest that the law should provide an effective means whereby a man can vindicate his reputation against calumny, has nevertheless to be accommodated to the competing public interest in permitting men to communicate frankly and freely with one another about matters with respect to which the law recognises that they have a duty to perform or an interest to protect in doing so. What is published in good faith on matters of these kinds is published on a privileged occasion. It is not actionable even though it be defamatory and turns out to be untrue.'

Second, it is suggested that the policy which underlies the defence of qualified privilege, viz that in the relevant circumstances men should be permitted to communicate frankly and freely with one another about all relevant matters, prevents the recognition of a duty of care owed by the giver of the reference to the subject of the reference. In this connection, reliance is placed in particular upon decisions of the Court of Appeal of New Zealand in *Bell-Booth Group Ltd v A-G* [1989] 3 NZLR 148 and *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigations Ltd*, *Mortensen v Laing* [1992] 2 NZLR 282. In the *Bell-Booth* case Cooke P said (at 156):

'The common law rules, and their statutory modifications, regarding defamation and injurious falsehood represent compromises gradually worked out by the Courts over the years, with some legislative adjustments, between competing values. Personal reputation and freedom to trade on the one hand have to be balanced against freedom to speak or criticise on the other. In the result the present rules are in broad terms well-known and reasonably clear. To an action for defamation truth is an absolute defence. Privilege, where applicable, is in a few areas an absolute but in most a qualified defence. Fair comment is a qualified defence subject to rather different rules. In injurious falsehood, on the other hand, the plaintiff has the burden of proving both falsity and malice. These evolved compromises may not draw the lines in places that will always be found generally acceptable in the community. Some argue, for instance, for greater media freedom or licence; statutory changes have been recommended but not enacted. It is a controversial area. The important point for present purposes is that the law as to injury to reputation and freedom of speech is a field of its own.'

Now I for my part accept that, as stated by Hallett J in *Foaminol Laboratories Ltd v British Artid Plastics Ltd* [1941] 2 All ER 393 at 399, 'a claim for mere loss of reputation is the proper subject of an action for defamation, and cannot ordinarily be sustained by means of any other form of action ...' Furthermore, it is (with respect) understandable that, in the *Bell-Booth* case the New Zealand Court of Appeal should have rejected a claim in negligence against the New Zealand Ministry of Agriculture and Fisheries in respect of an alleged failure to inform the plaintiffs of the results of certain trials of a product of the plaintiffs, or to consult them about the presentation of the results, as a result of which trials the product was truthfully described as 'ineffective' in a television broadcast; or that in the *South Pacific Manufacturing* and *Mortensen* cases the same court should have rejected claims in negligence against fire-loss investigators, whose reports to insurers (by whom they were instructed) should have resulted in the rejection of claims by parties whose premises had been damaged by fire and, in one case, a prosecution for arson. In neither case was any question of assumption of responsibility to the plaintiffs before the court. A case which bears some similarity to the present case is *Balfour v A-G* [1991] 1 NZLR 519 which was concerned with a school teacher whose file at the Department of Education contained a memorandum stating that he was a long practising and blatant homosexual, as a result of which his prospects of employment as a teacher were seriously prejudiced. However, the issue of assumption of responsibility does not appear to have been considered in that case, in which the claim appears to have failed primarily on the issue of causation.

By way of contrast, in the English case of *Lawton v BOC Transfield Ltd* [1987] 2 All ER 608, [1987] ICR 7 Tudor Evans J held that an employer owed a duty of care to a former employee in respect of the preparation of a reference for him. However, on the facts of the case he held that there was no breach of duty; and in any event he gave no consideration to the impact of the law of defamation upon his decision that a duty was owed by the employer.

In these circumstances it is, I consider, necessary to approach the question as a matter of principle. Since, for the reasons I have given, it is my opinion that in cases such as the present the duty of care arises by reason of an assumption of responsibility by the employer to the employee in respect of the relevant reference, I can see no good reason why the duty to exercise due skill and care which rests upon the employer should be negated because, if the plaintiff were instead to bring an action for damage to his reputation, he would be met by the defence of qualified privilege which could only be defeated by proof of malice. It is not to be forgotten that the Hedley Byrne duty arises where there is a relationship which is, broadly speaking, either contractual or equivalent to contract. In these circumstances, I cannot see that principles of the law of defamation are of any relevance.

It is true that recognition of a duty of care to an employee in cases such as the present, based on the Hedley Byrne principle, may have some inhibiting effect on the manner in which references are expressed, in the sense that it may discourage employers from expressing views such as those which are encouraged by r 3.5(2) of the Lautro rules. For my part, however, I suspect that such an inhibition exists in any event. Employers may well, like many people, be unwilling to indulge in unnecessary criticism of their employees: hence the perceived necessity for r 3.5(2). In all the circumstances, I do not think that we may fear too many ill effects from the recognition of the duty. The vast majority of employers will continue, as before, to provide careful references. But those who, as in the present case, fail to achieve that standard, will have to compensate their employees or former employees who suffer damage in consequence. Justice, in my opinion, requires that this should be done; and I, for my part, cannot see any reason in policy why that justice should be denied.

For these reasons I would allow the appeal; but I would nevertheless remit the matter to the Court of Appeal to consider the issue of the extent to which the damage suffered by the plaintiff was caused by the breach of duty of the defendants.

JUDGMENTBY-2: LORD LOWRY

JUDGMENT-2:

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 and I gratefully adopt his review of the facts and of the issues in dispute. I have also had the advantage of reading the speeches of my noble and learned friends Lord Goff of Chieveley, Lord Slynn of Hadley and Lord Woolf and, so far as concerns the issue of negligence, I entirely agree with both their analysis of the cases which provide or have been thought to provide guidance on the main disputed question and their conclusions. I also agree with my noble and learned friend Lord Goff's interpretation of *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575, [1964] AC 465. While I would ordinarily be content simply to concur in the conclusion reached by my noble and

learned friends, I wish, since the result of your Lordships' deliberations will be to reverse the decision of the Court of Appeal, to state as succinctly as I may my reasons for so concurring.

The defendants have two main arguments. The first is that to confer on the plaintiff a cause of action in negligence would distort and subvert the law of defamation in cases where the defence relied on is one of qualified privilege, that is, where, on an occasion when he has either a duty to communicate information or a legitimate interest of his own to protect, the defendant in good faith and without malice defames the plaintiff. I believe that the answer to this argument is that a person owes a general duty, subject to the principles governing the law of defamation and to the relationship, if any, between the defamer and the defamed, not to defame any other person, whereas a liability based on negligent mis-statement can exist only if (1) damage is foreseeable (and damage occurs) and (2) there is such proximity between the maker and the subject of the mis-statement as will impose a duty of care on the former for the protection of the latter. The existence of that foreseeability and that proximity between the plaintiff and the defendant is a justification, not for extending the liability for defamation by dispensing with the need for malice, but for bringing into play a different principle of liability according to which, in a restricted class of situations, a plaintiff can rely on negligence as the ingredient of the defendant's conduct which is essential to the existence of that liability. I consider that in the instant case damage stemming from the defendants' careless mis-statement when giving a reference was foreseeable and that the proximity between the defendants and the plaintiff imposed a duty of care on the former for the protection of the latter.

The defendants' second argument (which, in order that it may prevail, must be made to stand independently on its own feet) is that, even if one concedes foreseeability and proximity and even if it would otherwise be just and reasonable for the plaintiff to recover under the head of negligence, public policy dictates that the person who has been the subject of a negligent mis-statement shall not recover. The argument is grounded on the proposition that the maker of the mis-statement, provided he has acted in good faith, must, even if he has been negligent, be free to express his views in the kind of situation (including the giving of any reference) which is contemplated by the doctrine of qualified privilege which is part of the law of defamation.

This argument falls to be considered on the assumption that, but for the overriding effect of public policy, a plaintiff who is in the necessary proximate relation to a defendant will be entitled to succeed in negligence if he proves his case. To assess the validity of the argument entails not the resolution of a point of law but a balancing of moral and practical arguments. This exercise could no doubt produce different answers but, for my own part, I come down decisively on the side of the plaintiff.

On the one hand looms the probability, often amounting to a certainty, of damage to the individual, which in some cases will be serious and may indeed be irreparable. The entire future prosperity and happiness of someone who is the subject of a damaging reference which is given carelessly but in perfectly good faith may be irretrievably blighted. Against this prospect is set the possibility that some referees will be deterred from giving frank references or indeed any references. Placing full reliance here on the penetrating observations of my noble and learned friend Lord Woolf, I am inclined to view this possibility as a spectre conjured up by the

defendants to frighten your Lordships into submission. I also believe that the courts in general and your Lordships' House in particular ought to think very carefully before resorting to public policy considerations which will defeat a claim that *ex hypothesi* is a perfectly good cause of action. It has been said that public policy should be invoked only in clear cases in which the potential harm to the public is incontestable, that whether the anticipated harm to the public will be likely to occur must be determined on tangible grounds instead of on mere generalities and that the burden of proof lies on those who assert that the court should not enforce a liability which *prima facie* exists. Even if one should put the matter in a more neutral way, I would say that public policy ought not to be invoked if the arguments are evenly balanced: in such a situation the ordinary rule of law, once established, should prevail.

In marshalling my thoughts on public policy I have drawn freely upon the argument in *Rondel v Worsley* [1969] 1 AC 191 at 203 of Louis Blom-Cooper whose submissions, although not rewarded with success in that appeal, strike me as particularly appropriate in the context of the present case.

As in so many situations in which a deterrent sanction is envisaged for something which may be said or written, your Lordships were predictably reminded of art 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969). But, assuming that an action would otherwise lie for damages for negligent mis-statement, I do not think that art 10, a paramount and proper guardian of free speech, was intended to shield a negligent defendant in an action based on negligence any more than it would protect a malicious defendant from a well grounded claim in defamation. Freedom of speech, rightly prized in all civilised societies, is not to be identified with freedom to defame maliciously or to damage negligently.

When I look again at *Lautour* r 3.5(2), it does not seem to me that the obligation of a referee to make 'full and frank disclosure of all relevant matters which are believed to be true' is in any way incompatible with the existence of an obligation, owed to the referee's employee or agent, to exercise reasonable care in the giving of a reference. Indeed, it might without difficulty be implied that, in the interests of the recipient, a reference should be a careful one as well as being full and frank. Rule 3.5(2) cannot be determinative of the existence of a duty owed by the referee to the subject of a reference or of the nature of that duty, if one exists.

It is in the tradition of the English case law method to decide this appeal on its facts and not to be deterred by reflecting on all the possible situations in which a reference might be called for. Even if it is debatable where the line should be drawn, I am confident that from the plaintiff's point of view this case falls on the right side of it. It is not asking too much to expect the referee to exercise reasonable care; to hold for the plaintiff in this appeal does not mean that the referee must guarantee the accuracy of a reference.

So far as concerns other matters which have been discussed, including in particular the defendants' liability in contract, I will be content, having regard to my conclusion on the negligence issue, to remind myself of the felicitous reference to *obiter dicta* and the proverbial chickens of destiny made by Bowen LJ in *Cooke v New River Co* (1888) 38 Ch D 56 at 71.

For these reasons, and for the reasons in regard to negligence given by my noble and learned friends, I would allow this appeal and would remit the case to the High Court in order that damages may be assessed.

I prefer this course to the alternative of sending the case back to the Court of Appeal, where Glidewell LJ delivering the judgment of the court said ([1993] 2 All ER 273 at 296, [1993] ICR 412 at 439):

'Mr Eady QC argues that, even if negligence were established, it did not cause the damage alleged to the plaintiff. In the light of our decision to the effect that the defendants owed no duty of care, it is unnecessary to consider this argument further. We comment only that we would have been reluctant to disagree with the judge on this issue.'

Once the duty of care is held to exist and the defendants' negligence is proved, the plaintiff only has to show that by reason of that negligence he has lost a reasonable chance of employment (which would have to be evaluated) and has thereby sustained loss: McGregor on Damages (14th edn, 1980) paras 276-278, pp 198-202 and Chaplin v Hicks [1911] 2 KB 786, [1911-13] All ER Rep 224. He does not have to prove that, but for the negligent reference, Scottish Amicable would have employed him. In fact, the trial judge said:

'I turn, finally, to the question of causation. On the face of it, causation seems plain. Because of the reference, which I have held constitutes a negligent mis-statement, not only Scottish Amicable but Irish Life and National Financial Management refused to employ the plaintiff. Mr Eady, however, argues that this is not the full story. The plaintiff, he points out, must prove that had Scottish Amicable received a reference which was not a negligent mis-statement but one prepared with all reasonable care, then, on the facts of the case, they would have employed him. To this end he called further evidence from Mrs Ruth Evans, compliance officer at Scottish Amicable, who stated, on what Mr. Eady postulated as a hypothesis of the agreed facts in the case, that they would, in all probability, not have employed him. This attempt to breach the chain of causation was, in my judgment, ingenious but flawed. The postulates were of the defendants' or Mr Eady's own selection and excluded many other facts as were agreed or as I find proved in the case. To take a simple example, Mrs Evans stated that the most serious factor was of the plaintiff attempting to advise on investments he was not fully familiar with. She was not asked to postulate what her conclusion might have been if, for example, as Mr Livesey went to such pains to establish, the further fact was added that he had been given blanket authorisation to sell the defendants' products and was, of course, urged by the defendants so to do when, as I find, he had had only the sketchiest of training. As I observed in argument, the only person capable of giving an authoritative answer to the hypothetical question posed would have been somebody in Mrs Evans' position who had sat in this courtroom throughout the many days of evidence and heard all the facts about the plaintiff and his career at Corinium. As it is, having done so myself, I can only say that, in my judgment, on balance, had the plaintiff received the careful and accurate reference he was entitled to, he would probably have obtained employment with one of these companies.'

There is, in my view, much to be said for the proposition that the judge's finding of

fact on the issue of causation cannot be reversed. But I will not proceed on that basis, since the point was not the subject of argument before your Lordships.

If the case is remitted to the trial judge and if, as appears likely, he awards damages (assuming of course that the plaintiff can prove loss), then his judgment can be appealed and the issue of causation, as well as that of amount, will remain open in the Court of Appeal.

If, on the other hand, your Lordships were to send the case back to the Court of Appeal and that court were to decide causation in favour of the plaintiff, the case would then have to be sent back to the trial judge and he would have to evaluate the plaintiff's chances of employment in the event that the reference had been a proper one and assess the plaintiff's damages. His judgment on damages could then be appealed by either side to the Court of Appeal.

The argument in favour of now remitting this case to the Court of Appeal is, no doubt, that the proceedings could be terminated against the plaintiff without any assessment of damages if that court were to hold the trial judge's finding on causation to be perverse and were to decide that on no reasonable view could the plaintiff be regarded as having suffered any loss by reason of the defendants' negligence. I consider such a result to be most unlikely and that is another reason in favour of sending the case directly to the trial judge, particularly since causation of damage is so closely linked to the issue of damages.

JUDGMENTBY-3: LORD SLYNN OF HADLEY

JUDGMENT-3:

LORD SLYNN OF HADLEY: My Lords, the facts of this case, the relevant statutory provisions relating to the sale of long term insurance and the self-regulatory scheme adopted by the Life Assurance and Unit Trust Regulatory Organisation ('Lautro') are fully and clearly set out in the judgment of Glidewell LJ ([1993] 2 All ER 273, [1993] ICR 412). I do not therefore repeat them other than is necessary for the statement of my conclusions. I adopt the terminology of the Court of Appeal referring to the first defendant as 'Guardian Assurance' and to the fourth defendant as 'GRE Assurance'. I accept, as did the Judge and the Court of Appeal, that no distinction need be made between the second and third defendants (which were both subsidiaries of Guardian Assurance, itself a subsidiary of GRE Assurance) and I refer to the second and third defendants collectively as 'Corinium'.

The Court of Appeal said ([1993] 2 All ER 273 at 289, [1993] ICR 412 at 430) that the issue 'does the giver of a reference owe a duty of care to the subject of the reference (i) in giving or compiling the reference or (ii) in obtaining the information on which it is based?' was 'the most difficult and controversial question in this appeal'. That was no exaggeration. The Court of Appeal concluded that the question should be answered in the negative.

The Court of Appeal began its reasoning by saying ([1993] 2 All ER 273 at 289-290, [1993] ICR 412 at 431-432):

'It is a commonplace that, if A (a former or present employer) gives B (a possible

future employer) a written or oral reference concerning C (an employee) [which] contains some untrue statement about C which damages his reputation, C can only succeed in an action against A in defamation if he can prove that A was actuated by malice. This has been the law for over 200 years because the courts have held it to be in the public interest that, in giving such a reference, A should be encouraged to express his honest opinion, fully and frankly, about C without fear that he will be liable to C if something which he honestly believes to be true nevertheless is proved not to be true. Moreover, if A makes an untrue statement to B about C which damages C's business but not his reputation, C can sue A for damages for financial loss only if he can prove that A in making the statement was actuated by malice.'

One reason for this approach was said by Erle CJ in *Whiteley v Adams* (1863) 15 CBNS 392 at 418, 143 ER 838 at 848 to be --

'that it is to the general interest of society that correct information should be obtained as to the character of persons in whom others have an interest. If every word which is uttered to the discredit of another is to be the ground of an action, cautious persons will take care that all their words are words of praise only, and will cease to obey the dictates of truth.'

To this end, as Lord Diplock stressed in *Horrocks v Lowe* [1974] 1 All ER 662 at 669, [1975] AC 135 at 149-151, for the publisher of defamatory matter to lose his qualified privilege, where the law recognises that he has a duty to speak, 'express malice' must be shown. The burden on the plaintiff to establish malice on the part of the defendant is a heavy one. It must be shown that he did not have a positive or honest belief in the truth of what he published, or, if he did believe it when uttered on a privileged occasion, that he 'misused the occasion for some purpose other than that for which the privilege is accorded by the law' ([1974] 1 All ER 662 at 669, [1975] AC 135 at 150) or was guilty of personal spite. As to a reckless publication Lord Diplock said ([1974] 1 All ER 662 at 669, [1975] AC 135 at 150):

'If he publishes untrue defamatory matter recklessly, without considering or caring whether it be true or not, he is in this, as in other branches of the law, treated as if he knew it to be false. But indifference to the truth of what he publishes is not to be equated with carelessness, impulsiveness or irrationality in arriving at a positive belief that it is true.'

It is thus clear that if a claim is made that a statement is defamatory it is only express malice which removes the protection of qualified privilege in a situation where the law recognises that the duty to speak frankly is, in the absence of malice, paramount. Does it follow, as the Court of Appeal considered, that no one can ever sue in negligence for a statement, written or oral and whatever the circumstances?

Apart from the Court of Appeal's judgment the question is not without judicial decision. Thus in *Lawton v BOC Transhield Ltd* [1987] 2 All ER 608, [1987] ICR 7 Tudor Evans J held that an employer, who gave an employee on leaving an unfavourable reference, owed him a duty of care in compiling and giving the reference, but neither in the judgment, nor it seems in argument, was anything said about the principle established in regard to defamation. In *Foaminol Laboratories Ltd v British Artid Plastics Ltd* [1941] 2 All ER 393 at 399 Hallett J said:

'a claim for mere loss of reputation is the proper subject of an action for defamation, and cannot ordinarily be sustained by means of any other form of action ...'

This, however, does not deal with the real issue in the present case. Of more direct relevance are two decisions of the Court of Appeal of New Zealand in *Bell-Booth Group Ltd v A-G* [1989] 3 NZLR 148 and *Balfour v A-G* [1991] 1 NZLR 519.

In the *Bell-Booth* the claim arose out of a television programme which described the company's product as being ineffective for the purpose for which it was sold. The claim was based primarily on an alleged defamation. The claim failed when the judge found that the statements were justified. There was, however, an alternative claim that the statements had been made negligently, arising from a failure to disclose the result of certain trials of the relevant product or to give the company an opportunity to comment. The trial judge upheld this claim. Cooke P, giving the judgment of the Court of Appeal setting aside the findings of a duty of care and of a breach of that duty, said (at 155):

'The elaboration with which the duty has been defined, both by the judge and by counsel for the plaintiff, is more suggestive of contract than of tort. That may not be fatal. The suggested duty could possibly be refined as simply a duty to take reasonable care to safeguard the interests of the plaintiff. But where there is no authority in point, as is the position, it is of course material to consider whether it is just and reasonable that a duty of care of particular scope should be incumbent upon the defendant.'

The court concluded (at 156-157):

'The common law rules, and their statutory modifications, regarding defamation and injurious falsehood represent compromises gradually worked out by the courts over the years, with some legislative adjustments, between competing values. Personal reputation and freedom to trade on the one hand have to be balanced against freedom to speak or criticise on the other. In the result the present rules are in broad terms well-known and reasonably clear. To an action for defamation truth is an absolute defence. Privilege, where applicable, is in a few areas an absolute but in most a qualified defence. Fair comment is a qualified defence subject to rather different rules. In injurious falsehood, on the other hand, the plaintiff has the burden of proving both falsity and malice. These evolved compromises may not draw the lines in places that will always be found generally acceptable in the community. Some argue, for instance, for greater media freedom or licence; statutory changes have been recommended but not enacted. It is a controversial area. The important point for present purposes is that the law as to injury to reputation and freedom of speech is a field of its own. To impose the law of negligence upon it by accepting that there may be common law duties of care not to publish the truth would be to introduce a distorting element ... The duty in defamation may be described as a duty not to defame without justification or privilege or otherwise than by way of fair comment. The duty in injurious falsehood may be defined as a duty not to disparage goods untruthfully and maliciously. In substance the plaintiff would add to these duties a duty in such a case as this to take care not to injure the plaintiff's reputation by true statements. All the arguments for the plaintiff, though put skilfully in various ways by

counsel, reduce to that proposition. In our opinion, to accept it would be to introduce negligence law into a field for which it was not designed and is not appropriate ... For these reasons in our opinion justice does not require or warrant an importation of negligence law into this class of case. Where remedies are needed they are already available in the form of actions for defamation, injurious falsehood, breach of contract or breach of confidence. Accordingly the cross-appeal must be allowed, and the findings of duty of care and breach and the award of damages for negligence set aside.'

That decision was followed in *Balfour v A-G* [1991] 1 NZLR 519 which concerned the alleged duty of a government department to record information about a school teacher. It is sufficient to quote from the headnote (at 520):

'(ii) The allegation that there was a special relationship of proximity which imposed a duty to exercise care as to the accuracy of information recorded by the Department was in part perilously close to an allegation of defamation. Any attempt to merge that tort with negligence was to be resisted . . .

(iii) Assuming that the necessary proximity existed, the question was whether in a particular circumstance such duty of care ought to be recognised. Whether one applied an incremental approach or a policy approach, there was no acceptable basis for recognising such a duty . . .'

The Court of Appeal in the present case concluded ([1993] 2 All ER 273 at 294-295, [1993] ICR 412 at 437):

'In our view the decision in *Bell-Booth Group Ltd v A-G* [1989] 3 NZLR 148 represents the law of England. As a general proposition, in our judgment the giver of a reference owes no duty of care in the tort of negligence to the subject of the reference. His duty to the subject is governed by and lies in the tort of defamation. If it were otherwise, the defence of qualified privilege in an action for defamation where a reference was given, or the necessity for the plaintiff to prove malice in an action for malicious falsehood, would be bypassed. In effect, a substantial section of the law regarding these two associated torts would be emasculated. It follows that in our judgment *Tudor Evans J* was wrong in *Lawton v BOC Transfield Ltd* to hold that the defendants in that case owed a duty of care. It appears from the report of that decision that there was no discussion during the hearing of the relationship between the torts of negligence and defamation.'

The rule in defamation has been, as the Court of Appeal said, long established. It is, however, no less clear that the rule was established before modern developments in the law of negligence following the decision of your Lordships' House in *Donoghue v Stevenson* [1932] AC 562, [1932] All ER Rep 1. A duty of care has been held to exist in a wide variety of situations which previously would not have been contemplated. There is, thus, no doubt that liability may arise for economic loss arising from a negligently made mis-statement where the statement is given to someone who relies on it and suffers loss, though this will usually arise where the giver of the statement knows that the person to whom it is given or some other person will rely on it for a specific purpose: *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575, [1964] AC 465, *Caparo Industries plc v Dickman* [1990] 1 All ER 568, [1990] 2

AC 605, Ministry of Housing and Local Government v Sharp [1970] 1 All ER 1009, [1970] 2 QB 223 and Smith v Eric S Bush (a firm), Harris v Wyre Forest DC [1989] 2 All ER 514, [1990] 1 AC 831. These decisions do not directly cover the present case but they are a pointer as to what the principle should be. The position in English law being that there is no authority of your Lordships' House directly in point, it is open to your Lordships to decide the question as one of principle on an analysis of the tort of defamation and of the proper approach to considering whether a duty of care may exist when it has not been recognised before.

As to this approach Lord Keith of Kinkel said in *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1984] 3 All ER 529 at 534, [1985] AC 210 at 240:

'The true question in each case is whether the particular defendant owed to the particular plaintiff a duty of care having the scope which is contended for, and whether he was in breach of that duty with consequent loss to the plaintiff.'

That leads to a narrowing of the issue as initially defined in the Court of Appeal. I do not think that one can or should ask: 'Is it the law that the giver of a reference is always subject to a duty of care, actionable in negligence if he breaches it?' Nor: 'Is it the law that the giver of such a reference is never subject to such a duty of care?'

On the approach indicated by Lord Keith it seems to me that the answer to both questions has to be in the negative and the answers do not resolve the real questions posed by him.

The proper approach is further defined in *Caparo Industries plc v Dickman* [1990] 1 All ER 568, [1990] 2 AC 605 where the question was whether the auditors of a company owed a duty of care towards intending purchasers of shares in a company.

Lord Bridge said ([1990] 1 All ER 568 at 573-574, [1990] 2 AC 605 at 617-618):

'... 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 duty of care is owed and, if so, what is its scope... 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 on 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 ALR 1 at 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'." [per Lord Wilberforce in *Anns v Merton London Borough* [1977] 2 All ER 492 at 498, [1978] AC 728 at 752].'

Lord Jauncey of Tullichettle in the same case said ([1990] 1 All ER 568 at 602, [1990] 2 AC 605 at 655):

'Once foreseeability of likely harm from a careless statement has been established, it becomes necessary to examine the circumstances in and the purposes for which the statement was made in order to determine whether there are also present the further ingredients necessary to establish the requisite proximity of relationship between the maker of the statement and the person who has acted on it.'

It has also to be borne in mind that in *Downsview Nominees Ltd v First City Corp Ltd* [1993] 3 All ER 626 at 638, [1993] AC 295 at 316 Lord Templeman said:

'The House of Lords has warned against the danger of extending the ambit of negligence so as to supplant or supplement other torts, contractual obligations, statutory duties or equitable rules in relation to every kind of damage including economic loss.'

It seems to me that on the basis of these authorities two questions therefore arise. The first is whether the nature of the tort of defamation and the tort of injurious falsehood is such that it would be wrong to recognise the possibility of a duty of care in negligence for a false statement. The second question is whether, independently of the existence of the other two torts, and taking the tests adopted by Lord Bridge of Harwich in *Caparo Industries plc v Dickman* [1990] 1 All ER 568, [1990] 2 AC 605, a duty of care can in any event arise in relation to the giving of a reference. If the answer to the first is No, and to the second Yes, then it remains to consider whether in all the circumstances such a duty of care was owed in this case by an employer to an ex-employee.

As to the first question the starting-point in my view is that the suggested claim in negligence and the torts of defamation and injurious and malicious falsehood do not cover the same ground, as Mr Tony Weir shows in his note in [1993] CLJ 376. They are separate torts, defamation not requiring a proof by the plaintiff that the statement was untrue (though justification may be a defence) or that he suffered economic damage, but being subject to defences quite different from those in negligence, such as the defence of qualified privilege which makes it necessary to prove malice. Malicious falsehood requires proof that the statement is false, that harm has resulted and that there was express malice. Neither of these involves the concept of a duty of care. The essence of a claim in defamation is that a person's reputation has been

damaged; it may or not involve the loss of a job or economic loss. A claim that a reference has been given negligently is essentially based on the fact, not so much that reputation has been damaged, as that a job, or an opportunity, has been lost. A statement carelessly made may not be defamatory -- a statement that a labourer is 'lame', a secretary 'very arthritic', when neither statement is true, though they were true of some other employee mistakenly confused with the person named.

I do not consider that the existence of either of these two heads of claim, defamation and injurious falsehood, a priori prevents the recognition of a duty of care where, but for the existence of the other two torts, it would be fair, just and reasonable to recognise it in a situation where the giver of a reference has said or written what is untrue and where he has acted unreasonably and carelessly in what he has said.

The policy reasons underlying the requirement that the defence of qualified privilege is only dislodged if express malice is established do not necessarily apply in regard to a claim in negligence. There may be other policy reasons in particular situations which should prevail. Thus, in relation to a reference given by an employer in respect of a former employee or a departing employee (and assuming no contractual obligation to take care in giving a reference) it is relevant to consider the changes which have taken place in the employer/employee relationship, with far greater duties imposed on the employer than in the past, whether by statute or by judicial decision, to care for the physical, financial and even psychological welfare of the employee.

As to the second question it is a relevant circumstance that in many cases an employee will stand no chance of getting another job, let alone a better job, unless he is given a reference. There is at least a moral obligation on the employer to give it. This is not necessarily true when the claim is laid in defamation even if on an occasion of qualified privilege. In the case of an employee or ex-employee the damage is clearly foreseeable if a careless reference is given; there is as obvious a proximity of relationship in this context as can be imagined. The sole question therefore, in my view, is whether balancing all the factors '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' (per Lord Bridge of Harwich in *Caparo Industries plc v Dickman* [1990] 1 All ER 568 at 574, [1990] 2 AC 605 at 617-618).

Hedley Byrne & Co Ltd v Heller & Partners Ltd [1963] 2 All ER 575, [1964] AC 465 does not decide the present case, but I find it unacceptable that the person to whom a reference is given about an employee X should be able to sue for negligence if he relies on the statement (and, for example, employs X who proves to be inadequate for the job) as it appears to be assumed that he can; but that X who is refused employment because the recipient relies on a reference negligently given should have no recourse unless he can prove express malice as defined by Lord Diplock in *Horrocks v Lowe* [1974] 1 All ER 662 at 669, [1975] AC 135 at 149-151.

In *Balfour v A-G* [1991] 1 NZLR 519 at 522 the inspector who wrote the comment on the teacher 'Entirely unsuitable', giving detailed reasons, concluded 'check file to make absolutely sure I have the right person then ring Mrs Brocklesby and inform her'. It seems to me extraordinary that, if the remarks were untrue about the named individual and written without malice (so that no claim lay in defamation) but that the

teacher lost a job as a result, there should be no possibility for the employee to claim in negligence.

In *Bell-Booth Group Ltd v A-G* [1989] 3 NZLR 148 at 156 the New Zealand Court of Appeal emphasised that 'to impose the law of negligence upon [the law as to injury to reputation and freedom of speech] by accepting that there may be common law duties of care not to publish the truth would be to introduce a distorting element' (my emphasis) (see also the references to 'true statements' (at 156) and 'this class of case' (at 157), which seems to have the same element of a truthful statement in mind). This, however, in my view is not the issue. The question is whether there should be a liability where the statements negligently made are untrue or the opinions are unfounded even if honestly believed to be true or honestly held. If the statements alleged to have been carelessly given are true then the considerations adverted to by the New Zealand Court of Appeal would seem plainly to be right. They do not, however, to my mind apply in a situation where the statements are untrue.

I do not accept the in terrorem arguments that to allow a claim in negligence will constitute a restriction on freedom of speech or that in the employment sphere employers will refuse to give references or will only give such bland or adulatory ones as is forecast. They should be and are capable of being sufficiently robust as to express frank and honest views after taking reasonable care both as to the factual content and as to the opinion expressed. They will not shrink from the duty of taking reasonable care when they realise the importance of the reference both to the recipient (to whom it is assumed that a duty of care exists) and to the employee (to whom it is contended on existing authority there is no such duty). They are not being asked to warrant absolutely the accuracy of the facts or the incontrovertible validity of the opinions expressed but to take reasonable care in compiling or giving the reference and in verifying the information on which it is based. The courts can be trusted to set a standard which is not higher than the law of negligence demands. Even if it is right that the number of references given will be reduced, the quality and value will be greater and it is by no means certain that to have more references is more in the public interest than to have more careful references.

Those giving such references can make it clear what are the parameters within which the reference is given such as stating their limited acquaintance with the individual either as to time or as to situation. This issue does not arise in the present case but it may be that employers can make it clear to the subject of the reference that they will only give one if he accepts that there will be a disclaimer of liability to him and to the recipient of the reference.

Nor does it follow that if a duty of care is recognised in some situations it must exist in all situations. It seems to me that for the purposes of deciding whether the law recognises the duty as being fair, just and reasonable there may be a difference between the situation where it is an employer or ex-employer who gives a reference and the situation where a reference is given by someone who has only a social acquaintance with the person the subject of the reference. There may be difficult situations in between but these will, as is the common practice, have to be worked out in particular situations. That is really the purpose of the approach indicated by Lord Keith of Kinkel in *Peabody Donation Fund (Governors) v Sir Lindsay Parkinson & Co Ltd* [1984] 3 All ER 529 at 534, [1985] AC 210 at 240 which I have set out above.

In his article 'Misleading References and Qualified Privilege' (1988) 104 LQR 191 at 194, to which the Court of Appeal in the present case ([1993] 2 All ER 273 at 293, [1993] ICR 412 at 436) referred and with which they agreed, Dr Andrew Demopoulos writes that to have recourse to the --

'typical concepts employed in some of the leading cases on negligently caused economic and other loss ... for the purposes of establishing a duty of care in circumstances similar to those of *Lawton v BOC Transshield Ltd* [1987] 2 All ER 608, [1987] ICR 7 involves an extension of the law of negligence which flies in the teeth of express statements that anything less than malice in the making of a privileged statement cannot engage liability.'

I do not for my part consider that to recognise the existence of a duty of care in some situations when a reference is given necessarily means that the law of defamation has to be changed or that a substantial section of the law relating to defamation and malicious falsehood is 'emasculated' (see the Court of Appeal judgment [1993] 2 All ER 273 at 294, [1993] ICR 412 at 437). They remain distinct torts. It may be that there will be less resort to these torts because a more realistic approach on the basis of a duty of care is adopted. If to recognise that such a duty of care exists means that there have to be such changes -- either by excluding the defence of qualified privilege from the master-servant situation or by withdrawing the privilege where negligence as opposed to express malice is shown -- then I would in the interests of recognising a fair, just and reasonable result in the master-servant situation accept such change.

The precise relationship between the plaintiff and the four defendants has led to much argument. The judge accepted that the plaintiff had a contract with Corinium initially from 1987 as a self-employed salesman. By January 1989 he had become an assistant branch manager and in April 1989 he became sales director (designate) and office manager, though the judge treated this as being under a contract for services rather than of service. The judge found that all four defendants were subject to the *Lautro* rules but that the plaintiff had no contract with either of the two Guardian companies, the first and fourth defendants, though when Corinium in 1988 became an appointed representative of Guardian Assurance for the purpose of the Financial Services Act 1986, the plaintiff as a self-employed representative of Corinium (as the judge found) became a company representative of Guardian Assurance, selling exclusively the insurance contracts of Guardian Assurance. The plaintiff in the Court of Appeal contended that the judge was wrong to hold that there was no contract between him and Guardian Assurance. The Court of Appeal found it unnecessary to decide that issue.

For the purposes of the claim in negligence it does not seem to me necessary to consider the precise contractual relationship between the plaintiff and the four defendants. What is quite plain is that the four companies were working very closely together in relation to Mr Spring's activities. It is a fact that the plaintiff as a company representative of Guardian Assurance for the purpose of the scheme, and as a person contractually bound to provide services for Corinium as Guardian Assurance's authorised representative, was performing services for Guardian Assurance whether as a matter of contract or of status. The trial judge accepted that the legal framework created in this case by the *Lautro* rules consisted of five principles. He said they were:

'(1) No one can sell life assurance products without authorisation from a self-regulating organisation; (2) GRE, all its subsidiaries and all its sales consultants are bound by the Lautro rules; and (3) everybody knows that everybody else involved is also so bound; (4) a company representative can act as such for only one company at a time; (5) if he leaves that company he is unemployable in the industry without a reference which must be obtained from his former employers.' (Judge Lever's emphasis.)

A member of Lautro cannot appoint a person as a company representative unless he has, *inter alia*, taken up 'references relating to character and experience' (r 3.5(1)). By r 3.5(2):

'A member who receives an enquiry for a reference in respect of a person whom another member ... is proposing to appoint shall make full and frank disclosure of all relevant matters which are believed to be true to the other member ...'

The judge further found that 'the prime criterion by which the plaintiff's integrity and ethical standards would be judged would patently be the professional code of conduct set out in Sch 2 of the Lautro rules'. He was also satisfied that all the parties to the present case and Scottish Amicable to whom the reference was given knew of the legal framework created by these five principles; they also knew of the provisions of r 3.5.

The reference asked for by Scottish Amicable and given by Guardian Assurance was written by a Mrs Lee-Moore as an employee of GRE Assurance. It was based on information from other GRE Assurance employees, from the former chief executive of the Corinium companies, from Corinium's records, from a senior sales consultant and from a member of the compliance team of GRE Assurance. The reference given is set out in the Court of Appeal's judgment ([1993] 2 All ER 273 at 279, [1993] ICR 412 at 419-420). The judge was satisfied that neither the writer of the reference nor those who gave the information were guilty of malice. Mrs Lee-Moore was not negligent. As to parts of the reference the judge said:

'The statement about the lapse ratio is an accurate answer to a simple question; the statement about funding was accurate up to a point even though perhaps it did not tell the full story; the statement that the plaintiff had kept the best leads to himself was not justified by the evidence. None of these elements, taken singly or together, would, in my judgment have precluded Scottish Amicable from appointing the plaintiff as its company representative in any event.'

The judge found, however, that the statement in the reference about the plaintiff's honesty and integrity were, even if believed to be true, given without there being the careful and accurate assessment of his qualities to which the plaintiff was entitled: 'In my judgment, it was motivated by a leaping to a conclusion -- of dishonesty and lack of integrity -- careless of the true facts of the case.'

After a review of the authorities, the learned judge concluded that on the facts of the case a duty of care was owed to the plaintiff when the reference was given and that that duty had been broken. The reference was given in the name of Guardian

Assurance but the judge accepted that the four companies were so closely associated that all were to be treated as owing a duty and as being responsible for the reference. It was inevitable that the plaintiff would not be offered a job by the other insurance companies to whom such reference was given. In my opinion the judge was entitled to find, as he did, that there was here a sufficiently proximate relationship between the companies on whose behalf the reference was given; the damage was clearly foreseeable; and it is fair, just and reasonable in such an employment situation for the law to recognise a duty on the part of the giver of the reference, and the person who within the employer's organisation collates or provides information for the purpose of preparing the reference, to take reasonable care that the information was obtained and passed on with reasonable care. On this aspect of the case I think the judge was right; duty and breach were established.

There was a further ground of appeal on the basis that even if negligence were established it did not cause the damage alleged by the plaintiff. The Court of Appeal in view of their decision did not consider this argument. They said ([1993] 2 All ER 273 at 296, [1993] ICR 412 at 439): 'We comment only that we would have been reluctant to disagree with the judge on this issue', the judge having found that there was the necessary causation.

I think it would not be appropriate for your Lordships to decide this issue and the matter should be remitted to the Court of Appeal for them to reconsider it if, as I accept, the appeal on the issue of negligence otherwise succeeds.

There remains the question as to where there was a breach of duty in contract. Although the judge found that there was no contract between the plaintiff and Guardian Assurance, he really decided the claim in contract on the basis that no term to exercise reasonable care in the giving of a reference could be implied. Such a term was not necessary for the business efficacy of the contract (*The Moorcock* (1889) 14 PD 64, [1886-90] All ER Rep 530 and *Liverpool City Council v Irwin* [1976] 2 All ER 39 at 54, [1977] AC 239 at 266). It is not necessary in this case to decide the general question as to whether an employer has an implied duty to give a reference, though even if there is no universal duty to do so it would seem to me that contracts may exist when it is necessary to imply such a duty. That question does not arise because here there was an express duty under the Lautro rules to give a reference, if the employer was asked by another member of Lautro, but, more importantly a reference was in fact given. The question is, thus, whether if a reference is given there is a duty to exercise reasonable care in giving it.

It was known by all parties that a reference would have to be given under r 3.5(2) of the rules. As between the members or persons subject to the Lautro rules that requirement was to make 'full and frank disclosure of all relevant matters which are believed to be true to the other member or the [appointed] representative'. There is no provision in that rule that reasonable care shall be taken in the making of such disclosure and it is not necessary to decide whether such a duty of reasonable care is to be implied as between the members of Lautro. The terms of the obligation in r 3.5(2) as between members of Lautro do not exclude the possibility of a duty of care existing in the contract between the plaintiff and one or other of the companies by which he was employed. Accepting fully that the test is 'necessity' rather than 'reasonableness', it seems to me that in view of the fact that an employee could never

get a job with another member or representative without a reference and that there was an obligation on the prospective employer to ask for one and for the former employer to give one that there was a duty to take reasonable care in giving the reference.

There was undoubtedly a contract with Corinium as the judge found. Whether that was a contract of service or for services for present purposes in my view does not matter, though the title of the posts after the first appointment suggests that it was a contract of service. In the light of the relationship between these four companies I consider, on the judge's findings, (a) that it was an implied term of the contract of employment between the plaintiff and Corinium that Corinium would ensure that reasonable care was taken in the group of associated companies in the compiling and giving of the reference if it was asked for by a potential employer and (b) that Corinium was in breach of that implied term.

The Court of Appeal did not express a view as to whether a contract also existed with Guardian Assurance although they found the argument that it did to be 'persuasive'. Since the issue of causation has to be remitted to the Court of Appeal, I would remit this question also on the basis that if there is found to be a contract with Guardian Assurance a term is to be implied into it that reasonable care would be taken in the giving of the reference.

I would accordingly allow the appeal and remit the case to the Court of Appeal for these two matters to be considered.

JUDGMENTBY-4: LORD WOOLF

JUDGMENT-4:

LORD WOOLF: My Lords, I have had the advantage of reading the speech of Lord Keith of Kinkel. It is my misfortune not to agree with his conclusion as to the outcome of this appeal. However, I gratefully adopt his description of the facts giving rise to this appeal and, like Lord Keith, I rely on the careful description of the facts which is contained in the judgment of the Court of Appeal given by Glidewell LJ ([1993] 2 All ER 273, [1993] ICR 412).

I am therefore able, from the outset, to focus on the important issues of principle to which this appeal gives rise. They are:

(1) Whether a person who suffers loss as a result of being the subject of an inaccurate reference is ever able to recover damages for that loss in an action for negligence or whether he is confined to seeking damages for defamation or injurious falsehood. (The difference in practice between an action for negligence and an action for defamation or injurious falsehood is that in an action based on defamation or injurious falsehood it will be necessary to establish that the person responsible for giving the reference was motivated by malice, while in the case of an action based on negligence it will be sufficient to establish that it was due to a lack of care in ascertaining the facts on which the reference is based on the part of the person giving the reference or those for whom he is responsible.)

(2) Whether, in the appropriate circumstances, in a contract for service or services a

term can be implied requiring an employer to exercise due care in the preparation of a reference relating to a person who is, or has been, in his service.

I do not consider it is of any significance whether Mr Spring was employed by or acting under a contract for services with Corinium. Certain of the documents suggest he was self-employed and the judge held he was acting under a contract for services. However, this is wholly inconsistent with the nature of his role with the company, which was that of a sales director (designate) and office manager. However, whether he was a servant or self-employed, his activities in selling insurance policies would be as a company representative, subject to the Lautro rules; and the person who was responsible for compiling the reference, Mrs Debra Lee-Moore, had delegated to others the task of collecting the information on which the reference was based. As a matter of convenience, I will treat him as an employee, but it should be appreciated that my views would be the same if he was acting under a contract for services.

In order to determine these issues, it is not necessary to distinguish between the position of the two Guardian companies (the first and fourth defendants) or the two Corinium companies (the second and third defendants). Nor is it necessary, on my view of the outcome of this appeal, to make any distinction between the different relations which Mr Spring had with the different defendants since all the defendants at the material time were part of a single group of companies and can be regarded as acting on behalf of each other.

There is also an issue of causation as to Mr Spring's alleged loss. However, as Mr Eady QC contends on behalf of the defendants, this is more appropriately determined by the Court of Appeal, by whom it has not, as yet, been considered.

On 12 November 1989 when the reference was given, Mr Spring was no longer engaged by Corinium. However, as his relationship with all the defendants arose out of his previous engagement with Corinium, the primary source of any liability is contractual rather than tortious. This is a point made forcefully by Lord Bridge of Harwich in *Scally v Southern Health and Social Services Board* [1991] 4 All ER 563 at 568-569, [1992] 1 AC 294 302-304. Furthermore, in the employment field, there has always been a considerable overlap between claims based on an alleged breach of duty in contract and in tort, as is stated in *Charlesworth & Percy on Negligence* (8th edn, 1990), para 10-06, p 795):

'The relationship itself of master and servant is necessarily based upon contract but it has been the subject of some controversy in the past whether the common law duties, regarding the servant's safety, are contractual duties or lie in tort. Because of the closeness of the relationship between master and servant, as well as its very nature, there really can be no doubt today that a duty of care does arise under the law of tort, as expressed in *Donoghue v Stevenson* ([1932] AC 562, [1932] All ER Rep 1). In *Davie v New Merton Board Mills Ltd* ([1959] 1 All ER 346 at 350, [1959] AC 604 at 619), Viscount Simonds considered that, although liability primarily was to be regarded as having arisen in tort, it could also be based on implied terms contained in the contract of employment.'

That statement was made in relation to the 'servant's safety'. It is equally applicable to duties owed in respect of a servant's welfare, which is what this appeal concerns.

Nonetheless, in the circumstances of this case, it is more convenient to consider the position in negligence first, which is the order adopted in the courts below. I therefore turn now to consider the possible cause of action in negligence.

The claim based on negligence

The claim here is in respect of economic loss. Before there can be a duty owed in respect of economic loss, it is now clearly established that it is important to be able to show foreseeability of that loss, coupled with the necessary degree of proximity between the parties. It is also necessary to establish that in all the circumstances it is fair, just and reasonable for a duty to be imposed in respect of the economic loss. Deferring for the moment consideration of the consequences of there being possible alternative causes of action of defamation and injurious falsehood and the related public policy considerations, there can really be no dispute that the plaintiff can establish the necessary foreseeability and proximity.

It is clearly foreseeable that if you respond to a request for a reference by giving a reference which is inaccurate, the subject of the reference may be caused financial loss. Where the reference is required by a prospective employer, the loss will frequently result from a failure to obtain that employment. The prospect of such loss is considerably increased if the reference relates to an applicant, like the plaintiff, for a position as a company representative in an industry which is subject to a rule which is in equivalent terms to r 3.5 of the Lautro rules. That rule provides:

'(1) A person shall not be appointed as a company representative of a member unless the member has first taken reasonable steps to satisfy itself that he is of good character and of the requisite aptitude and competence, and those steps shall ... include ... the taking up of references relating to character and experience.

(2) A member which receives an enquiry for a reference in respect of a person whom another member or appointed representative is proposing to appoint shall make full and frank disclosure of all relevant matters which are believed to be true to the other member or the representative.'

Judge Lever QC, at first instance, accepted the description of the reference by plaintiff's counsel as being 'the kiss of death' to the plaintiff's career in insurance. This was the inevitable consequence of the reference. The reference related to a time and was based upon events which occurred while the plaintiff was working for Corinium and was engaged in selling policies issued by Guardian. The relationship between the plaintiff and the defendants could hardly be closer. Subject to what I have to say hereafter, it also appears to be uncontroversial that if an employer, or former employer, by his failure to make proper inquiries, causes loss to an employee, it is fair, just and reasonable that he should be under an obligation to compensate that employee for the consequences. This is the position if an employer injures his employee physically by failing to exercise reasonable care for his safety and I find it impossible to justify taking a different view where an employer, by giving an inaccurate reference about his employee, deprives an employee, possibly for a considerable period, of the means of earning his livelihood. The consequences of the employer's carelessness can be as great in the long term as causing the employee a serious injury.

However, while the requirements which I have been considering are of importance, that importance should not be exaggerated for the reasons which were elegantly explained by Lord Oliver of Aylmerton in *Caparo Industries plc v Dickman* [1990] 1 All ER 568 at 585-586, [1990] 2 AC 605 at 632-633:

'The extension of the concept of negligence since the decision of this House in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575, [1964] AC 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 on 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* [1967] 3 All ER 993, [1969] 1 AC 191 was such a case, as was *Hill v Chief Constable of West Yorkshire* [1988] 2 All ER 238, [1989] AC 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.'

Lord Oliver added ([1990] 1 All ER 568 at 587, [1990] 2 AC 605 at 635-636):

'The damage which may be occasioned by the spoken or written word is not inherent. It lies always in the reliance by somebody on the accuracy of that which the word communicates and the loss or damage consequential on that person having adopted a course of action on 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 on 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.'

I therefore recognise that in a situation, such as this, where their Lordships are being asked to make a measured extension to the ambit of the law of negligence, the requirements to which both Lord Oliver and I have referred must be kept in proper perspective. I also agree and accept that it is preferable to define as precisely as possible the relevant circumstances before deciding whether a duty exists. Nonetheless, that the required degree of foreseeability and proximity undoubtedly exists in this case is of considerable significance in deciding the proper outcome of this appeal.

In *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575, [1964] AC 465 their Lordships extended the circumstances giving rise to a duty of care so as to protect the recipient from an inaccurate reference in those situations where the relationship between the person giving and receiving the reference is (per Lord Devlin [1963] 2 All ER 575 at 610, [1964] AC 465 at 529) 'equivalent to contract' that is, where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract'. In such a situation it is necessary to distinguish 'between social and professional relationships and between those which are of a contractual character and those which are not'. It may also 'be material to consider whether the adviser is acting purely out of good nature or whether he getting his reward in some indirect form'. Applying that guidance to the different situation of the relationship between the person giving and the person who is the subject of the reference, it is immediately clear that a distinction can be drawn between cases where the subject of the reference is an employee (I use that term hereafter to include a person engaged on a contract for services as well as a contract of service) or an ex-employee and where the relationship is social and has never been contractual. In the latter situation all that the person who is the subject of the reference may be able to rely on is the fact that the referee gave the reference. That I can well understand may

not be considered sufficient to create the required degree of proximity. The proximity would be closer to that in *Hedley Byrne*, if the reference had been given by a purely social acquaintance at the request of the subject of the reference. While the request may or may not be sufficient to create the required proximity it can still be distinguished from the present class of case. Here the relationship is of a different order because there is or has been a contract of employment or services. Of course the period which elapses between the end of the engagement and the giving of the reference is capable of reducing the degree of proximity.

In addition, the relationship is one where the employer should, as I have already indicated, appreciate that the terms of any reference which he gives could materially affect the ability of the subject of the reference to find alternative employment. Furthermore, in a contemporary employment context it is appropriate to regard the employer as obtaining an indirect benefit from giving a reference. Employers in industry, commerce and the professions are all dependent on the reciprocity which exists among employers as to the giving of references on prospective recruits. Without that reciprocity recruitment of staff would be more difficult. It would also directly affect an employer's ability to recruit staff if it became known that he was not prepared to assist those he has previously engaged by giving them references. Employees are unlikely to regard as attractive employment at the end of which they would find themselves without a reference.

The duty imposed by the *Lautro* rules is not for the protection of employees. It is for the protection of the public. An employee cannot therefore rely on the rules directly. However, they nonetheless demonstrate the importance now attached in the insurance industry to references being given and obtained. To be of value they need to be full, frank and, by implication, accurate references.

Finally, no difficulty is created by the fact that before the reference was given the employment had come to an end. The plaintiff was dismissed on 26 July 1989 and the reference which has resulted in these proceedings was the consequence of his seeking an appointment as a representative almost immediately thereafter on 2 August 1989. The reference was sent on 21 November 1989 and, as Judge Lever said, 'the inevitable happened'. The plaintiff was rejected first by Scottish Amicable and then by two other insurance companies. This all occurred within a reasonable time of the employment ending.

I therefore now turn to examine the two factors which make the issues in this case difficult to resolve. The first of those factors is the existence of the alternative causes of action in defamation and injurious falsehood which are available to a person in the plaintiff's position who believes he has been caused damage by an inaccurate reference. (I will treat both those alternative causes of action under the heading of defamation since it is their common characteristic that to succeed a plaintiff must prove malice which creates the difficulty.) The second factor is closely related to the first. It is the public policy consequences which would follow from there being a remedy in negligence.

The defamation issue

There would be no purpose in extending the tort of negligence to protect the subject

of an inaccurate reference if he was already adequately protected by the law of defamation. However, because of the defence of qualified privilege, before an action for defamation can succeed (or, for that matter, an action for injurious falsehood) it is necessary to establish malice. In my judgment the result of this requirement is that an action for defamation provides a wholly inadequate remedy for an employee who is caused damage by a reference which due to negligence is inaccurate. This is because it places a wholly disproportionate burden on the employee. Malice is extremely difficult to establish. This is demonstrated by the facts of this case. The plaintiff . . . was able to establish that one of his colleagues, who played a part in compiling the information on which the reference was based, had lied about interviewing him, but this was still insufficient to prove malice. Without an action for negligence the employee may, therefore, be left with no practical prospect of redress, even though the reference may have permanently prevented him from obtaining employment in his chosen vocation.

If the law provides a remedy for references which are inaccurate due to carelessness this would be beneficial. It would encourage the adoption of appropriate standards when preparing references. This would be an important advantage as frequently an employee will be ignorant that it is because of the terms of an inaccurate reference, of the contents of which he is unaware, that he is not offered fresh employment.

The availability of a remedy without having to prove malice will not open the floodgates. In cases where the employee discovers the existence of the inaccurate reference, he will have a remedy if, but only if, he can establish, instead of malice, that the reason for the inaccuracy is the default of the employer, in the sense that he has been careless. To make an employer liable for an inaccurate reference, but only if he is careless, is, I would suggest, wholly fair. It would balance the respective interests of the employer and employee. It would amount to a development of the law of negligence which accords with the principles which should control its development. It would, in addition, avoid a rather unattractive situation continuing of a recipient of a reference, but not the subject of a reference, being able to bring an action for negligence. It would also recognise that while both in negligence and defamation it is the untrue statement which causes the damage, there is a fundamental difference between the torts. An action for defamation is founded upon the inaccurate terms of the reference itself. An action for negligence is based on the lack of care of the author of the reference.

Notwithstanding the distinction between the two causes of action, it was the different principles which govern an action for damages for defamation which the Court of Appeal found to be fatal to the attempt of the plaintiff to establish that the defendants owed him a duty of care in respect of the accuracy of the contents of a reference. Glidewell LJ expressed the Court of Appeal's approach by saying ([1993] 2 All ER 273 at 294, [1993] ICR 412 at 437):

'As a general proposition, in our judgment the giver of a reference owes no duty of care in the tort of negligence to the subject of the reference. His duty to the subject is governed by and lies in the tort of defamation. If it were otherwise, the defence of qualified privilege in an action for defamation where a reference was given, or the necessity for the plaintiff to prove malice in an action for malicious falsehood, would be bypassed. In effect, a substantial section of the law regarding these two associated

torts would be emasculated.'

In coming to this conclusion the Court of Appeal were greatly influenced by the decision of the Court of Appeal of New Zealand in *Bell-Booth Group Ltd v A-G* [1989] 3 NZLR 148. That case did not involve the giving of a reference. It concerned a broadcast of a programme which was highly critical of the effectiveness of the principal product marketed by the plaintiff's business and therefore of the plaintiff. At first instance the claim in defamation failed because a plea of justification succeeded. However, notwithstanding the truth of the alleged libel the plaintiff succeeded in its action against the Ministry of Agriculture and Fisheries on an alternative claim for negligence because of the ministry's failure to disclose all the results of trials which it had conducted and because the ministry had published its findings in an unreasonable and unfair manner. The Court of Appeal allowed the appeal and decided that the ministry was not liable.

The facts of the present case can be distinguished from those in *Bell-Booth Group Ltd v A-G* [1989] 3 NZLR 148 and I accept that the outcome of that case was correct. In particular, I agree with what was said in that case about it being inappropriate that there should be an action for damages for the publication of a true statement. The importance of the case arises, however, because of certain broad statements of principle which Cooke P made in giving the judgment of the court which were followed by the Court of Appeal in this case. One of those statements, that is, that an action for negligence would act as a fetter on free speech, I will deal with later. Now I have to address the following passage of the judgment of Cooke P (at 155-156):

As far at least as the law of torts is concerned, the common understanding is almost certainly as expressed by Hallett J in *Foaminol Laboratories Ltd v British Artid Plastics Ltd* [1941] 2 All ER 393, 399: "a claim for mere loss of reputation is the proper subject of an action for defamation, and cannot ordinarily be sustained by means of any other form of action." The closest reported cases which counsel for the appellant [plaintiff] were able to find were two. First, *Thurston v Charles* (1905) 21 TLR 659, where Walton J gave damages for the tort of conversion on the basis that the conversion of a letter had resulted in damage to the plaintiff's reputation. (See further *Gatley on Libel and Slander* (8th edn, 1981), para 895.) That case deals with the scope of damages for a tort that has undoubtedly been committed and does not touch the issue of judicial creation of a duty of care. Second, *Lawton v BOC Transhield Ltd* [1987] 2 All ER 608, where Tudor Evans J held that a former employer owed to its former employee a duty of care in giving a reference. That action failed, however, because the reference was honest, accurate and not negligently written. The bearing of defamation law is not discussed in the judgment and the case is a difficult one: see notes by Mr Philip Lewis (the editor of *Gatley*) in (1988) 17 Ind LJ Recent Cases 109 and Mr Andrew Demopoulos in (1988) 104 LQR 191. The latter writer is of the opinion, citing *Horrocks v Lowe* ([1974] 1 All ER 662, [1975] AC 135), that *Lawton* "involves an extension of the law of negligence which flies in the teeth of express statements that anything less than malice in the making of a privileged statement cannot engage liability". Similar comments could be made in cases of justification or fair comment. The common law rules, and their statutory modifications, regarding defamation and injurious falsehood represent compromises gradually worked out by the Courts over the years, with some legislative adjustments, between competing values. Personal reputation and freedom to trade on the one hand

have to be balanced against freedom to speak or criticise on the other. In the result the present rules are in broad terms well-known and reasonably clear. To an action for defamation truth is an absolute defence. Privilege, where applicable, is in a few areas an absolute but in most a qualified defence. Fair comment is a qualified defence subject to rather different rules. In injurious falsehood, on the other hand, the plaintiff has the burden of proving both falsity and malice. These evolved compromises may not draw the lines in places that will always be found generally acceptable in the community. Some argue, for instance, for greater media freedom or licence; statutory changes have been recommended but not enacted. It is a controversial area. The important point for present purposes is that the law as to injury to reputation and freedom of speech is a field of its own. To impose the law of negligence upon it by accepting that there may be common law duties of care not to publish the truth would be to introduce a distorting element. It was argued for the appellant, inter alia, that neither defamation nor slander of goods requires a background duty or breach; and if injury does or may involve those separate elements, there is no ground for depriving the plaintiff of a separate cause of action. That is really no more than a semantic point. The duty in defamation may be described as a duty not to defame without justification or privilege or otherwise than by way of fair comment. The duty in injurious falsehood may be defined as a duty not to disparage goods untruthfully and maliciously. In substance the appellant would add to these duties a duty in such a case as this to take care not to injure the plaintiff's reputation by true statements. All the arguments for the appellant, though put skilfully in various ways by counsel, reduce to that proposition. In our opinion, to accept it would be to introduce negligence law into a field for which it was not designed and is not appropriate.' (My emphasis.)

Since the Court of Appeal's decision in this case, two articles, in addition to those referred to by the President in the passage from his judgment which I have cited, have been published. Like the earlier articles I find them of considerable benefit. They are respectively by Tony Weir [1993] CLJ 376 and Thomas Allen ('Liability for References: *Spring v Guardian Assurance*') (1994) 57 MLR 111. While this is a gross over-simplification of their careful consideration of the subject, it can be said in general that the earlier articles were in favour of the decisions in both Courts of Appeal and the more recent articles are more favourable to the plaintiff. The academic honours are therefore about even. However, I consider that a possible explanation for the difference of approach is that the later articles were dealing primarily with the facts of this case while the first two were dealing with the earlier authorities.

The principal point which the plaintiff has to overcome in respect of the reasoning of *Cooke P* is the fact that to allow an action for negligence would be to introduce a 'distorting element' into the law of defamation, that is, into the area of law which deals with unjustified injury to reputation, which is an area of the law which up to now defamation has had to itself. I can well understand why *Cooke P* should have made the comment that he did about the case which was before him where there was publication on television, but in the case of a reference there is unlikely to be other than limited publication. If there is any re-publication this is unlikely to give rise to an action for negligence since the recipient of the reference will neither owe a duty of care to the subject of the reference or, normally, be guilty of any lack of care in re-publishing the reference.

The extent of any intrusion into the area of the law covered by defamation will

therefore be circumscribed. The case is also very different in that the contents of the publication were true and I unreservedly accept that there can be no action for negligence if the statement is true.

In the later cases of *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* and *Mortensen v Laing* [1992] 2 NZLR 282 Cooke P again considered the relationship between an action for defamation and negligence. These cases involved actions for negligence against fire-loss investigators, whose reports to the insurers had resulted in the rejection of claims by the plaintiffs whose premises were damaged by fire. To give an action for negligence in that situation Cooke P considered would mean 'by a side-wind the law of defamation would be overthrown' (see at 302). Again, I would not quarrel with the decision to strike out these claims because as Cooke P indicated 'the report of the investigators [is] made pursuant to their contractual duty to the insurer ...' I would therefore have reservations as to whether there would be any duty owed to the plaintiffs in those cases. There is not the same proximity between the parties as there is in the case of a reference given by an employer concerning an employee. I therefore do not give the same weight to Cooke P's comments as I would if they had been made in a context which was the same as or more analogous to the context which is being considered here. Cooke P's approach is, however, a reminder of the importance of not readily extending the law of negligence into an area of law already covered by another tort. It would not, however, be right to treat his remarks as preventing the law of negligence in any circumstances overlapping the law of defamation. To do so would be to inject an undesirable rigidity into the law. Instead, in a case where an action in negligence would otherwise be available, the approach should be to inquire whether justice requires that the additional cause of action in negligence should be available. In *Bell-Booth Group Ltd v A-G* [1989] 3 NZLR 148 at 157 Cooke P said:

'For these reasons in our opinion justice does not require or warrant an importation of negligence law into this class of case. Where remedies are needed they are already available in the form of action for defamation, injurious falsehood, breach of contract or breach of confidence.'

This statement is appropriately limited to the 'class of case' with which the Court of Appeal in New Zealand was then concerned. As I have already indicated, I regard this case as being in a different class. The distinction between the class of cases is also important in relation to the comment of Hallett J in *Foaminol Laboratories Ltd v British Artid Plastics Ltd* [1941] 2 All ER 393 at 399: 'A claim for mere loss of reputation is the proper subject of an action for defamation, and cannot ordinarily be sustained by means of any other form of action' which Cooke P cited ([1989] 3 NZLR 148 at 156). This appeal is not concerned with a claim for mere loss of reputation. What concerns the plaintiff is his loss of an opportunity to obtain employment due to the negligence, as the judge found, in the preparation of the reference. I am afraid I do not accept the logic of the argument that to have an action for negligence will undermine the law of defamation. If this appeal is allowed, this will leave the law of defamation in exactly the same state as it was previously. The plaintiff would not have succeeded in an action for defamation. Negligence has always been an irrelevant consideration (I am not referring to quantum of damages) and it will remain irrelevant in an action for defamation. In the present context the two causes of action are not primarily directed at the same mischief although they, admittedly, overlap. I have

already indicated that an action for negligence is concerned with the care exercised in ascertaining the facts and defamation with the truth of the contents of what is published.

This is also demonstrated by what would be the respective approaches to damages in an action based on defamation and negligence. In the case of defamation the primary head, but not the only head, of damages is as to the loss of reputation. In an action for negligence, on the other hand, the subject of the reference will be primarily interested in and largely limited to his economic loss. To prevent the law of negligence applying to the present situation, when it is otherwise fair and just that it should apply, by the imposition of a requirement to prove malice in effect amounts to transferring a defence which has been developed for one tort to another tort to which it has never been previously applied when it is inappropriate to do so.

The historic development of the two actions has been quite separate. Just as it has never been a requirement of an action for defamation to show that the defamatory statement was made negligently, so, if the circumstances establish that it fair and just that a duty of care should exist, the person who suffers harm in consequence of a breach of that duty should not have to establish malice, merely because that would be a requirement in an action for defamation. I can see no justification for erecting a fence around the whole of the field to which defamation can apply and treating any other tort, which can beneficially from the point of view of justice enter into part of that field, as a trespasser if it does so. The conclusive answer in the present context to applying the approach of *Cooke P* is that it will, here, result in real injustice. It would mean that a plaintiff who would otherwise be entitled to succeed in an action for negligence would go away empty-handed because he could not succeed in an action for defamation. This cannot be a desirable result.

Public policy

It would alter the situation, if it would be contrary to some identifiable principle of public policy for there to be a liability for negligence imposed on the giver of a negligent reference. If there were to be such a principle it would be an unusual one since, unless *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575, [1964] AC 465 was wrongly decided, it would apparently apply to the negligent provider of a bad but not a good reference.

The Courts of Appeal in New Zealand and in this country both considered that the necessary justification for excluding liability for negligence could be found in the defence of qualified privilege. In support of the importance of that defence *Glidewell LJ* ([1993] 2 All ER 273 at 287, [1993] ICR 412 at 428-429) cited the powerful language of Lord Diplock in *Horrocks v Lowe* [1974] 1 All ER 662 at 669-670, [1975] AC 135 at 150, and I would not seek to qualify that language in a case where a plaintiff is not in a position to establish that subject to questions of public policy the defendant would be liable to him for breach of a duty of care. When the defence of qualified privilege was established such a duty of care was not in contemplation. As Mr Livesey QC forcefully argued, it by no means follows that so far as references are concerned the same view should be taken of public policy as was taken when *Whiteley v Adams* (1863) 15 CBNS 392, 143 ER 838 was decided.

It is obviously in accord with public policy that references should be full and frank. It is also in accord with public policy that they should not be based upon careless investigations. In the case of references for positions of responsibility this is particularly important. That is confirmed by the Lautro rules. It has also to be accepted that some referees may be more timid in giving full and frank references if they feel there is a risk of their being found liable for negligence. However, there is already such a possible liability in respect of a negligently favourable reference, so all that needs to be considered is the possible adverse consequences of a negligently unfavourable reference. For reasons to which I have already referred I consider there is little practical likelihood of no reference at all being given nowadays. Certainly this could not happen in the case of appointments to which the Lautro rules apply.

However, the real issue is not whether there would be any adverse effect on the giving of references. Rather the issue is whether the adverse effects when balanced against the benefits which would flow from giving the subject a right of action sufficiently outweigh the benefits to justify depriving the subject of a remedy unless he can establish malice. In considering this issue it is necessary to take into account contemporary practices in the field of employment; the fact that nowadays most employment is conditional upon a reference being provided. There are also the restrictions on unfair dismissal which mean that an employee is ordinarily not capable of being dismissed except after being told of what is alleged against him and after he has been given an opportunity of giving an explanation. This is also the widespread practice, especially in the Civil Service, of having annual reports which the subject is entitled to see -- which practice, apparently even in an ongoing employment situation, is not defeated by any lack of candour. There is now an openness in employment relationships which did not exist even a few years ago.

There is also the advantage, already referred to, of it being appreciated that you cannot give a reference which could cause immense harm to its subject without exercising reasonable care.

A further consideration mentioned by Cooke P in *Bell-Booth Group Ltd v A-G* [1989] 3 NZLR 148 at 156 is the undesirability of infringing freedom of speech. This is a consideration as least as important to the common law as it is under the international conventions by which it is also protected. Here it is necessary to bear in mind that, as is the case with all fundamental freedoms, the protection is qualified and not absolute. Freedom of speech does not necessarily entitle the speaker to make a statement without exercising reasonable care. Freedom of speech has to be balanced against the equally well recognised freedom both at common law and under the conventions that an individual should not be deprived of the opportunity of earning his livelihood in his chosen occupation. A development of the law which does no more than protect an employee from being deprived of employment as a result of a negligent reference would fully justify any limited intrusion on freedom of speech.

When I weigh these considerations I find that public policy comes down firmly in favour of not depriving an employee of a remedy to recover the damages to which he would otherwise be entitled as a result of being a victim of a negligent reference.

Under this head there remains to be considered whether it is preferable for the law in this area to be developed by Parliament or by the courts. It is an area of law where

previous decisions of the courts have already clearly identified the tests which should be applied in deciding whether the law should be developed. It is also an area where a case-by-case approach is particularly appropriate and so as happened in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575, [1964] AC 465 it appears to me desirable for the courts to provide the remedy which I believe is clearly required.

The claim based on the breach of contract

As I indicated earlier it is possible to approach this appeal as being primarily one involving a contractual issue. This was the preferred approach of Lord Bridge of Harwich in *Scally v Southern Health and Social Services Board* [1991] 4 All ER 563, [1992] 1 AC 294 in a speech, with which other members of the House agreed, from which I obtained singular assistance. In that case, Lord Bridge stated the obverse of the proposition that I have previously advanced when he said ([1991] 4 All ER 563 at 568, [1992] 1 AC 294 at 303): 'If a duty of the kind in question was not inherent in the contractual relationship, I do not see how it could possibly be derived from the tort of negligence.' In *Scally* it was decided that where a contract of employment negotiated between employers and a representative body contained a particular term conferring on an employee a valuable contingent right to a pension of the benefit of which he could not be expected to be aware unless the term was brought to his attention, there was an implied obligation on the employer to take reasonable steps to publicise that term. Accordingly, when the employer failed to notify the employee of his pension rights, which were therefore lost, he was entitled to recover damages for breach of contract in respect of that loss.

In the course of his speech Lord Bridge ([1991] 4 All ER 563 at 571, [1992] 1 AC 294 at 307) drew a distinction 'between the search for an implied term necessary to give business efficacy to a particular contract and the search, based on wider considerations, for a term which the law will imply as a necessary incident of a definable category of contractual relationship'. He also referred to the difficulty which would arise if the implied term 'must necessarily be too wide in its ambit to be acceptable as of general application'. He indicated that he believed that 'this difficulty is surmounted if the category of contractual relationship in which the implication will arise is defined with sufficient precision'.

Lord Bridge then proceeded to define the situation on the basis of the relationship of employer and employee where the circumstances he specified existed. As I understand *Scally*, it recognises that, just as in the earlier authorities the courts were prepared to imply by necessary implication a term imposing a duty on an employer to exercise due care for the physical wellbeing of his employees, so in the appropriate circumstances would the court imply a like duty as to his economic well-being, the duty as to his economic well-being giving rise to an action for damages if it is breached.

Here, it is also possible to specify circumstances which would enable a term to be implied. The circumstances are: (i) the existence of the contract of employment or services; (ii) the fact that the contract relates to an engagement of a class where it is the normal practice to require a reference from a previous employer before employment is offered; (iii) the fact that the employee cannot be expected to enter into that class of employment except on the basis that his employer will, on the

request of another prospective employer made not later than a reasonable time after the termination of a former employment, provide a full and frank reference as to the employee.

This being the nature of the engagement, it is necessary to imply a term into the contract that the employer would, during the continuance of the engagement or within a reasonable time thereafter, provide a reference at the request of a prospective employer which was based on facts revealed after making those reasonably careful inquiries which, in the circumstances, a reasonable employer would make.

In this case Mr Spring's employers were in breach of that implied term. Although the person actually writing the reference was not negligent, she delegated the task of ascertaining the facts to others, and as is the case with the employer's duty to exercise reasonable care for the safety of his employee, the employer cannot escape liability by so delegating his responsibility.

It only remains for me to underline what I anticipate is already clear, that is, that the views which I have expressed are confined to the class of case with which I am now dealing. Some of the statements I have made I appreciate could be applied to analogous situations. However, I do not intend to express any view either way as to what will be the position in those analogous situations. I believe that they are better decided when, and if, a particular case comes before the court. This approach can lead to uncertainty which is undesirable. However, that undesirable consequence is in my view preferable to trying to anticipate the position in relation to other situations which are not the subject matter of this appeal.

I would allow this appeal and remit the case to the Court of Appeal so that that court can deal with the question of causation.

DISSENTBY-1: LORD KEITH OF KINKEL

DISSENT-JDGMT-1:

LORD KEITH OF KINKEL: My Lords, the facts of this case are quite complex. They are set out very fully in the judgment of Glidewell LJ in the Court of Appeal ([1993] 2 All ER 273, [1993] ICR 412) and it is unnecessary to rehearse them in detail in order to identify the most important issue of law which arises on the appeal to this House, which is whether one who supplies a defamatory reference about a person in response to a request from a concern with which that person is seeking employment is liable in negligence to the subject of the reference if it has been compiled without reasonable care.

It is, however, necessary for an understanding of the manner in which the issue arises to give a brief outline of the salient facts. The plaintiff, Mr Spring, was in 1989 employed by the third defendants ('Corinium') as sales director (designate) and office manager at their premises in Cirencester. Corinium were estate agents and were also agents for the sale of insurance policies issued by the first defendants ('Guardian Assurance') of which they were an 'appointed representative' within the meaning of s 44 of the Financial Services Act 1986, and thus authorised to carry on investment business. On 22 July 1988 Mr Spring was appointed a 'company representative' of Guardian Assurance and was thus authorised, in accordance with r 1.2. of the Lauto

Rules 1988, to sell Guardian insurance policies and to advise on their merits. Lautro is the Life Assurance and Unit Trust Regulatory Organisation, the self-regulatory body of the industry set up under the 1986 Act.

On 7 July 1989 the major shareholder in Corinium sold the company to Guardian Assurance, which appointed a Mr Siderfin to be its chief executive. Mr Siderfin did not get on with Mr Spring, and on 26 July 1989 he dismissed him without explanation. Mr Spring then ceased to be a Guardian Assurance company representative. Mr Spring, together with a Mr Parker, sought to go into business in Dursley, near Cirencester, selling the policies of another insurance company, and to this end he approached the Scottish Amicable Life Assurance Society plc. Scottish Amicable, like Guardian Assurance, was a member of Lautro, the rules of which at the time included the following:

'3.5(1) A person shall not be appointed as a company representative of a member unless the member has first taken reasonable steps to satisfy itself that he is of good character and of the requisite aptitude and competence, and those steps shall ... include ... the taking up of references relating to character and experience.

(2) A member which receives an enquiry for a reference in respect of a person whom another member or appointed representative is proposing to appoint shall make full and frank disclosure of all relevant matters which are believed to be true to the other member or the representative.'

Scottish Amicable applied to Guardian Assurance for a reference and received a reply dated 12 November 1989 stating inter alia:

'Mr Spring held the position of Sales Manager until he was asked to leave in August of this year. His former superior has stated in writing that he was seen by some of the sales staff as a person who consistently kept the best leads for himself with little regard for the sales team that he supposedly was to manage; and his former superior has further stated that he is a man of little or no integrity and could not be regarded as honest . . . Since the 1st January 1989, Messrs Spring and Parker shared all their commission earnings on a 50:50 basis and left owing the company some £12,000 in funding which to date has not been repaid. This matter is now in the hands of solicitors. The current lapse ratio is running at 18% and this is only for policies written since March of this year. Since their departure, we have found a serious case of mis-selling where the concept of "best advice" was ignored and the policies sold yielded the highest commissions. GRE personnel have had to visit the investor to rectify the situation. There have been other cases where there has been bad advice but there is no current evidence to indicate whether it was deliberate or through ignorance.'

Scottish Amicable naturally declined to appoint Mr Spring as one of its company representatives. Mr Spring applied to two other companies for such an appointment, but each of them received from Guardian Assurance a reference in the same terms, which led to their refusing his application.

The reference was compiled by a Mrs Debra Lee-Moore, who was assistant chief compliance officer of the fourth defendants ('GRE Assurance'). She relied for the

purpose principally upon information given to her by Mr Siderfin, by a Mr Beard, who was a member of a GRE Assurance compliance team which had paid a visit to Corinium in November 1989, and by a Mr Dixon, who was senior sales consultant for GRE Assurance in Gloucester. The statement that Mr Spring could not be regarded as honest came from Mr Siderfin ('his former superior'), and that about a serious case of mis-selling came from Mr Beard and Mr Dixon. The case in question involved a Mr Fennell, to whom Mr Spring had sought to sell a highly unsuitable policy which would have generated a very large commission for him. The trial judge found that in so doing Mr Spring had acted incompetently, and not dishonestly with the object of securing a substantial commission. The trial judge further found in relation to the reference that Mrs Lee-Moore had accurately stated what she had learnt from her sources of information and that she was not guilty either of malice or of negligence. He went on to find that neither Mr Siderfin or Mr Dixon had acted out of malice, in respect that each of them genuinely believed in the truth of the allegations he was making, but that each of them had failed to exercise reasonable care in respect of the allegations through making them without carrying out a thorough investigation into their truth. Such an investigation, he found, would have shown that Mr Spring had not acted dishonestly.

Mr Spring raised an action of damages against all four defendants pleading causes of action in malicious falsehood, breach of contract and negligence. The trial judge, Judge Lever QC, rejected the claim in malicious falsehood, following his finding that none of the persons involved in the giving of the reference had acted maliciously. As regards the claim for breach of contract he held that there was no contract between Mr Spring and either Guardian Assurance or GRE Assurance and that there was not to be implied into the contract between Mr Spring and Corinium a term that any reference given about him should be prepared with reasonable care. He found in favour of Mr Spring, however, on the claim founded on negligence, with damages to be assessed. On appeal by the defendants his judgment was set aside by the Court of Appeal (Glidewell and Rose LJJ and Sir Christopher Slade) on 10 December 1992. Mr Spring now appeals to your Lordships' House, but only on the issues concerned with negligence and with breach of contract.

My Lords, if no reasons of policy intervened there might be much to be said for the view that Mr Spring is entitled to succeed in his claim based on negligence, on the basis that it was reasonably foreseeable that damage to him would result if the reference were prepared without reasonable care and it thus incorrectly disparaged him, that there was proximity between him and those who prepared the reference, and that it would be fair, just and reasonable to impose a duty of care on the latter. This would, however, extend the ambit of liability in negligence for pure economic loss. In *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575, [1964] AC 465 such liability was held to exist in circumstances where a plaintiff has relied to his detriment upon a negligent mis-statement by a defendant. In the present case there is no question of reliance by the plaintiff on the carelessly prepared reference. But in any event this is, in my opinion, a case in which the second stage of the test propounded by Lord Wilberforce in *Anns v Merton London Borough* [1977] 2 All ER 492 at 498, [1978] AC 728 at 752 properly comes into play. He there said:

'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 ...'

In *Yuen Kun-yeu v A-G of Hong Kong* [1987] 2 All ER 705 at 712, [1988] AC 175 at 193 I said:

'The second stage of Lord Wilberforce's test is one which will rarely have to be applied. It can arise only in a limited category of cases where, notwithstanding that a case of negligence is made out on the proximity basis, public policy requires that there should be no liability.'

I gave as an instance of such a case *Rondel v Worsley* [1967] 3 All ER 993, [1969] 1 AC 191 dealing with the liability of a barrister for negligence in the conduct of proceedings in court. *Hill v Chief Constable of West Yorkshire* [1988] 2 All ER 238, [1989] AC 53 was a case where the executor of the last victim of a serial murderer sued the chief constable on grounds of alleged negligence in failing to apprehend the murderer before he killed that particular victim. The claim failed on the basis that no duty of care had been made out. But in the course of my speech, concurred in by three of my colleagues, I said that the action was in any event precluded by considerations of public policy (see [1988] 2 All ER 238 at 243, [1989] AC 53 at 63).

In this present case the reference was defamatory of Mr Spring, and so were the communications made for the purpose of its preparation by Mr Siderfin and Mr Dixon to Mrs Lee-Moore. Mrs Lee-Moore was under a duty to give the reference and Mr Siderfin and Mr Dixon were under a duty to make the communications to her which they did make. So an action in defamation by Mr Spring against any of them or against their employers would have been defeated by the defence of qualified privilege unless Mr Spring proved malice. He sought to do so for the purpose of his claim on grounds of malicious falsehood, but the trial judge found that he had failed in this. That finding was affirmed by the Court of Appeal, and no appeal against it is before your Lordships.

The policy grounds which underlie the defence of qualified privilege in an action for defamation were thus stated by Lord Diplock in *Horrocks v Lowe* [1974] 1 All ER 662 at 668-669, [1975] AC 135 at 149:

'My Lords, as a general rule, English law gives effect to the ninth Commandment that a man shall not speak evil falsely of his neighbour. It supplies a temporal sanction: if he cannot prove that defamatory matter which he published was true, he is liable in damages to whomsoever he has defamed, except where the publication is oral only, causes no damage and falls outside the categories of slander actionable *per se*. The public interest that the law should provide an effective means whereby a man can vindicate his reputation against calumny has nevertheless to be accommodated to the competing public interest in permitting men to communicate frankly and freely with one another about matters in respect of which the law recognises that they have a duty to perform or an interest to protect in doing so. What is published in good faith on matters of these kinds is published on a privileged occasion. It is not actionable even though it be defamatory and turns out to be untrue. With some exceptions which are irrelevant to the instant appeal, the privilege is not absolute but qualified. It is lost if the occasion which gives rise to it is misused. For in all cases of qualified privilege

there is some special reason of public policy why the law accords immunity from suit -- the existence of some public or private duty, whether legal or moral, on the part of the maker of the defamatory statement which justifies his communicating it or of some interest of his own which he is entitled to protect by doing so. If he uses the occasion for some other reason he loses the protection of the privilege.'

In my opinion the same grounds of public policy are applicable where the claim is based not on defamation as such but on negligence associated with the making or publication of an untrue statement, where the occasion on which that was done was a privileged one in the sense in which that expression is used in the context of defamation law. If liability in negligence were to follow from a reference prepared without reasonable care, the same adverse consequences would flow as those sought to be guarded against by the defence of qualified privilege. Those asked to give a reference would be inhibited from speaking frankly lest it should be found that they were liable in damages through not taking sufficient care in its preparation. They might well prefer, if under no legal duty to give a reference, to refrain from doing so at all. Any reference given might be bland and unhelpful and information which it would be in the interest of those seeking the reference to receive might be withheld.

It appears that the issue which arises has only once been considered in this jurisdiction. That was in *Lawton v BOC Transhield Ltd* [1987] 2 All ER 608, [1987] ICR 7, a decision of Tudor Evans J. A former employee of the defendants sued them in negligence on the basis of a reference which they had given to other employers who had engaged him temporarily, and who by reason of the reference had refused to make his employment permanent. Tudor Evans J held that the defendants owed the plaintiff a duty of care in respect of the reference, but that it was honest, accurate and not negligently written, so that the claim failed. In holding that the defendants were under a duty of care to the plaintiff Tudor Evans J did not give any consideration to the possible relevance of the position in the law of defamation, particularly the defence of qualified privilege. The report does not indicate to what extent if at all, this matter was argued, and the only passage in the judgment which may touch upon it is this ([1987] 2 All ER 608 at 617-618, [1987] ICR 7 at 19):

'The next point of counsel for the defendants is that there are policy reasons which should negative a duty of care in a case such as this. First, he says that the existence of a duty of care might inhibit an employer from giving a reference freely and frankly. But it is always open to an employer to protect himself with a disclaimer of responsibility, as the respondents did in [*Hedley Byrne*]. I can see no reason why a disclaimer cannot be so framed as to exclude a liability not only to the recipient but also to the subject of the reference and also to protect the actual servant who writes the reference, Mr Uffendale in this case. As to the subject of the reference, I cannot see why an employer cannot effectively protect himself, either in the reference itself or by writing separately to the subject indicating a willingness to give a reference but stating that it will be given without responsibility.'

If Tudor Evans J had received fuller argument on the point he might well have reached a different decision. As it is, I am of opinion that his decision upon it was wrong.

The point has arisen more than once in New Zealand. In *Bell-Booth Group Ltd v A-G*

[1989] 3 NZLR 148 the Ministry of Agriculture and Fisheries took part in a television broadcast the thrust of which was that a product of the plaintiffs called Maxicrop was ineffective for its claimed purpose of stimulating plant growth in agriculture and horticulture. The plaintiffs sued the Ministry and the Broadcasting Corporation of New Zealand in defamation and in negligence. The trial judge held that the claim in defamation failed because it had been proved that Maxicrop was indeed useless, thus establishing the defence of justification, but he sustained the claim in negligence against the Ministry, on the ground that it owed the plaintiffs a duty to inform the plaintiffs of the results of certain trials of the product before publishing and to consult them about the presentation of the results. The Court of Appeal set aside the decision on negligence. Cooke P, giving the judgment of the court, said (at 155-156):

'Negligence in words can certainly give rise to liability if there is a duty of care. One need only mention *Hedley Byrne*. Breach of confidence is actionable, subject to special defences, however the duty of confidence arises (*Attorney-General v Wellington Newspapers Ltd* [1988] 1 NZLR 129, 172). A contract may impose restraints on freedom of speech, subject no doubt to public policy defences. In some cases damages for breach of contract can extend to loss of publicity or positive harm to reputation: see generally *McGregor on Damages* (15th edn, 1988), para 54. But cases in the foregoing categories are all readily distinguishable. As far at least as the law of torts is concerned, the common understanding is almost certainly as expressed by Hallett J in *Foaminol Laboratories Ltd v British Artid Plastics Ltd* [1941] 2 All ER 393, 399: "a claim for mere loss of reputation is the proper subject of an action for defamation, and cannot ordinarily be sustained by means of any other form of action." The closest reported cases which counsel for the appellant [plaintiff] were able to find were two. First, *Thurston v Charles* (1905) 21 TLR 659, where Walton J gave damages for the tort of conversion on the basis that the conversion of a letter had resulted in damage to the plaintiff's reputation. (See further *Gatley on Libel and Slander* (8th edn, 1981), para 895.) That case deals with the scope of damages for a tort that has undoubtedly been committed and does not touch the issue of judicial creation of a duty of care. Second, *Lawton v BOC Transhield Ltd* [1987] 2 All ER 608, where Tudor Evans J held that a former employer owed to its former employee a duty of care in giving a reference. That action failed, however, because the reference was honest, accurate and not negligently written. The bearing of defamation law is not discussed in the judgment and the case is a difficult one: see notes by Mr Philip Lewis (the editor of *Gatley*) in (1988) 17 Ind LJ Recent Cases 109 and Mr Andrew Demopoulos in (1988) 104 LQR 191. The latter writer is of the opinion, citing *Horrocks v Lowe* ([1974] 1 All ER 662, [1975] AC 135), that *Lawton* "involves an extension of the law of negligence which flies in the teeth of express statements that anything less than malice in the making of a privileged statement cannot engage liability". Similar comments could be made in cases of justification or fair comment. The common law rules, and their statutory modifications, regarding defamation and injurious falsehood represent compromises gradually worked out by the Courts over the years, with some legislative adjustments, between competing values. Personal reputation and freedom to trade on the one hand have to be balanced against freedom to speak or criticise on the other. In the result the present rules are in broad terms well-known and reasonably clear. To an action for defamation truth is an absolute defence. Privilege, where applicable, is in a few areas an absolute but in most a qualified defence. Fair comment is a qualified defence subject to rather different rules. In injurious falsehood, on the other hand, the plaintiff has the burden of proving both

falsity and malice. These evolved compromises may not draw the lines in places that will always be found generally acceptable in the community. Some argue, for instance, for greater media freedom or licence; statutory changes have been recommended but not enacted. It is a controversial area. The important point for present purposes is that the law as to injury to reputation and freedom of speech is a field of its own. To impose the law of negligence upon it by accepting that there may be common law duties of care not to publish the truth would be to introduce a distorting element. It was argued for the appellant, inter alia, that neither defamation nor slander of goods requires a background duty or breach; and if injury does or may involve those separate elements, there is no ground for depriving the plaintiff of a separate cause of action. That is really no more than a semantic point. The duty in defamation may be described as a duty not to defame without justification or privilege or otherwise than by way of fair comment. The duty in injurious falsehood may be defined as a duty not to disparage goods untruthfully and maliciously. In substance the appellant would add to these duties a duty in such a case as this to take care not to injure the plaintiff's reputation by true statements. All the arguments for the appellant, though put skilfully in various ways by counsel, reduce to that proposition. In our opinion, to accept it would be to introduce negligence law into a field for which it was not designed and is not appropriate.'

Later, he said (at 157):

'For these reasons in our opinion justice does not require or warrant an importation of negligence law into this class of case. Where remedies are needed they are already available in the form of actions for defamation, injurious falsehood, breach of contract or breach of confidence.'

Although the case was directly concerned with a publication which was found to be true, it is clear that Cooke P considered its ratio to cover situations which in the law of defamation would involve the defences of qualified privilege and fair comment. This becomes even clearer in *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd*, *Mortensen v Laing* [1992] 2 NZLR 282. Both were striking-out cases, involving claims in negligence against fire-loss investigators, whose reports to insurers had resulted in the rejection of claims against them by the parties whose premises had been damaged by fire and in the second case a prosecution for arson. The Court of Appeal held that both actions should be struck out. Cooke P said (at 301-302):

'So far then there are weighty considerations in favour of a duty in the kind of situation with which we are now dealing. But in the other scale there have to be put a series of formidable objections arising because the duty asserted would cut across established principles of law in fields other than negligence. The first is the one that weighed most with this Court in *Bell-Booth*, namely the defences available in a defamation action. Any shortcomings in the investigation of a fire assurance claim are unlikely in themselves to harm the insured. If there is real harm it will probably arise from the report by the investigators to the insurer. To the extent that the report reflects adversely on the insured by suggesting that he may have been guilty of arson the insured will prima facie have a cause of action in defamation. Initially at least, the publication may be very limited; yet it could have most serious consequences for the insured and warrant substantial general or special damages. These matters are all

sufficiently elementary to require no authority apart perhaps from a reference to 28 Halsbury's Laws of England (4th edn) at paras 10, 18, 59 and 244. It will be a defence, however, if the investigators can prove the truth of the imputation. And more importantly in the present context, the report of the investigators made pursuant to their contractual duty to the insurer will be the subject of qualified privilege. Qualified privilege can be defeated by proof of malice, but not by proof of mere negligence. The suggested cause of action in negligence would therefore impose a greater restriction on freedom of speech than exists under the law worked out over many years to cover freedom of speech and its limitations. By a side-wind the law of defamation would be overthrown. That this is reality, not mere theory, is apparent from the various causes of action in defamation pleaded in the South Pacific case and from the plea in *Laing v Mortensen* that the plaintiffs have suffered loss of reputation. Qualified privilege is conferred because of reciprocal duty and interest between a writer or speaker and those with whom he communicates. To cut down the practical scope of the protection would run counter to public policy in this field.'

Balfour v A-G [1991] 1 NZLR 519 was a case concerning a school teacher whose employment prospects were seriously jeopardised by the presence in his file at the Department of Education of a memorandum stating that he was a long practising and blatant homosexual. He sued the department claiming damages for breach of statutory duty and in negligence. The claim failed principally on the issue of causation, but *Hardie Boys J*, giving the judgment of the Court of Appeal, said in relation to the claim in negligence (at 529):

'This second aspect comes perilously close to defamation. Any attempt to merge defamation and negligence is to be resisted. Both these branches of the law represent the result of much endeavour to reconcile competing interests in ways appropriate to the quite distinct areas with which they are concerned, but not necessarily appropriate to each other: see *Bell-Booth Group Ltd v Attorney-General* [1989] 3 NZLR 148, 155-157. An inability in a particular case to bring it within the criteria of a defamation suit is not to be made good by the formulation of a duty of care not to defame. In *Lawton v BOC Transhield Ltd* *Tudor Evans J* held that an employer owed his former employer a duty of care in giving a reference to a prospective new employer, but his decision, which has been considerably criticised, was disapproved by this Court in *Bell-Booth*.'

The views expressed in these three cases decided in a jurisdiction which is well known to be tender in its approach to claims in negligence involving pure economic loss are of great importance. The process of reasoning which they contain is in my opinion entirely sound and apt to be followed and applied in the present case. It is appropriate to add a reference to what was said by Lord Templeman in *Downsview Nominees Ltd v First City Corp Ltd* [1993] 3 All ER 626 at 638, [1993] AC 295 at 316:

'The House of Lords has warned against the danger of extending the ambit of negligence so as to supplant or supplement other torts, contractual obligations, statutory duties or equitable rules in relation to every kind of damage including economic loss: see *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1988] 2 All ER 484 at 497, [1988] AC 1013 at 1059, *Caparo Industries plc v Dickman* [1990] 1 All ER 568, [1990] 2 AC 605 and *Murphy v Brentwood DC* [1990] 2 All ER 908,

[1991] 1 AC 398.'

Lord Templeman went on to describe the adverse consequences likely to flow from such an extension in the type of case before him. If the ambit of negligence were extended to cover the sort of circumstances that exist in the present case, the consequences would be no less deleterious. The purpose of the defence of qualified privilege is to encourage frankness. Although in many instances the encouragement of frankness may operate only in the interests of the particular person to whom the communication is made, in many other instances it is necessary for the protection of the wider public. In the present case that is the position. The purpose of *Lautour* 3.5(2) is to protect the public against being exposed to the activities of company representatives selling insurance policies who may be dishonest or incompetent. The need for that has been amply demonstrated by the many instances of misselling that have recently been uncovered by *Lautour*. If there exists some suspicion that a person in respect of whom a reference has been asked for has not acted with complete integrity, the public interest requires that such suspicion should be communicated. If liability for negligence towards the subject of the reference were to be held to exist, there would be a temptation not to communicate the suspicion. In the present case it required a protracted trial with examination and cross-examination of witnesses to establish that in relation to the Fennell transaction Mr Spring had on a balance of probabilities acted incompetently but not dishonestly. An inquiry of comparable scope would not be within the powers of the ordinary employer. Faced with the possibility of an action of damages for negligence at the instance of the subject of the reference there are grounds for expecting that the employer would be inhibited from expressing frankly any reservations which he might have about the honesty of the employee. Another field of employment where frankness is of the greatest importance is that where contact with children is involved. It may be very difficult to prove that a person has interfered with young children, yet there may be grounds for suspecting it. The public interest demands that the existence of such suspicion should not be suppressed. In general, precisely the same grounds of public policy which make the defence of qualified privilege available in an action for defamation strongly favour the exclusion of an action of damages for negligence in similar situations. If it were to be held that such an action was to be available in relation to the giving of references in the employment field, there would be pressure to extend the principle to cover all situations where the defence of qualified privilege would be available if the action were one for defamation, and such extension could not logically be resisted. Thus the whole rationale of the defence of qualified privilege would be overthrown. While giving Mr Spring a right of action in negligence would operate favourably in his interest and in those of other individuals who might find themselves in a like position, the adverse consequences from the point of view of public interest which would flow from doing so in my opinion militate strongly against it.

My Lords, for these reasons I would affirm the decision of the Court of Appeal on the issue of negligence.

As regard the claim for breach of contract, Glidewell LJ giving the judgment of the Court of Appeal, after observing that the trial judge had held that there was no contract between Mr Spring and Guardian Assurance and that it had been argued that he was wrong in this, said ([1993] 2 All ER 273 at 295-296, [1993] ICR 412 at 438-439):

'If he was (which we do not find it necessary to decide) the essential question is, did either the plaintiff's contract with Corinium or his contract with Guardian Assurance contain the implied term pleaded in the rerereamended statement of claim? This is set out in para 8 of the pleading as: "... that, the Defendants and/or any of them would provide a reference which was full, frank and truthful and which was in any event prepared using reasonable care." The judge, having referred to the decisions in *Addis v Gramophone Co Ltd* [1909] AC 488, [1908-10] All ER Rep 1 and *The Moorcock* (1889) 14 PD 64, [1886-90] All ER Rep 530, cited a sentence from the speech of Lord Edmund-Davies in *Liverpool City Council v Irwin* [1976] 2 All ER 39 at 54, [1977] AC 239 at 266 to the effect that: "The touchstone is always necessity and not merely reasonableness . . ." (Lord Edmund-Davies's emphasis.) More recently Lord Bridge in *Scally v Southern Health and Social Services Board (British Medical Association, third party)* [1991] 4 All ER 563 at 571, [1992] 1 AC 294 at 307 drew a clear distinction between what he described as "the search for an implied term necessary to give business efficacy to a particular contract and the search, based on wider considerations, for a term which the law will imply as a necessary incident of a definable category of contractual relationship." In our view the judge directed himself entirely correctly that he had to decide whether a term of the kind pleaded was a necessary incident of either contract. He concluded that it was not, and thus that he would not imply such a term. In our view, if the law implied any term in the plaintiff's contract with either Guardian Assurance or Corinium in relation to this matter, such a term would go no further than to require the defendants to comply with their obligations under r 3.5(2) of the Lautro rules, i e to give a reference which made "full and frank disclosure of all relevant matters which are believed to be true". With such an obligation the judge of course held that the defendants complied.'

I respectfully agree and find it unnecessary to add anything.

Accordingly, I would dismiss the appeal.