

# Financial Loss



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# “Financial Loss”

What is it?

And when is it covered?

# Croydon

Wednesday 31st August



# Burst water mains

- Thea Savosnick
- £258: new airline ticket
  
- Michelle Connolly and three friends
- £80 cab to Gatwick
- and... £1,200 for new airline tickets

...their property was not damaged, and they were not injured.

Just pure economic losses.

# Burst water mains

Thames Water has refused to compensate rail passengers

*“Whilst I sympathise ... I must inform you that **we are not liable for any costs that have been incurred.**”*

# Burst water mains

Leader of the London Assembly's Lib-Dem transport group:

- “*Thames Water **should stop playing legal games** and **accept that they were responsible** for the havoc faced by thousands of passengers.”*

*“As a direct result of their water burst many people had to take expensive taxi journeys simply to get home or to travel to Gatwick Airport. **Thames Water must offer compensation to Network Rail and the train operating companies.** They in turn should offer compensation to their passengers.”*

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**Sir Roger Toulson**



# Preface – Sir Roger Toulson

- First, there is a **confusing range of expressions in common usage** which do **not have a uniform legal definition**: financial loss, pecuniary loss, economic loss, pure economic loss and so on
- Secondly, the law about the recovery of such losses, in contract or in tort, can be tricky and confusing, as the examples in the book show. **Not all decisions of the courts can be easily reconciled**
- Thirdly, **the strengths of the insurance market include its ability to adapt to changes in the law and the flexibility of the products offered**, but the variety of terms offered can itself be a source of **confusion**

# Introduction

# What is financial loss?

The law divides situations into two:

- where there has been physical injury or damage, and
- where there has not

Two main strands have developed:

- physical injury or damage cases – the *Donoghue v Stevenson* strand
- special relationship cases – the *Hedley Byrne v Heller* strand

# What is financial loss?

What are the differences between the following?

- economic loss
- pure economic loss
- consequential loss
- financial loss

# What is financial loss?

## Important definitions

- **Economic loss:** pecuniary loss consequential on injury or damage
- **Pure economic loss:** pecuniary loss not consequential on injury or damage
- **Consequential loss:** often used to mean economic loss
  
- **Financial loss:** as defined in the policy

**Tort strand 1**

# Tort: strand 1

- negligence
- nuisance
- trespass
- interference with rights such as rights of way, air, light or water

# Tort: strand 1





# Tort: strand 1

## Donoghue v Stevenson (1932)

Stevenson: maker of ginger beer

Mr Minchella: owned the café that sold the ginger beer

Friend: bought the ginger beer at the café

Mrs Donoghue: drank the ginger beer. Suffered gastro-entiritis.

Mrs Donoghue: could not sue Stevenson as no contract (of sale) with him.

But... sued Stevenson and won the case (at House of Lords).

The law had changed!

# Tort: strand 1

## Donoghue v Stevenson

### Neighbour principle - Lord Atkin:

*“You must take **reasonable care** to avoid acts or omissions which you can reasonably foresee would be likely to **injure your neighbour**”*

***Who then in law is my neighbour?** The answer seems to be **persons who are so closely and directly affected by my act** that I ought reasonably to **have them in contemplation** as being so affected when I am directing my mind to the acts or omissions which are called in question.”*

# Tort: strand 1 - floodgates argument

## *Weller v Foot and Mouth Disease Research Institute (1966)*

Weller, a firm of auctioneers which had lost income due to the cancellations

Widgery J: “*The world of **commerce would come to a halt and ordinary life would become intolerable if the law imposed a duty on all persons at all times** to refrain from any conduct which might foreseeably cause detriment to another.*”

# Tort: strand 1 - opening the floodgates (Anns)

*Anns v Merton London Borough Council (1978)*

Block of flats: structural damage (foundations inadequate)

Local authority (Merton) administered the building regulations and had inspected foundations.

Merton were negligent.

This was property damage.

But... the judgement loosened the requirements to prove negligence.

# Tort: strand 1 - opening the floodgates (Anns)

*Anns v Merton London Borough Council (1978)*

Lord Wilberforce (House of Lords): a two stage test for negligence requiring *just*

- a sufficient relationship of proximity to give rise to a duty and
- the absence of any considerations which ought to negate that duty

# Tort: strand 1 - what went through in the flood? (Junior Books)

## *Junior Books v Veitchi (1983)*

The House of Lords applied Lord Wilberforce's test from *Anns v Merton*. They decided that both stages of the test had been satisfied

This was a significant extension of liability to insureds who **previously** would only have been liable in negligence **if** their work or product caused injury or physical damage

# Tort: strand 1 - what went through in the flood? (Junior Books)

Junior Books: engaged main contractor to build a factory

Main contractor employed an architect

Architect employed a sub-contractor (Veitchi) to lay the flooring

Flooring developed cracks and had to be re-laid

Junior Books incurred that cost

Junior Books sued Veitchi. No contractual relationship, so JB sued in tort (negligence).

# Tort: strand 1 - what went through in the flood? (Junior Books)

Veitchi were negligent, but the loss was a pure economic loss.

There would be no liability today, but following *Anns*, there was.

Lord Wilberforce (*Anns*): a two stage test for negligence requiring *just*

- a sufficient relationship of proximity to give rise to a duty and
- the absence of any considerations which ought to negate that duty

The requirement for damage in negligence was virtually abandoned.



# Tort: strand 1 - what went through in the flood? (Junior Books)

Insurers responded by adding “*tort only*” financial loss extensions – sometimes known as “*Junior Books extensions*”

# Tort: strand 1 - closing the floodgates (Murphy)

- *Murphy v Brentwood* (1991): House of Lords reversed *Anns*
- *Junior Books* was (subsequently) categorised as a “unique” case
- “tort only” financial loss extensions lose much of their *raison d'être*

# Tort: strand 1 - closing the floodgates (Murphy)

- *Murphy v Brentwood (1991)*
- Murphy: bought a new house (£65,000)
- Defective foundations. Cracked appeared.
- Murphy sold the house. Got £30,000.
- NU (Household policy) paid the difference.
- NU sought recovery from Brentwood District Council (negligently approved the foundations) (*Anns... easy*)

# Tort: strand 1 - closing the floodgates (Murphy)

- House of Lords: decided the council was not liable as cost of repairing the defective building was pure economic loss.
- Lord Bridge linked *Murphy* with *Donoghue* in the context of the liability of a manufacturer in tort (and thus applied it to a building case)
- The chattel was merely defective in quality
- The loss to the owner is purely economic
- (Decided / reaffirmed) that pure economic loss is not recoverable in tort

# Tort: strand 2

Hedley Byrne and other special relationships

# Tort: strand 2 - Hedley Byrne v Heller (1963)

The House of Lords said a duty of care arises where:

- irrespective of contract
- a person with special skill
- applies that skill to assist someone who relies on it.

It also arises where:

- a person in a position where others will reasonably rely on his skill or judgment
- takes it upon himself to give information or advice knowing that the recipient will rely on it

**RESULT - “NEGLIGENT MISSTATEMENT”**

# Tort: strand 2 - special relationships

## 1963 Making statements

*Hedley Byrne v Heller*

## 1979 Failure to act

*Midland Bank v Hett, Stubbs and Kemp*

## 1990 Building society surveyor and purchaser

*Smith v Bush*

## 1994 Performance of a service

*Henderson v Merrett*

# Tort: strand 2 - more special relationships

## 1994 Giving a reference

*Spring v Guardian*

## 1995 Solicitor and beneficiary

*White v Jones*

## 2001 Employee assuming personal responsibility

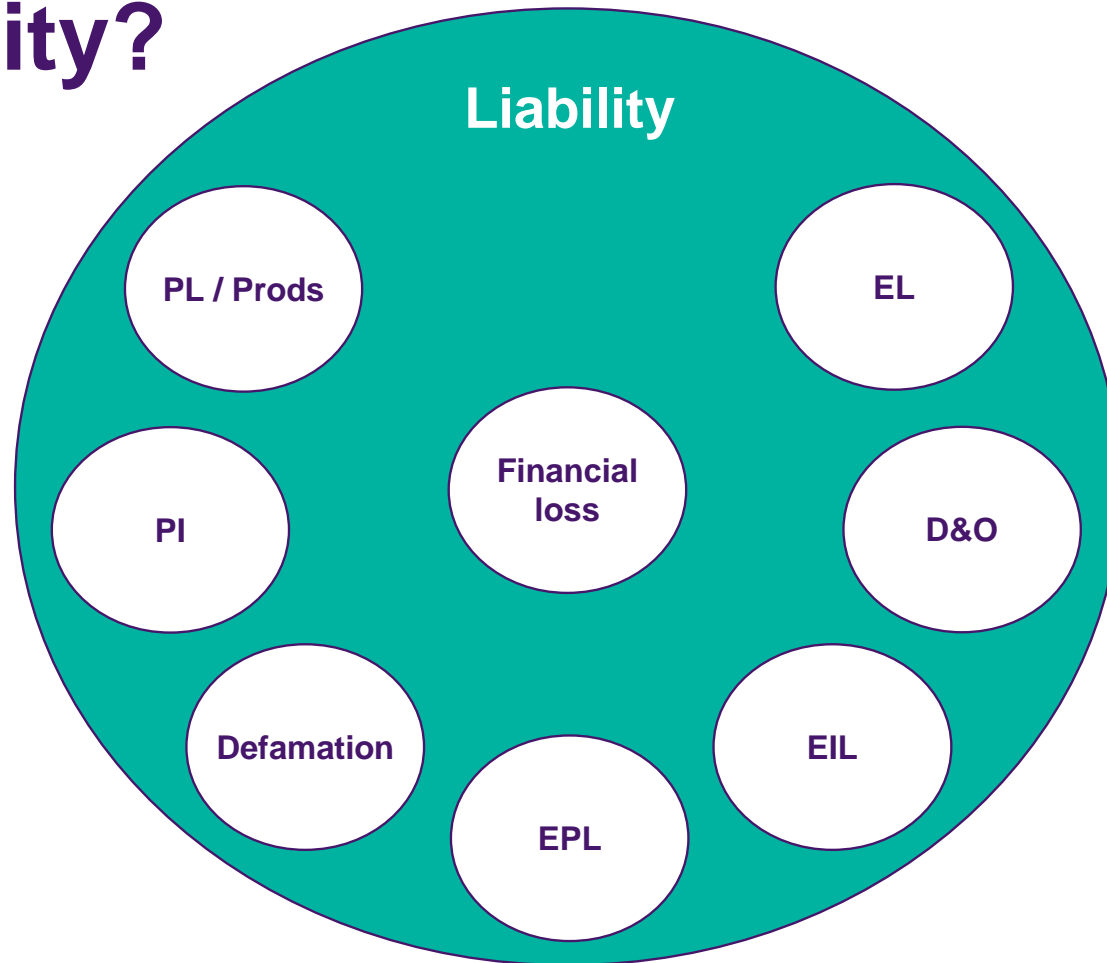
*Merrett v Babb*

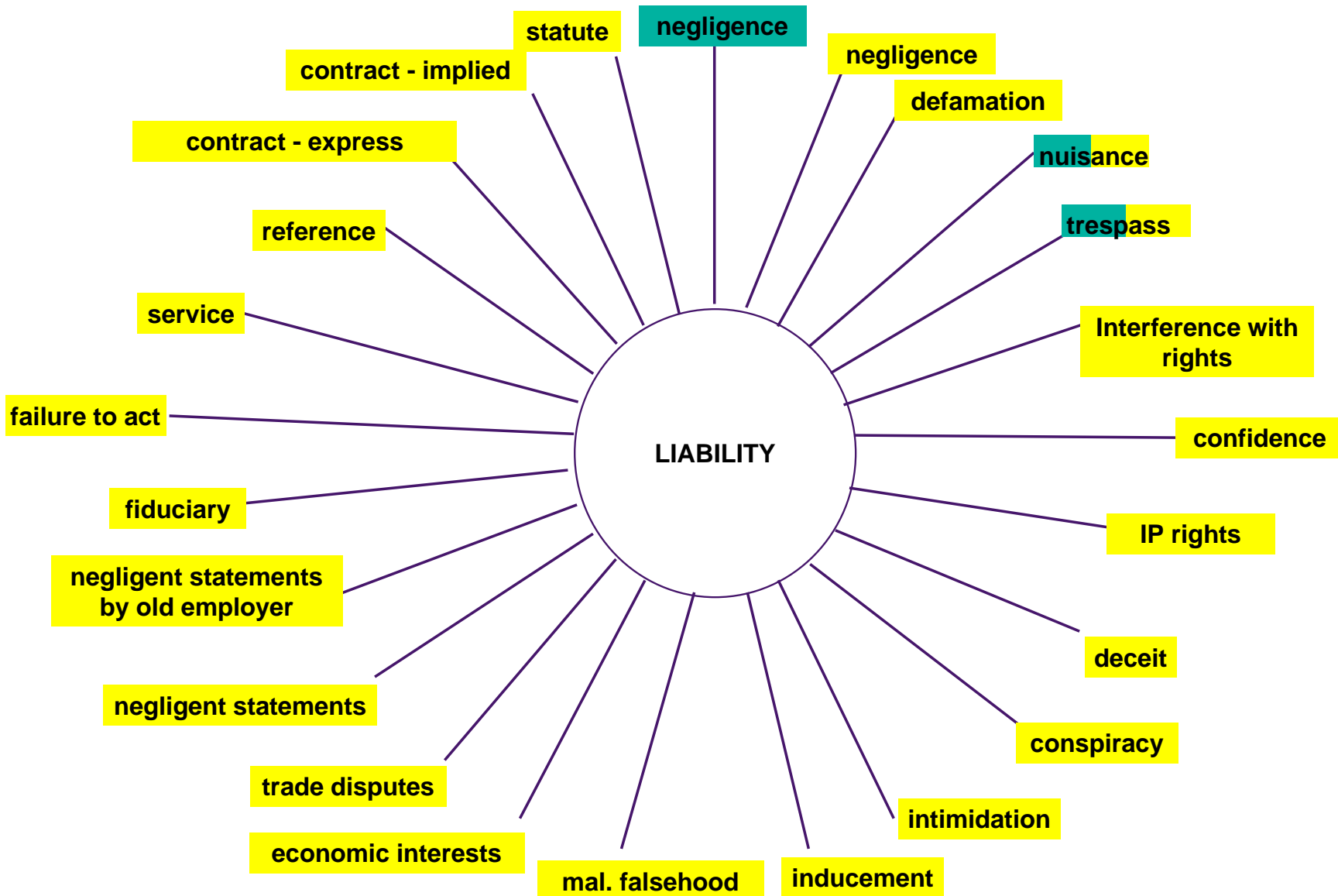
## 2011 Negligent misstatement by former employer

*McKie v Swindon College*



# How many ways do we cover an insured's legal liability?





# Contract: Hadley v Baxendale

# Contract

*Hadley v Baxendale (1854)*



# Contract - Hadley v Baxendale (1854)

Damages for breach of contract are damages which:

- are reasonably considered to arise naturally - in the ordinary course of things - from the breach, or
- may reasonably be supposed to have been in the contemplation of the parties as the probable result of the breach.

Result - **pure economic loss** is recoverable where there is a **contractual relationship**.

# Contract

Two main types of contractual terms:

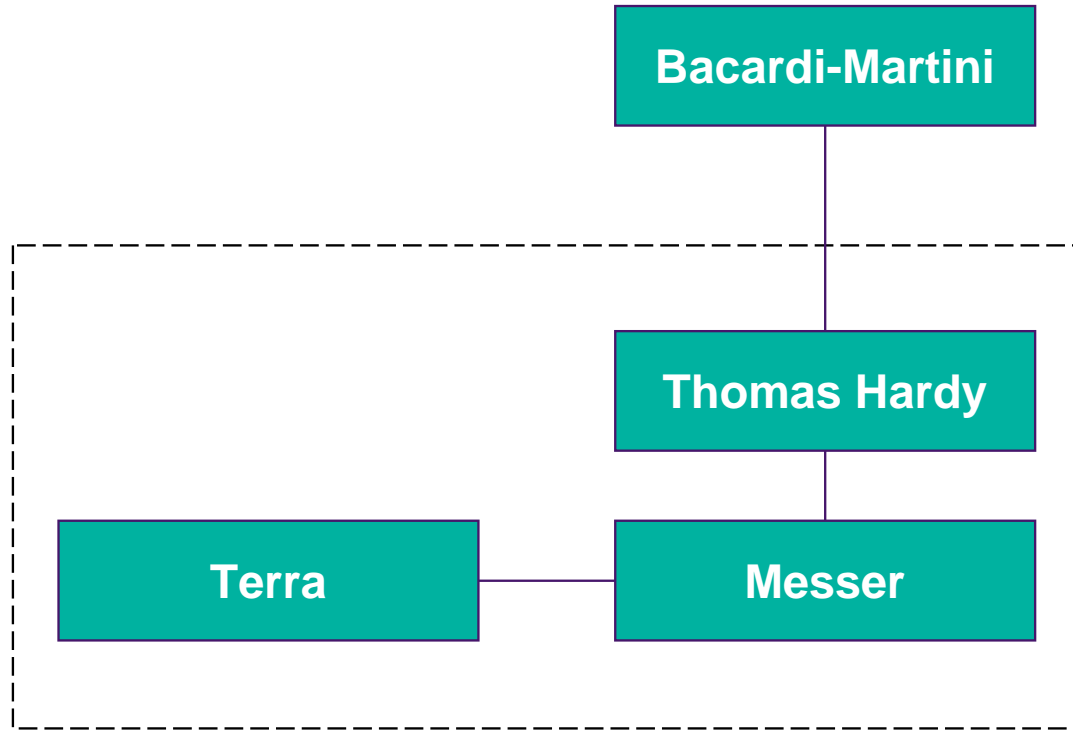
- Express terms
- Implied terms

# Contract - Sale of Goods Act 1979

Implied terms including...

- Quality
- Fitness

# Contract - Bacardi

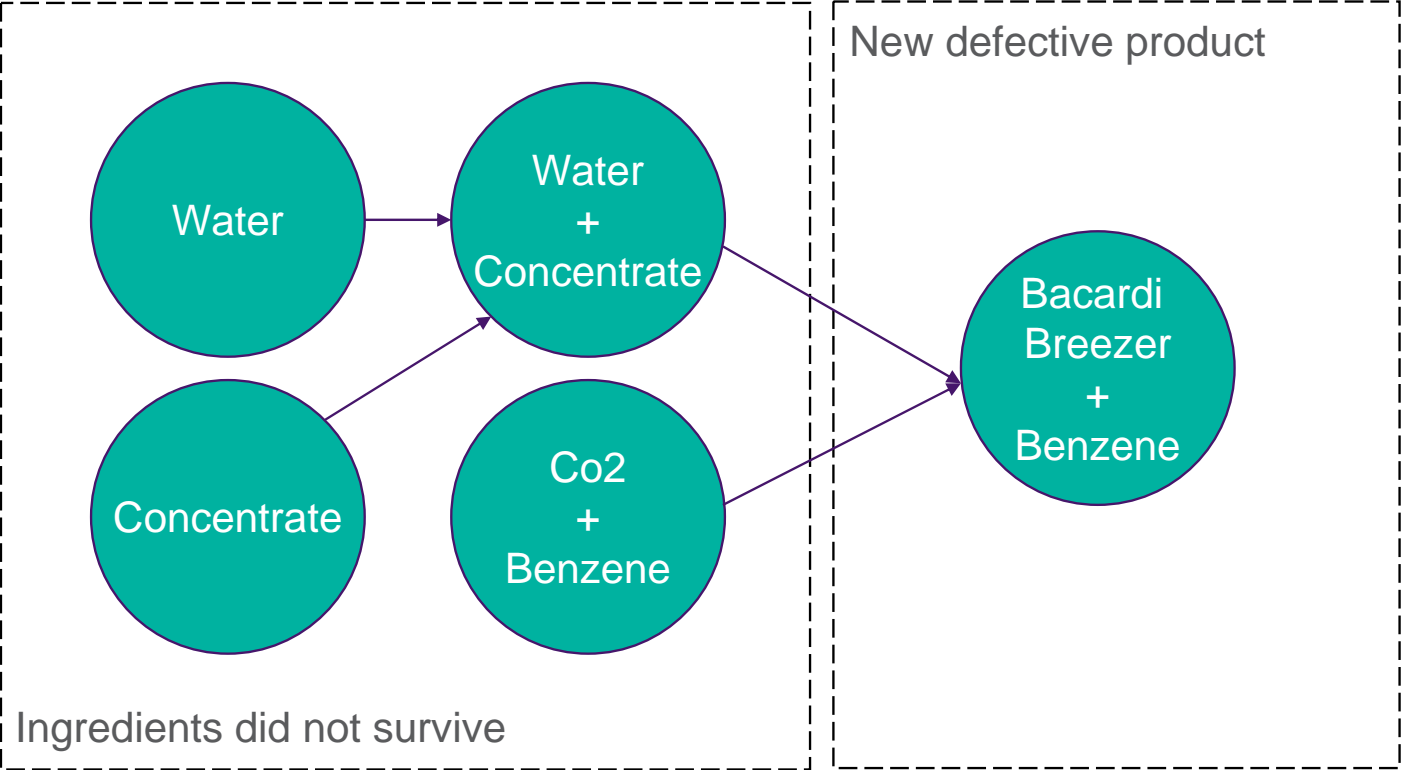




# Contract - Bacardi

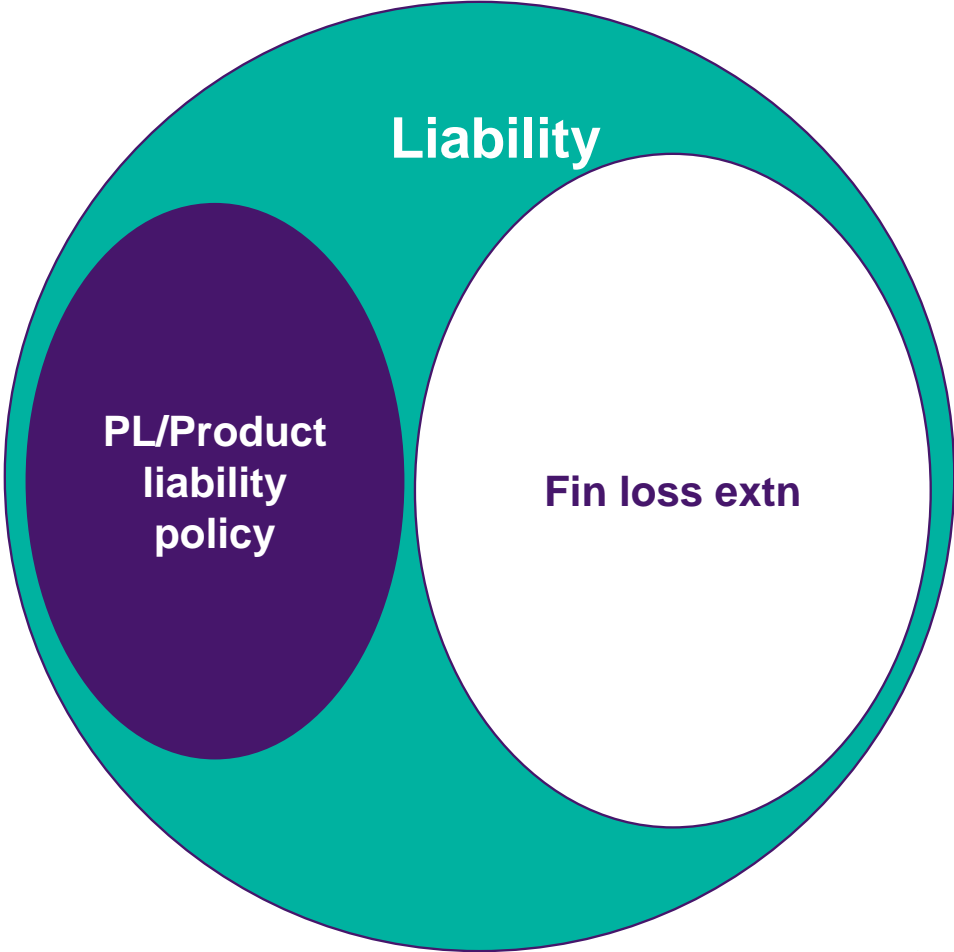
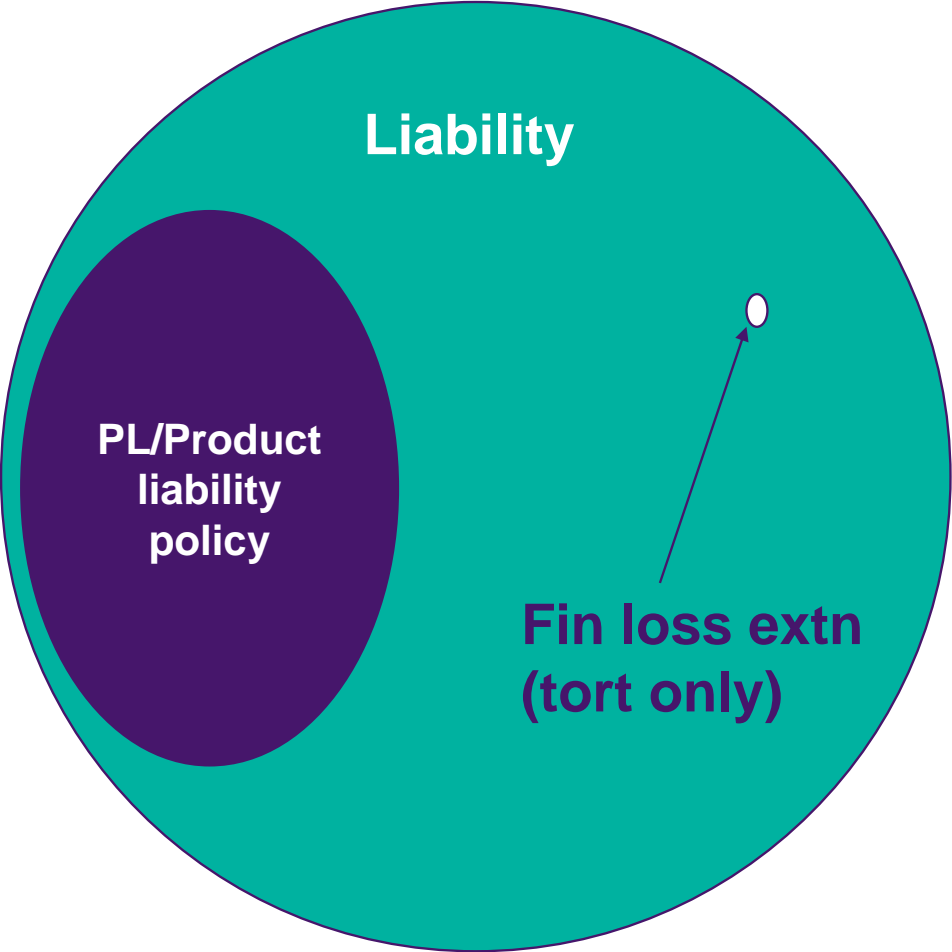
- Messer's liability "*in respect of ... direct physical damage to property*" was limited to £500k
- Messer was to have "*no liability whatsoever in respect of losses ... of a purely financial or economic nature*"

# Contract - Bacardi

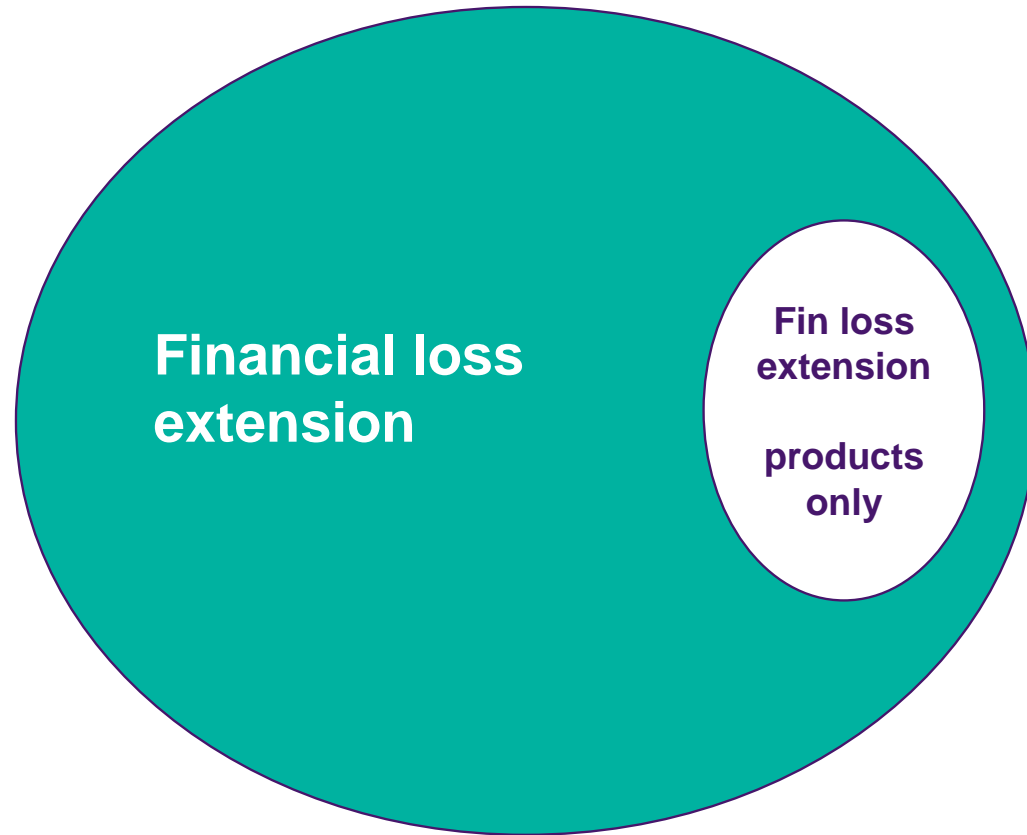


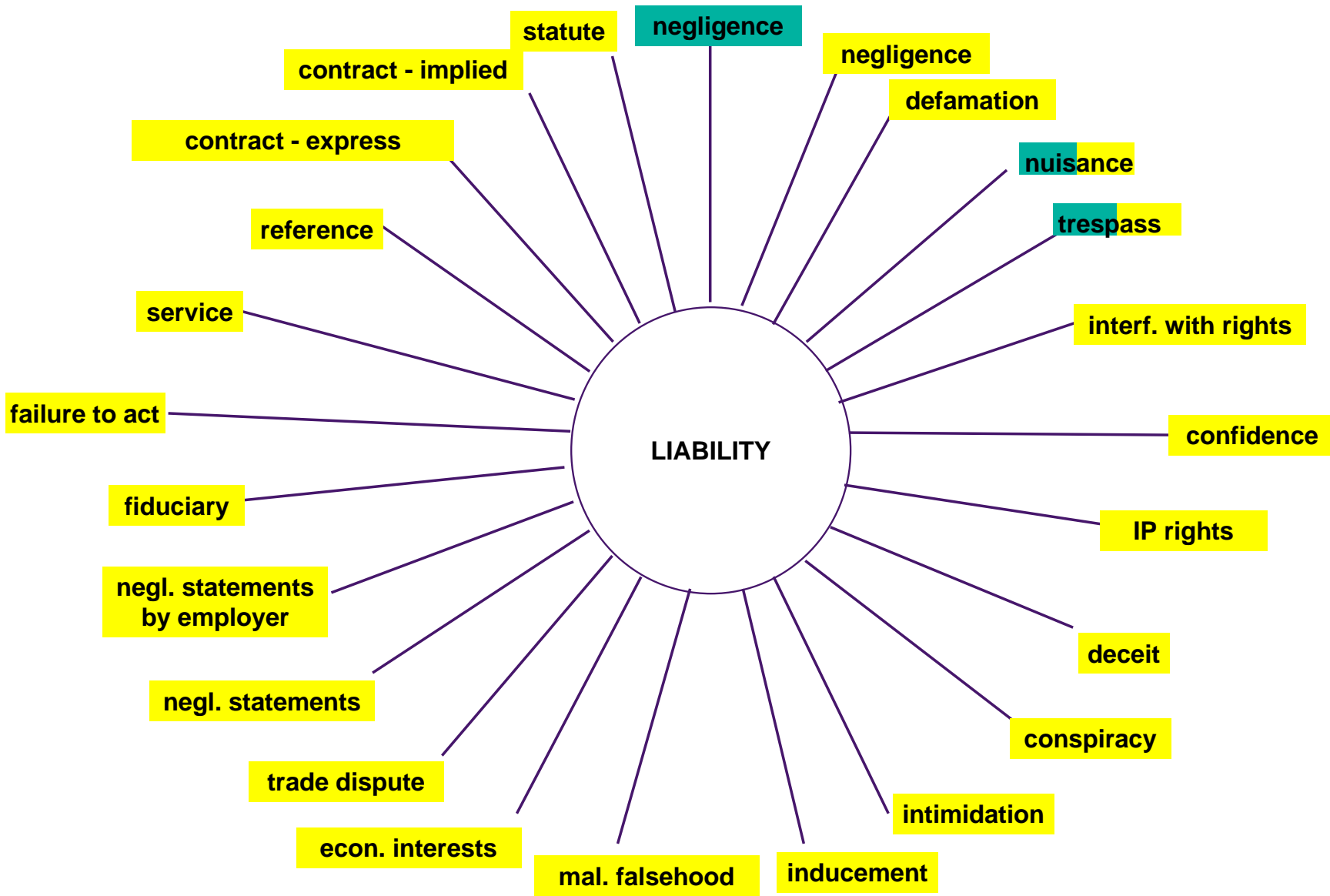
**Pure economic loss!**

# How wide is your Financial Loss extension?



# Distinguishing the two types of financial loss extension





# Contractual liability exclusions – take your pick!

## From total

- excludes liability to any claimant with whom there is a contractual relationship

## Through partial

- excludes liability to a claimant with whom there is a contract unless it would have arisen in the absence of the contract
- excludes liability under the express terms of a contract
- several other variations

## To non-existent

- No exclusion at all

# Burst water mains



# Burst water mains

versus...

**Brennan J** (Australian case) (1995): “If liability were to be imposed for the doing of anything which caused pure economic loss that was foreseeable, the tort of negligence would **destroy commercial competition** and, in the well-known dictum of Chief Judge Cardozo, expose defendants to potential liability 'in an **indeterminate amount** for an **indeterminate time** to an **indeterminate class**'.”



# Summary

# Summary

Generally stable

- **Incremental changes** - the Swindon College & McKie case
  - Social pressure for justice
  - **Long term approach by the courts** and therefore a reluctance to change, unless a need really exists
- 
- **What does all this mean to us?**

**Q&A**



**TOKIO MARINE**  

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**EUROPE**

