



## Financial Loss – revisited



A spirit of trust



- 
- So long and thanks for all the fish
  
  - 42

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# Croydon



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## Definition

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Important definitions (Box 1, page 4)

- **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 - negligence

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- Negligence
- Two main strands have developed:
  - physical injury or damage cases – *strand 1*
  - special relationship cases – *strand 2*

## Tort: negligence: strand 1

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

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.*”

*(...and again in 2007!)*



## Tort: negligence: strand 2

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### *Hedley Byrne v Heller (1963) (House of Lords)*

Hedley Byrne, an advertising agency, was concerned about credit worthiness of its client (Easipower)

Hedley Byrne asked Heller - that client's bank - for a credit reference on the client

Heller gave a good reference so Hedley Byrne continued to give the client credit

The client (Easipower) became insolvent, causing Hedley Byrne to lose over £17,000

## Tort: negligence: strand 2

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### *Hedley Byrne v Heller (1963) cont'*

Heller (the bank) argued no duty of care existed (the loss was a pure economic loss, in tort)

Why? Because...

No contract

Therefore common law = tort

Tort = negligence

Negligence = no liability for pure economic loss

BUT... Heller was held to owe a duty to Hedley Byrne to take care when giving the reference

## Tort: negligence: strand 2

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### *Hedley Byrne v Heller (1963) cont'*

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: Liability for pure economic losses arising from “negligent misstatements”



## Tort: negligence: strand 2 – more special relationships

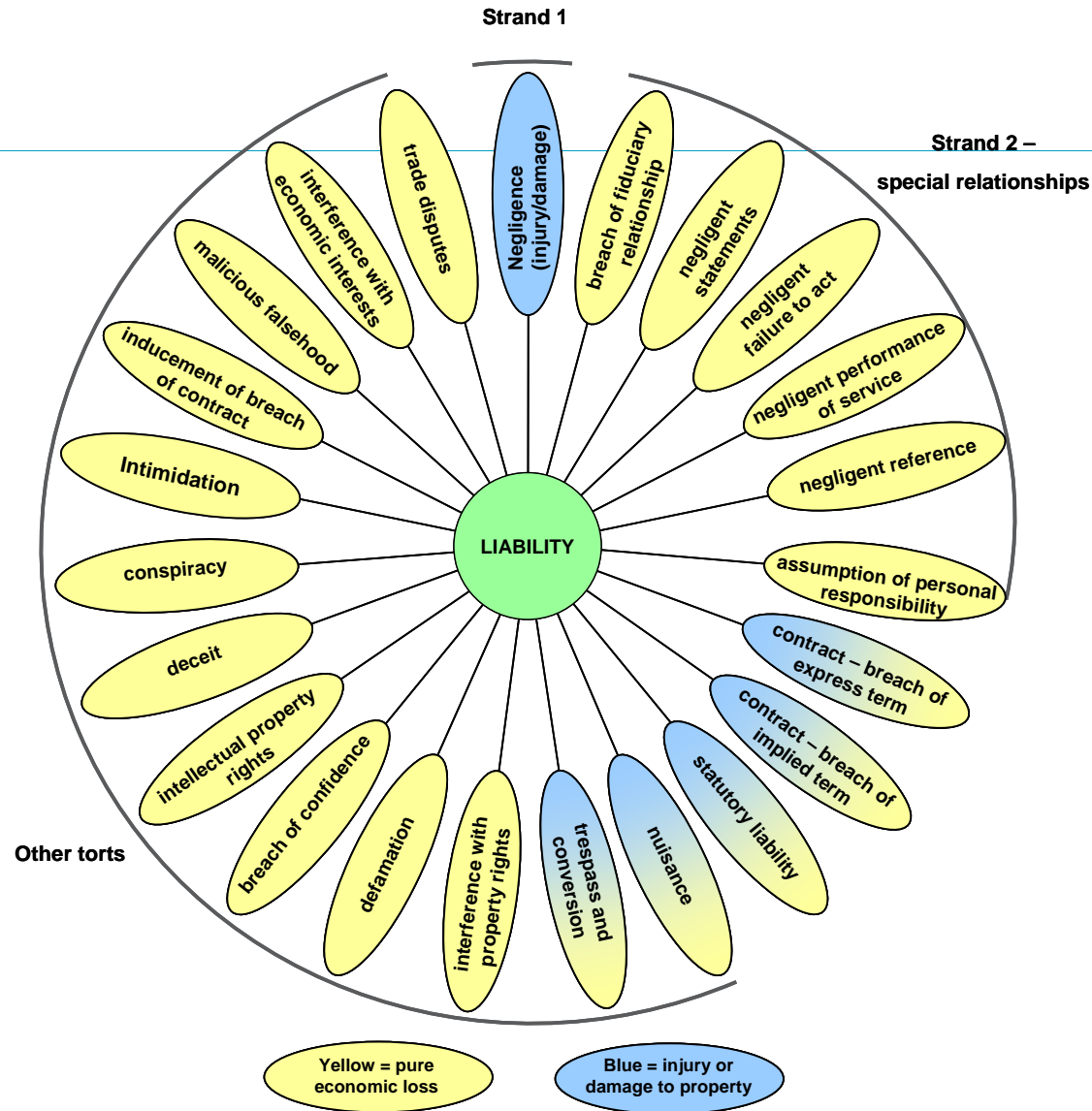
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- 1963 Making statements  
*Hedley Byrne v Heller*
- 1979 Failure to act  
*Midland Bank v Hett, Stubbs and Kemp*
- 1990 Building society surveyor and purchaser  
*Smith v Bush*
- 1994 Performance of a service  
*Henderson v Merrett*

## Tort: negligence: strand 2 – special relationships (more...)

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- 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*



Deceit to Trade  
Disputes  
(inclusive) =  
intentional  
(therefore not  
insurable)

## Statutes

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Civil liabilities, imposed by statute, where recompense may be required for pure economic losses (i.e. not injury and not damage to property) suffered by the injured-party

Examples (pages 23 and 24)

- Civil Liability (Contribution) Act 1971
- Data Protection Act 1998
- Employment legislation
- Human Rights Act 1998
- Misrepresentation Act 1967
- Package Travel Regs 1992
- Protection from Harassment Act 1997

## Contract

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### *Hadley v Baxendale (1854)*

Crankshaft (etc)

Hadley lost profits caused by the delay

Hadley sued Baxendale and won £25

Judge (Baron Alderson) said that pure economic loss can be recovered in contract



## Contract

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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

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Two main types of contractual terms:

- Express terms
- Implied terms

## Contract - Sale of Goods Act 1979

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Business to business; and Business to consumer

Implied terms including...

- Quality
- Fitness

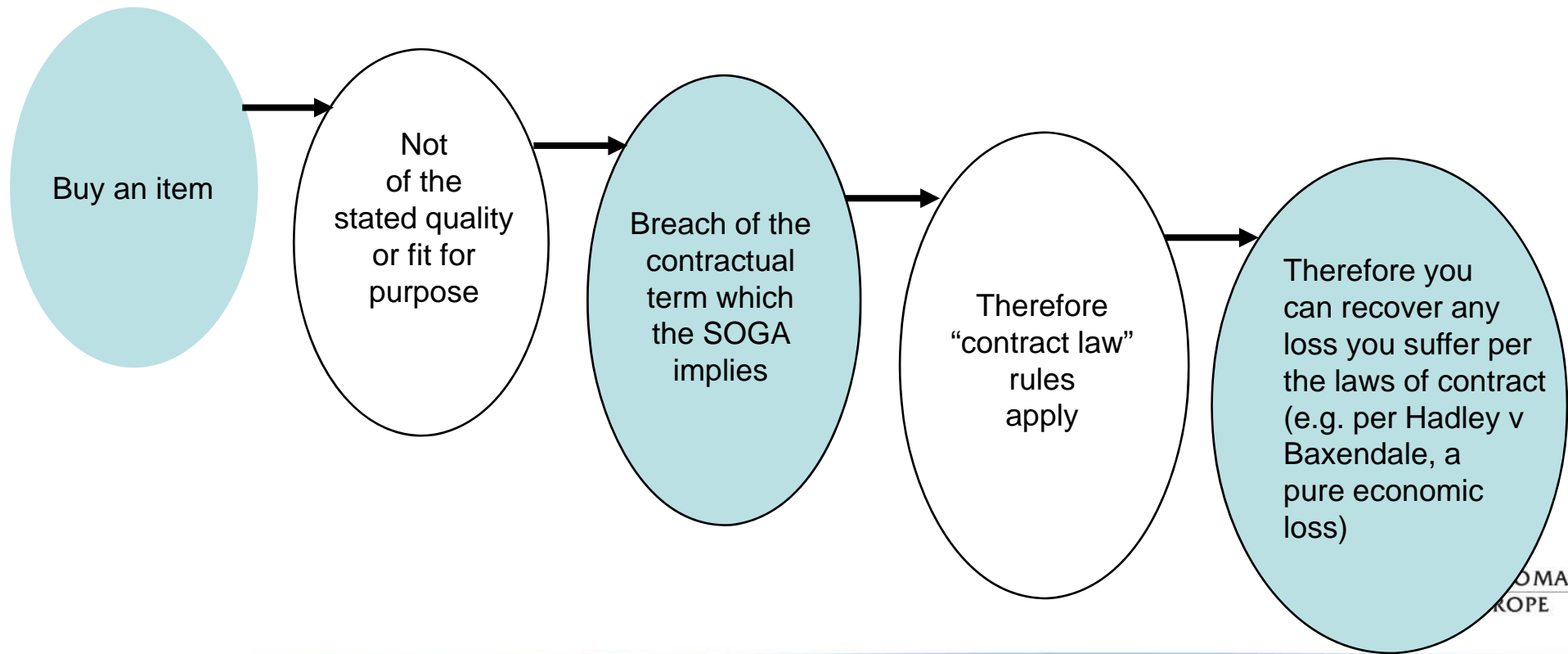
You can claim for the pure economic loss that you incur for something, if:

- it is not of the stated **quality**, or
- because it is not **fit for the purpose** that you want it for.

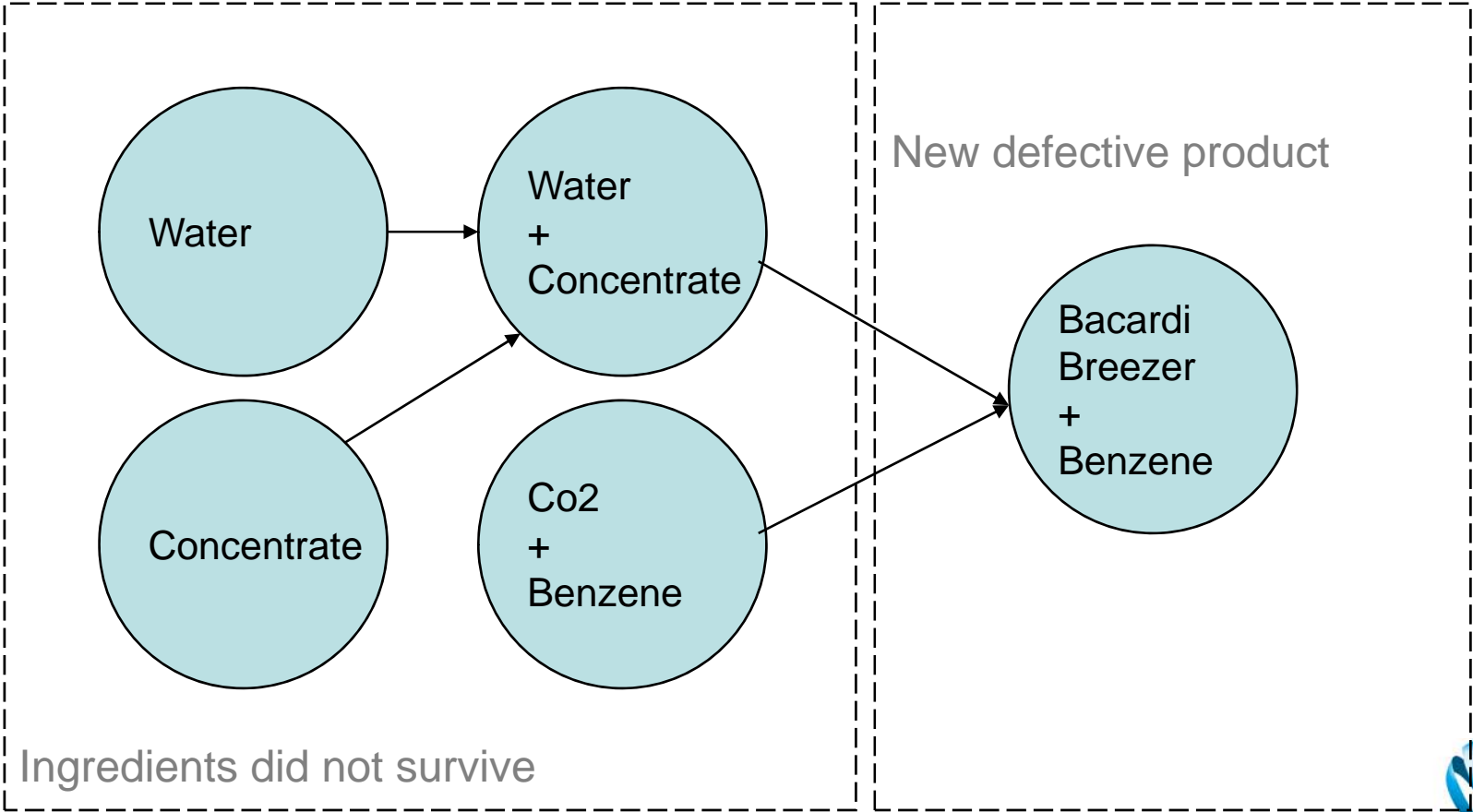
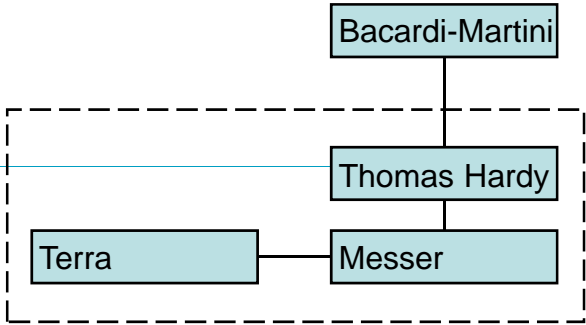
# Contract - Sale of Goods Act 1979

Business to business; and Business to consumer

...why?



# Products - Bacardi



TOKIOMARINE  
EUROPE

## Products – Bacardi

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Useless – or defective – but not damaged

“a worthless end product that had been defective from the moment of its creation”

(There was no end product that was damaged. Until the ingredients came together, the product did not exist. From the moment of its creation, the product was defective)

## Products

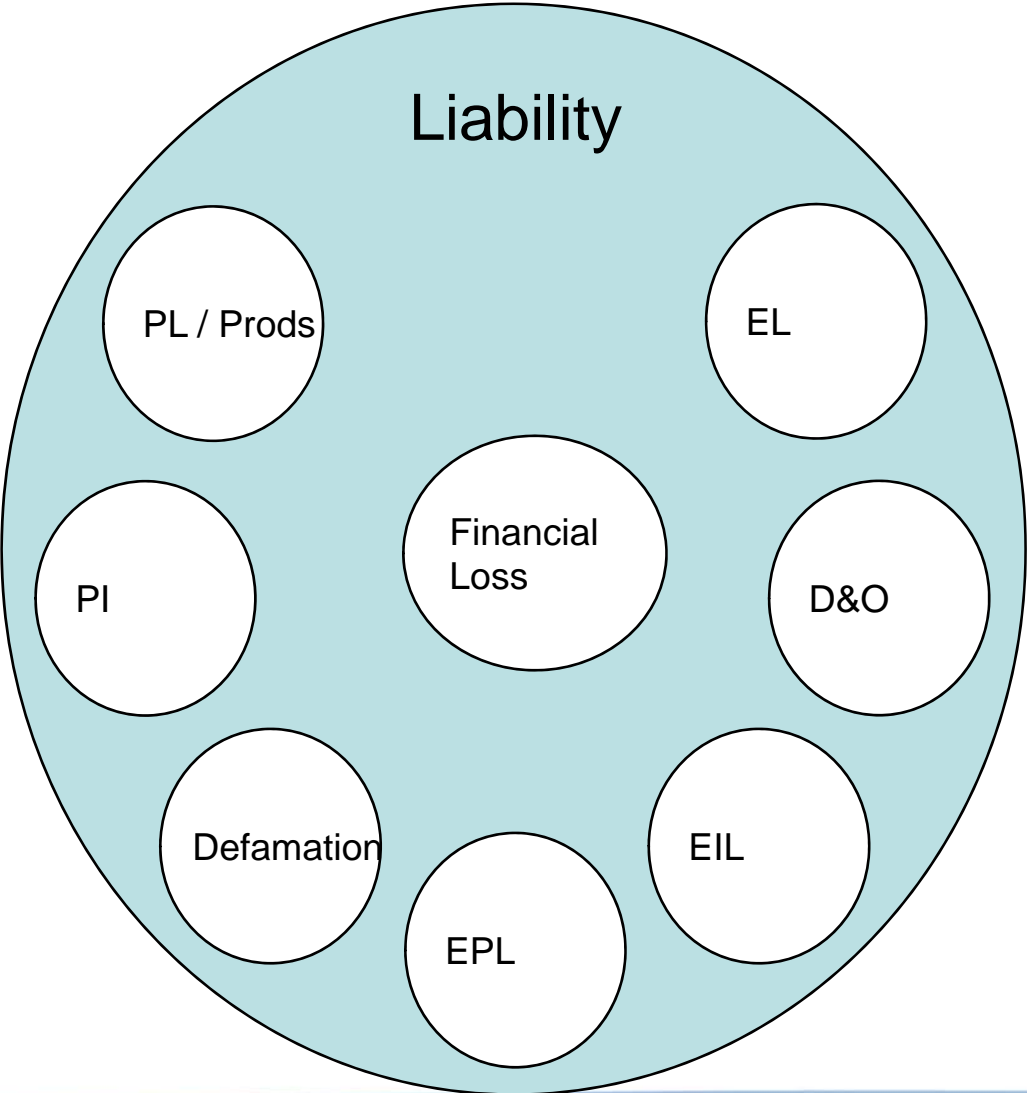
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Liability...

- In respect of
- Arising out of
- On account of

...injury or damage to property

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





## Contractual liability exclusions within a Financial Loss extension

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### **From total**

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

### **Through to 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

## Summary

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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

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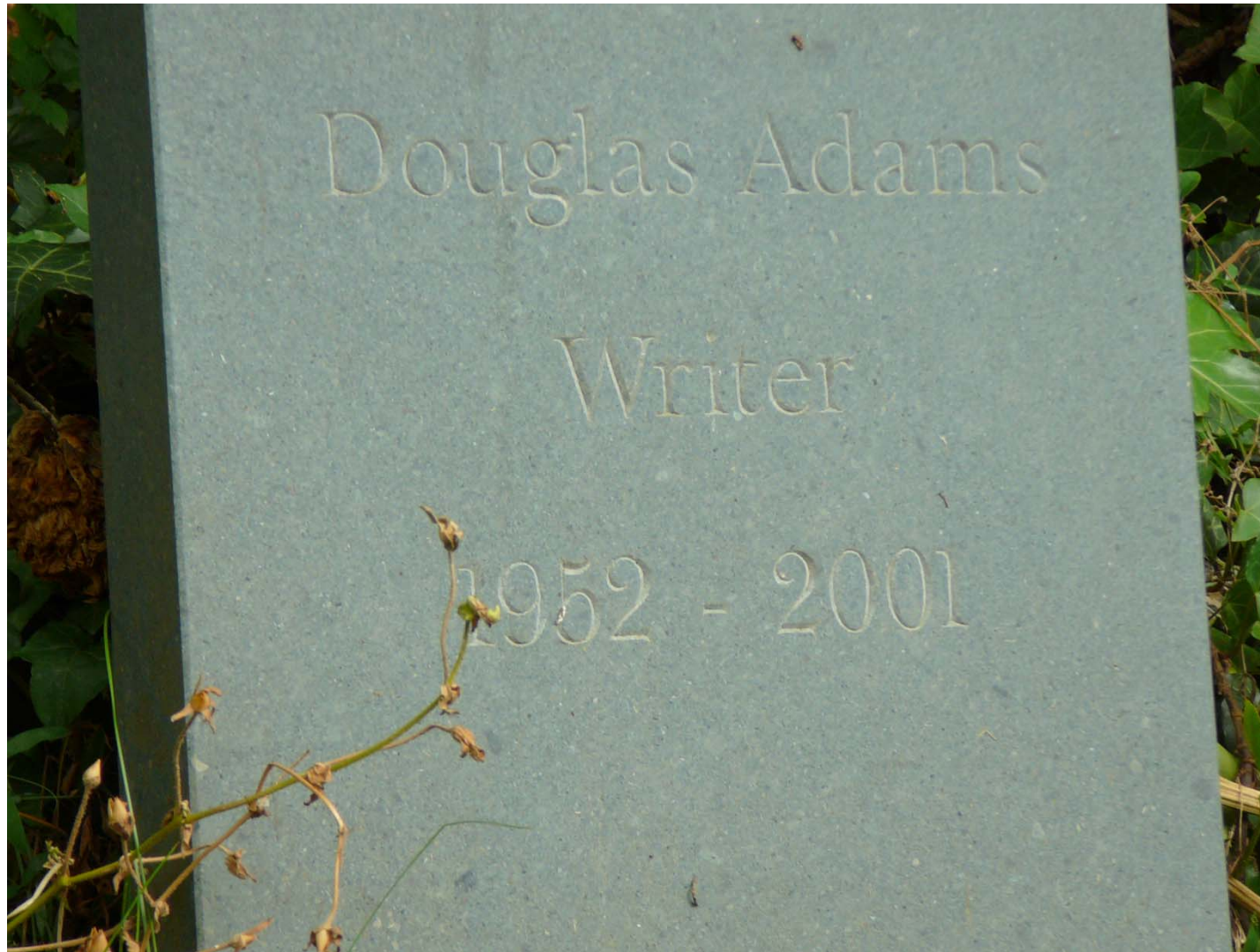
Generally stable

- **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

## Sir Roger Toulson (preface)

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- 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 etc
- the law about the recovery of such losses, in contract or in tort, can be tricky and confusing, as the examples in the report show. **Not all decisions of the courts can be easily reconciled**
- **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**



The Great Question, the Ultimate Question of Life,  
the Universe and Everything

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- “So once you know what the question actually is, you’ll know what the answer means.”
  - “What do you want it to cover?”

## Presentation

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“Financial Loss – revisited” presentation

Liability conference, Cambridge

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## Additional information

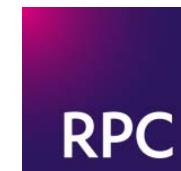
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