UNDERSTANDING TORT LAW'S DISTINCT TREATMENT OF PURE ECONOMIC LOSS

by

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Abstract

The distinct treatment that the law reserves for pure economic loss emerges from the law's requirement, as revealed in the origins and historical evolution of the common law duty of care, that claimants under the law of torts demonstrate injury to a right, grounded in a proprietary interest. Thus principles indigenous to the law of torts afford jurists a means of understanding and governing recovery for pure economic loss; they engage dual proprietary justifications which offer principled justifications for recovery where the plaintiff has suffered injury to a "direct" (that is, corporeal or tangible) proprietary interest or, by reason of having reasonably and detrimentally relied on another's undertaking or assumption of responsibility, an "indirect" proprietary interest attaching to another's autonomy. The mutual coherence and unifying conception of tort liability of these dual abstract concepts becomes apparent in their concrete application to generalized classes of pure economic loss cases.

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I. INTRODUCTION

Pure economic loss,[1] taken as economic loss that is unaccompanied by physical damage to person or property, is "of daily occurrence",[2] and has consequently been a common subject of judicial consideration in litigation arising from circumstances as various as competition in trade and commerce, deficient construction, negligently-drafted wills or consumer boycotts. Despite this pervasiveness, common law jurists have struggled in grappling with its legal significance, with the result that juristic expression in this area of law has lurched among inconsistent and contradictory decisions, and shifted between allowing and disallowing recovery of its various forms. Thus while some commentators refer to an "exclusionary" or "bright line" rule to which courts might refer in dismissing claims for pure economic loss,[3] as early as 1973 the majority of the Supreme Court of Canada boldly stated that "where liability is based on negligence the recovery is not limited to physical damage but also extends to economic loss."[4]

In fact, both views reflect a misunderstanding of the law, which neither excludes nor allows, as an invariable rule, recovery for negligently-caused pure economic loss. Rather, and as I will demonstrate in this thesis, the distinct treatment which the law reserves for pure economic loss emerges from the law's requirement of economic loss claimants which, paradoxically, is precisely what it also requires of claimants who allege

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[1] The term "pure economic loss" is a term commonly used to distinguish the subject loss from economic loss that is consequent upon physical injury to person or property, which distinction I will address in Chapters 2 and 3.
[2] *Rogers v. Rajendro Dutt* (1860), 19 E.R. 469, 8 Moo. Ind. App. 103, 3 Moo. 208 at 241 (P.C.).
[3] Jane Stapleton, "Duty of Care and Economic Loss: A Wider Agenda" (1991) 107 Law Q. Rev. 249 at 258 [Stapleton, "A Wider Agenda"]; J.A. Smillie, in "Negligence and Economic Loss" (1982) 32 U.T.L.J. 231 at 232 [Smillie, "Negligence and Economic Loss"].
[4] *Rivtow Marine Ltd. v. Washington Iron Works*, [1974] S.C.R. 1189, [1973] 6 W.W.R. 692, 40 D.L.R. (3d) 530 at 546 [*Rivtow* cited to D.L.R.].

physical damage to person or property: that they prove injury to a proprietary interest. The substance of that requirement, and its application to pure economic loss, then, will be the focus, generally stated, of my thesis. More specifically, in considering whether legal principles indigenous to the law of torts afford jurists a means of governing recovery for pure economic loss, I will inform the law's distinct treatment of pure economic loss by analysing the origins and historical evolution of the common law duty of care. In this way, I will identify dual proprietary justifications for that treatment, thereby articulating a principled case for recovery where the plaintiff has suffered injury to a "direct" proprietary interest or, by reason of having reasonably and detrimentally relied on another's undertaking or assumption of responsibility, an "indirect" proprietary interest.

These concepts established, I will demonstrate their coherence by moving from their abstract operation as justifications for recovery based on proprietary interests to two forms of economic loss. First, in order to contrast the understanding of the tort law duty of care which I enunciate with the current judicial orthodoxy of employing "proximity" as a duty determinant, and also to illustrate the operation of the law's protective force where direct proprietary interests are at stake, I will address the loss consequent on injury to a third party's property, also called "relational economic loss."[5] Secondly, and in order to consider the limits of the conception of the duty of care in respect of the "indirect" conception of a proprietary interest, I will address the loss arising from defective products or building structures. In the course of these two analyses, I will apply the principles discerned from my inquiry into the historical common law and theoretical

[5] "Relational economic loss" is a term used to describe economic loss that has resulted from physical damage to the person or property of a third party.

justification for a duty of care generally to claims falling under each category, with reference to the foundational bases of direct proprietary interests and indirect proprietary conceptions of undertaking and reliance. Where neither the direct or indirect proprietary interests are engaged, I will argue that legal principles mandate non-recovery in the law of torts.

"Relational economic loss" and "defective products or building structures" are two of five categories which were first articulated by Professor Bruce Feldthusen,[6] the influence of whose contributions to academic commentary on this area of the law is pervasive in Canada and other Commonwealth jurisdictions, notably Australia. While, in this thesis, I use his categories as helpful organizational and analytical reference points to consider difference cases of pure economic loss, I should not be taken as supporting categorization as a norm that confines the law to unique and category-specific parameters. The fundamental justification for the distinct treatment which the law accords pure economic loss is universal, not categorical. Moreover, the practical utility of categorization as a determinant of recovery has been undermined by the Supreme Court of Canada's recent statement that neither the categories of pure economic loss nor the three broad exceptions to the otherwise unrecoverable category of relational economic loss are closed.[7]

Given the current dominant influence of Professor Feldthusen's categorization of pure economic loss cases, however, any commentator venturing into this area must at least

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[6] Bruce Feldthusen, "Economic Loss in the Supreme Court of Canada": Yesterday and Tomorrow" (1991), 17 C.B.L.J. 356 [Feldthusen, "Economic Loss in the Supreme Court of Canada"]. The other three categories are negligent misrepresentation, negligent performance of a service and a public authority's failure to confer an economic benefit.

[7] *Martel Building Ltd. v. Canada*, [2000] 2 S.C.R. 860, 193 D.L.R. (4th) 1.

address and justify the exclusion of any categories from his or her analysis specifically, and his or her failure to adhere to categorization generally. I accordingly do so here. Hence while I do not specifically dedicate a delineated portion of my thesis to Professor Feldthusen's category of negligent misrepresentation, I canvass it as an exemplar of recoverable pure economic loss in the course of my analysis, in Chapter 1, of the duty of care and its application to pure economic loss. Its recoverability or non-recoverability, then, is amply demonstrated through the concepts introduced and explicated in that analysis. Similarly, while I do not specifically assign cases of negligent performance of a service a subtitular place in my thesis, their place within the law's distinct treatment of pure economic loss is also determinable through principles I identify in this thesis and, moreover, is specifically addressed in Chapter 3's analysis of defective products and building structures, a category which affords obvious potential for overlap with cases of negligent performance of a service. Consistent, however, with my view that categorization is organizationally and analytically helpful but doctrinally unnecessary, I do not consider it separately. The last category, grouping cases where a public authority has failed to confer an economic benefit, involves considerations that are entirely distinct from all other areas of pure economic loss, including the high degree of regulation by statutory bodies, the wide range of "policy decisions" that are left to their discretion, and the factor of public safety (which is typically invoked in the building inspection cases). In addition, most of these issues are not unique to pure economic loss cases, and will just as often arise in physical damage to property cases. This point relates to my final reason for not considering this category, which is that if a common law duty is derived from a statute that is specifically concerned with economic harm or benefit, the juristic response

is or ought to be fundamentally different as there would be no basis to distinguish the claim because it constitutes pure economic loss. Finally, and with respect to Professor Feldthusen's categories generally, I observe that they do not (and do not purport to) cover all types of pure economic loss such as, for example, competition, trade union activity and true or privileged defamation. The potential scope of this subject is vast and this thesis, while enunciating fundamentals that are universally applicable in the law of torts, like Professor Feldthusen's treatment, cannot be, and is not intended to be, comprehensive in its recital and consideration of the various specific fact situations.

Approaching the subject as I do, and in demonstrating that pure economic loss is recoverable in the law of torts only in cases where the defendant has interfered with either a direct or an indirect proprietary interest of the plaintiff, I seek to contribute to our understanding of the law's distinct treatment of pure economic loss in three respects: in the first chapter, I will rationalize those dual interests such that they form a mutually coherent and unified conception of the duty of care, applied to claims for damages arising from pure economic loss; secondly, I will demonstrate how the classes of recoverable "exceptions" of relational economic loss can be justified by reference to direct proprietary conceptions; and, thirdly, I will attempt to demonstrate how the indirect proprietary conceptions of undertaking and reliance extend beyond the conventional confines of negligent misrepresentation and negligent provision of a service, to explain and justify recovery in the field of products liability and negligent construction.

II. DUTY OF CARE: THE BASIS FOR THE LAW'S DISTINCT TREATMENT OF PURE ECONOMIC LOSS[8]

> The law takes no cognizance of carelessness in the abstract. It concerns itself with carelessness only where there is a duty to take care and where failure in that duty has caused damage.[9]

This statement, made by Lord MacMillan in his concurring speech in the seminal House of Lords pronouncement in *Donoghue v. Stevenson*, emphasizes the significance which the law of torts has historically ascribed exclusively to obligations which, where the law gives them recognition and effect, are owed to others and ought to be discharged. As a consequence, such duty-imbedded obligations are normative prescriptions for conduct by which the law regulates those subject to its jurisdiction. Where such a subject, through inadvertence, fails to conform to the yardstick of the duty of care and causes damage to another who was entitled to liberty from the subject's interference and thus to whom the duty of care was owed, the law may apply sanctions prescribed to support the duty of care and to restore, or make whole, the damaged party. Where, however, an injury is caused in the absence of a duty of care, as Lord MacMillan pithily stated, the law "takes no cognizance." The duty of care, then, is the foundational basis of liability in the law of torts; damage resulting from the breach of a duty of care engages the causal chain leading to liability, while damage in the absence of a duty of care does not.

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[8] Much of the analysis in this chapter is a restatement of the arguments I make in my essay, "Still Crazy after all these Years: *Anns*, *Cooper v. Hobart* and Pure Economic Loss" U.B.C. L. Rev. [forthcoming in 2003].

[9] *Donoghue v. Stevenson*, [1932] All E.R. 1, [1932] A.C. 562 at 618 (H.L.) [*Donoghue v. Stevenson* cited to A.C.].

Not surprisingly, then, given the duty of care's fundamentality to the law of torts, it has been the subject of much juristic consideration and debate and, consequently, judicial formulation and reformulation, varying with the myriad of different circumstances in which a finding of a duty of care might be urged upon a court. Since *Donoghue v. Stevenson*, and especially in the past 30 to 35 years, courts in various Commonwealth jurisdictions have attempted to incorporate within the duty analysis diverse concepts such as economics, philosophy, sociology and politics, some operating independently, others operating cumulatively and in combination with each other, in a search for what has been termed "practical justice."[10] In particular, much recent duty analysis has been characterized by the judicial invocation of proximity, tempered by considerations of public policy. While the latter consideration is not an entirely novel concept in the law of torts,[11] a discernible consistency in judicial expression emerged with *Home Office v. Dorset Yacht Co. Ltd.*[12] where Lord Reid, referring to *Donoghue v. Stevenson*'s neighbour principle, said:

> ... I think that the time has come when we can and should say that it ought to apply unless there is some justification or valid explanation for its exclusion ... where negligence is involved the tendency has been to apply principles analogous to those stated by Lord Atkin ... .[13]

Thus the duty of care began to be conceptualized in terms of "an ocean of liability for carelessly causing harm, dotted with islands of non-liability",[14] the "islands" being

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[10] *Williams v. Natural Life Ltd.*, [1998] 2 All E.R. 577, [1998] 1 W.L.R. 830 at 837 (H.L.) [*Williams* cited to W.L.R.].

[11] Purely public policy considerations historically underlay, for example, the liability of a pregnant woman in the law of torts for injury to her unborn child, and the defence of qualified privilege for the tort of defamation.

[12] [1970] A.C. 1004, [1970] 2 All E.R. 297 (H.L.) [*Dorset Yacht* cited to All E.R.].

[13] *Ibid.* at 297.

[14] D.J. Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford, 1999) at 165-66 [Ibbetson].

grounded in public policy. Lord Wilberforce consolidated this process seven years later in *Anns v. Merton Borough Council*,[15] prescribing a two-stage test for the determination of whether a duty of care arises in given circumstances, comprising proximity (giving rise to a *prima facie* duty of care) and public policy (which may operate to "negative", reduce or limit the scope of the duty of care). This *prima facie* duty test is still applied in Canada, although, as I will observe later in this chapter, there are signs of judicial unease with *Anns* and the current judicial orthodoxy governing the formulation of the duty of care; in 2001, and for the first time, the Supreme Court of Canada, having adopted the *Anns* test,[16] then having reaffirmed it,[17] sought in *Cooper v. Hobart* [18] and its companion case *Edwards v. Law Society of Upper Canada* [19] to "highlight and hone the role of policy concerns in determining the scope of liability for negligence" and thus ensure that the two-stage test for establishing a duty of care propagated by the House of Lords in *Anns* is "properly understood."

In this first chapter I will seek, overall, to grasp the elusive essence of the duty of care, both generally and with specific regard to pure economic loss. In doing so, I will also posit dual justifications for the duty of care in the law of torts, both of which rely on the defendant's demonstrated interference with the plaintiff's proprietary interest. That is, I will establish two conceptions of the plaintiff's necessary interest which engages the

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[15] [1978] A.C. 728, [1977] 2 All E.R. 492 (H.L.) [*Anns* cited to All E.R.].
[16] *Kamloops v. Nielsen*, [1984] 2 S.C.R. 2, 10 D.L.R. (4th) 641.
[17] *Canadian National Railway v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, 11 C.C.L.T. (2d) 1, 91 D.L.R. (4th) 289 [*Norsk* cited to D.L.R.].
[18] (2001), 206 D.L.R. (4th) 193, [2002] 1 W.W.R. 221, 2001 SCC 79 [*Cooper* cited to D.L.R.]. For criticisms of *Cooper* and its companion case of *Edwards*, see, Lewis Klar, "Foreseeability, Proximity and Policy" (2002) 25 Advocates' Q. 360, and Bruce Feldthusen, "The *Anns/Cooper* Approach to Duty of Care for Pure Economic Loss: The Emperor has no Clothes" (Paper presented to a conference of the National Judicial Institute, May 2002) [unpublished].
[19] (2001), 206 D.L.R. (4th) 211, 56 O.R. (3d) 456 (S.C.C.) [*Edwards* cited to D.L.R.].

defendant's obligation to take care not to injure or otherwise interfere with such interests. Thus pure economic loss will be shown to be recoverable in the law of torts in cases where, first, the defendant has interfered *directly*, that is by injuring, a proprietary interest of the plaintiff or, secondly, where the defendant has engaged in an *indirect* proprietary interference, arising from his or her having made an undertaking (or otherwise assumed responsibility for his or her conduct), upon which the plaintiff has relied. Given, however, the current predominance in Canada of *Anns* and its test for determining whether a duty of care arises, this inquiry at the outset will necessarily consider the *prima facie* duty of care, as articulated in *Anns* and as recently reformulated by the Supreme Court of Canada, from which I will identify difficulties with which courts have grappled in applying the *prima facie* duty to cases of pure economic loss, and the rationales which have found judicial expression for distinguishing between economic and non-economic loss. In order to pose a more fundamental challenge to the *prima facie* duty of care, I will then discern a principled justification for the law's distinct treatment of pure economic loss drawing from the origins of the conception of a duty of care and from an historical review of its common law evolution, from the nascent expressions of the 18th and early-to-mid 19th century cases, through to more recent and definite expressions consistent with its origins. In this way, I will unite the notions of rights and duties, with the "neighbour principle" of *Donoghue v. Stevenson*, into a single conception of duty of care based on a defendant's undertaking and a plaintiff's reasonable detrimental reliance. As an incident of this inquiry, I will also demonstrate that *Anns* and other conceptions of the *prima facie* duty, including the Supreme Court of Canada's recent "honing", are inconsistent with a principled approach, as reflected in the evolution of the common law, to a duty of care

that can be justified, both on the particular facts of a given case, and as a consistent reflection of that common law development.

a. *Prime Facie* Duty

In *Anns*, Lord Wilberforce prescribed his now-famous two-stage test for the recognition in negligence law of a duty of care:

> Through the trilogy of cases in this House, *Donoghue v. Stevenson, Hedley Byrne & Co Ltd v. Heller & Partners Ltd* and *Home Office v. Dorset Yacht Co Ltd*, the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather, the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise ... .[20]

Two principles can be drawn from this statement. First, in determining whether a duty of care arises, no distinction is to be made between cases of physical damage (whether to person or property) and cases of pure economic loss. "Proximity", howsoever defined, is enough.[21] The second principle is that negligence cases are to be subjected to a two-stage

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[20] *Anns*, *supra* note 15 at 498. While strictly speaking beyond the scope of this thesis, it is intriguing that Lord Wilberforce based his proximity-based test in part on *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*, [1964] A.C. 465, [1963] 2 All E.R. 575 (H.L.) [*Hedley Byrne* cited to All E.R.], implying that recovery there was denied not on the more commonly-understood basis of the absence of an undertaking giving rise to reasonable, detrimental reliance, but on the neighbour principle articulated in *Donoghue v. Stevenson*. I suggest later in this chapter that both bases of liability, that is liability founded on a correlative undertaking and reliance, and on the neighbour principle, are mutually complementary and reinforcing.

[21] I view McLachlin J., as she then was, as having confirmed this in *Norsk*, *supra* note 17 at 364, where she said:

> This court in *Kamloops v. Nielsen*, *supra*, held that the purchaser of a house which the defendant municipality had negligently caused to be constructed could recover his financial loss in the absence of physical damage, affirming the non-exclusionary test of *Anns v. Merton London Borough Council*. It confirmed that

test: the first inquiry, whether a duty of care exists, is made with reference to proximity (arising out of "reasonable contemplation" that failure to take care "may be likely" to cause damage). That stage one inquiry is followed by the stage two inquiry into the existence of policy considerations which negative or reduce or limit the scope of the duty. Since *Anns*, the Supreme Court of Canada has struggled with these principles and their application to pure economic loss. The reason, I suggest, is that *Anns* has focussed the court's attention on proximity, instead of on the more difficult exercise of justifying a duty of care by reference to principles drawn from recognized protected interests and corresponding obligations. As will become apparent in this chapter, this becomes important in pure economic loss cases which are fundamentally different from physical damage insofar as, in most circumstances, they do not arise from injury to an interest to which the law extends protection.[22]

To understand this point, it is crucial to appreciate the role of proximity in establishing a common law cause of action for negligence. The first step in determining liability is to ask whether the law imposes a duty of care. Any theory of tort law absolutely requires,

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claims for economic loss in negligence are not confined to cases where the plaintiff has suffered physical damage or where there has been reliance.

[22] In differentiating between economic loss and physical damage, I am agreeing with Bruce Feldthusen, but I disagree with his reasoning. He argues that economic losses are not social losses but rather wealth transfers. See Bruce Feldthusen, *Economic Negligence: The Recovery of Pure Economic Loss*, 4th ed. (Toronto: Carswell, 2000) [Feldthusen, *Economic Negligence*], and Bruce Feldthusen, "Liability for Pure Economic Loss: Yes, but Why?" (1999) 28 U.W.A.L. Rev. 84 at 86 [Feldthusen, "Liability for Pure Economic Loss"]. My point is that, social loss or not, economic loss, in most circumstances, does not result from damage to an interest protected by law. As to whether economic loss is a true social loss, for an economic analysis in support of Feldthusen's argument, see W. Bishop, "Economic Loss in Tort" (1982) 2 Oxford J. Legal Stud. 1. Bishop bases his thesis, however, on a dubious assumption of excess capacity which is criticized in Mario J. Rizzo, "A Theory of Economic Loss in the Law of Torts" (1982) 11 J. Legal Stud. 281.

as a condition for an award of damages, "a breach of *a legal duty* owed to a plaintiff."[23] Hence, for example, the direction Lord MacMillan set out in his above-cited speech in *Donoghue v. Stevenson*.[24] There, both Lord Atkin and Lord MacMillan were careful to ground their duty of care in precedent and principles from which a legally protected interest could be recognized in "life or property"[25] (as Lord Atkin said) or "person and property"[26] (as Lord MacMillan said). Lord Atkin's famous neighbour principle is thus directed not at the existence of a duty of care, as that had already been recognized, but rather to whom the duty of care is owed; his was a statement, as he put it, of "rules of law" which limit not the duty but "the range of complainants and the extent of their remedy." Lord Atkin had already articulated the duty as being to "take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour."[27] (As already noted, the "injury" had to be to the plaintiff's "life or property.") Having recognized that duty (which he later justified at length in his speech), Lord Atkin then turned his mind to the second inquiry which is the standard of care, or content of the duty:

> 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 into question.[28]

That, he said, required the contemplation, while "directing my mind to the acts or omissions which are called into question", of how the act or omission might affect such "persons who are so closely and directly affected by my act."

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[23] Peter Birks, "The Concept of a Civil Wrong" in David Owen, *Philosophical Foundations of Tort Law* (Oxford, 1995) 31 at 33 (emphasis added) [Birks, "Civil Wrong"].
[24] *Donoghue v. Stevenson*, *supra* note 9 at 618.
[25] *Ibid.* at 599.
[26] *Ibid.* at 614.
[27] *Ibid.* at 580.
[28] *Ibid.* at 580.

The imposition of liability, therefore, involves two distinct initial inquiries: first, whether the law imposes a duty, and then what the duty entails. It is only the latter inquiry that invokes considerations of proximity – in other words, if there is a duty of care, proximity governs the scope of those to whom it is owed. The existence of a foreseeable risk of harm outside of legally recognized protected interests is irrelevant to the question of whether the law will impose a duty of care.[29]

The essential problem with *Anns* is that it skips the first step and proceeds to the second, thereby circumventing the judicial inquiry into the foundational legal issue of the existence of a duty in favour of an inquiry into the standard of care issue of proximity. If, in conformance with the principle in *Anns* that we are to make no distinction between claims for economic loss and claims for non-economic loss, we apply this methodology to pure economic loss, difficulties arise by reason of the nature of our liberal economic system. Economic interests are, in a system of a competitive market economy, inherently vulnerable to foreseeable injury.[30] Such damage might be an unintended but inevitable incident of competition – for example, the introduction by a retailer of new particular

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[29] "Proximity" and "foreseeability" are often (incorrectly) used interchangeably. Foreseeability, both as to the plaintiff and the harm, is a factor, albeit an important one, in determining proximity. It is not, however, determinative. For example, all users of a bridge may be "foreseeable", but not necessarily "proximate." I agree on this point, and also on the distinction between duty and proximity, articulated by J.C. Smith in "Economic Loss and the Common Law Marriage of Contracts and Torts" (1984) 18 U.B.C. L. Rev. 95 [Smith, "Economic Loss"]. It can be argued that Lord Wilberforce equated proximity and foreseeability in his articulation of the first stage of his two-stage test in *Anns*; in defining proximity as "the reasonable contemplation" by a tortfeasor that "carelessness on his part may be likely to cause damage to (the plaintiff)", he requires nothing more than mere foreseeability. Under the *Cooper v. Hobart* and *Edwards v. Law Society of Upper Canada* analysis, discussed later in this chapter, proximity determination is expressed as a function of foreseeability and questions of policy that arise from the relationship between the plaintiff and the defendant.

[30] Here I am agreeing with the view of Stephen R. Perry, in "Protected Interests and Undertakings in the Law of Negligence" (1992) 42 U.T.L.J. 247 at 264 [Perry, "Protected Interests"].

product line may draw customers from its competitor. As Lord Diplock noted in *Dorset Yacht*, one "may cause loss to a tradesman by withdrawing one's custom although the goods which he supplies are entirely satisfactory ... ."[31] It might, however, be intentionally inflicted, whether indirectly (through for example retail price undercutting to drive out competition) or directly (such as through labour disruption or boycotts). Lord Reid's speech in *Dorset Yacht* alludes to this:

> ... causing economic loss is a different matter; for one thing it is often caused by deliberate action. Competition involves traders being entitled to damage their rivals' interests by promoting their own ... ."[32]

It is, of course, not universally true that the law refrains from proscribing the intentional infliction of pure economic loss. Causes of action exist for certain intentional acts causing pure economic loss, such as deceit, fraud and intentional interference with contractual relations. As McHugh J. of the High Court of Australia said in *Hill v. Van Erp*,[33] these are narrow exceptions to the rule of non-liability:

> Anglo-Australian law has never accepted the proposition that a person owes a duty of care to another person merely because the first person knows that his or her careless act may cause economic loss to the other person. Social and commercial life would be very different if it did. Indeed, leaving aside the intentional tort cases of wrongful interference with a person's legal rights (including breach of contract, intimidation and conspiracy, for example) a person will generally owe no duty to prevent economic loss to another person even though the first person intends to cause economic loss to another person. In our free enterprise society, no one questions the right of the trader to increase its advertising or cut its prices even though that action is done with the intention of taking the market share of its rivals.[34]

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[31] *Dorset Yacht*, *supra* note 12 at 326.
[32] *Ibid.* at 297. Curiously, this excerpt is found in the very passage on which Lord Wilberforce relied in articulating the *prima facie* duty of care in *Anns*, which, as already noted, eschews distinctions between economic and non-economic loss.
[33] (1997), 71 A.L.J.R. 487, 142 A.L.R. 687 (H.C.A.) [*Hill v. Van Erp* cited to A.L.R.].
[34] *Ibid.* at 726. McHugh J. echoed these comments two years later in *Perre v. Apand* (1999), 73 A.L.J.R. 1190, 164 A.L.R. 606 (H.C.A.) [*Perre* cited to A.L.R.], describing "competitive acts" as "legitimate unless they come within the ambit of one of the economic torts ... Ordinary competitive conduct imposes no duty to protect others from economic loss."

Intentional economic torts (and breach of contract) aside, what remain are acts committed in furtherance of competition that intentionally and directly, or inadvertently and indirectly, cause pure economic loss. That understood, it can be fairly said that a general protection against negligently caused pure economic loss gives rise to an inherent inconsistency in an economic system characterized by unpunished intentionally caused pure economic loss.[35]

A related and oft-cited concern arising from our competitive market economy is the potentially wide scope of indirect economic repercussions of negligence. The underlying assumption is that the physical consequences of negligence have usually (but not always) been more limited.[36] There are, of course, exceptions – the (perhaps apocryphal) origins of the Great Fire of Chicago (in a clumsy cow kept in Mrs. Murphy's stable) being an obvious one. Generally, however, it seems fair to state that some forms of pure economic loss are far-reaching, and carry consequences that, while broad in scope, are nonetheless "proximate" in the sense that Lord Wilberforce expressed the term. Given the potential for infliction of foreseeable damage on a vast scale upon the economic interests of countless others, commerce and, indeed, common social interaction would be

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[35] See *Kripps v.Touche Ross & Co.*, *infra* note 143, where Taylor J.A. said: "...such an objective would make no sense in the field of pure economic loss simpliciter, a field in which most foreseeable loss is caused, not accidentally but deliberately, in the pursuit of self-serving economic objectives on which the "free market" system is founded." Taylor J.A. approached the issue from a different but interesting perspective in *Kamahap Enterprises Ltd. v. Chu's Central Market Ltd.*, *infra* note 139, where, instead of highlighting the inconsistency to justify a rule excluding liability for economic loss, he sought to limit that exclusionary rule: "(T)o exempt business activity from a general rule imposing a duty of care in the economic field would ... excuse deliberate infliction of economic loss while imposing liability when such loss is caused by accident, and without selfish motive."

[36] Fleming James, "Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal" (1972) 25 Vand. L. Rev. 43 [James, "A Pragmatic Appraisal"]. James calls the indeterminate range of economic consequences of negligence a "pragmatic objection" to liability for economic loss which justifies non-recovery in cases where the plaintiff was not proximate (although James uses the term "foreseeable") and to allow for recovery where the plaintiff is proximate.

prohibitively expensive or, for the risk-averse, impossible if liability for pure economic loss were to be based solely on foreseeability of the associated risk.

The potential for indeterminate liability has been a dominant judicial concern in recent years and, in view of the *prima facie* duty of care prescribed in *Anns*, has been expressly cited as a policy consideration negativing liability under the second branch of Lord Wilberforce's two-branch test.[37] This concern, however, has also given rise to awkward attempts to discern helpful criteria for proximity or "cut-off points"[38] for recovery in pure economic loss cases (although some of these pre-date *Anns*). Thus the Australian High Court restricted recovery, in *Caltex Oil (Australia) Pty. Ltd. v. Dredge "Willemstad"*,[39] to cases where "the defendant has knowledge or means of knowledge that the plaintiff individually, and not just as a member of an unascertained class, will be likely to suffer (the) loss as a consequence of his negligence."[40] This was recently affirmed by the same court in *Perre v. Apand Pty Ltd.*, which added to the *Caltex* criteria a "particular vulnerability" on the part of the plaintiffs.[41] One American decision held that a successful plaintiff must show that he or she fell within a foreseeable and "identifiable" class.[42] An earlier Canadian case held that recovery for pure economic loss should be allowed to compensate for actually incurred costs, but not for lost prospective earnings.[43]

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[37] See, for example, *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210, 153 D.L.R. (4th) 385 [*Bow Valley* cited to D.L.R.], and the dissenting judgment of La Forest J. in *Norsk*, *supra* note 17. The facts of *Bow Valley* are recited *infra* note 46.
[38] Perry, "Protected Interests", *supra* note 30, at 266.
[39] (1976), 136 C.L.R. 529, 11 A.L.R. 227 (H.C.A.) [*Caltex* cited to A.L.R.].
[40] *Ibid.* at 245. The facts of *Caltex* are recited at *infra* note 196 and following.
[41] *Perre*, *supra* note 34. I summarize the individual judges' conclusions on this point *infra* note 227.
[42] *People Express Airlines Inc. v. Consolidated Rail Corporation*, 495 A.2d 107 (N.J. Sup. Ct. 1985) [*People Express*].
[43] *Dominion Tape of Can. Ltd. v. L.R. McDonald & Sons Ltd.* (1971), 34 O.R. (2d) 129, 18 C.C.L.T. 97, 21 D.L.R. (3d) 299 (Co. Ct.) [*Dominion Tape* cited to D.L.R.].

Other cases have suggested that recovery should be allowed for pure economic loss where it was accompanied by an (unrealized) risk of physical harm.[44] After struggling with the specific factors to be taken in discerning proximity on a case-by-case basis in *Canadian National Railway v. Norsk Pacific Steamship Co.*,[45] McLachlin J. (as she then was) later eschewed that approach to seek greater certainty, recognizing in *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*[46] recoverability of what has become known as "relational economic loss"[47] in limited, defined circumstances.

These various attempts to establish "cut-off points" can be criticized principally on two interrelated grounds. Stephen Perry argues that the line between what is recoverable and what is not has not been justified in principled terms, but has been accomplished arbitrarily, with no underlying rationale other than to develop some means of avoiding indeterminate liability.[48] The point can be taken further, however; the absence of a

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[44] *Attorney General for Ontario v. Fatehi* (1981), 127 D.L.R. (3d) 603 (Ont. C.A.), rev'd [1984] 2 S.C.R. 536, 31 C.C.L.T. 1, 15 D.L.R. (4th) 132 [*Fatehi* cited to D.L.R.]. Where the economic loss was incurred in order to avert the imminent risk of physical harm, a strong argument can be advanced in favour of recovery. See Chapter 2 (under "Recoverable Relational Economic Loss") and Peter Benson, "The Basis for Excluding Liability for Economic Loss in Tort Law", in David Owen, *Philosophical Foundations of Tort Law* (Oxford, 1995) 427 [Benson, "Economic Loss in Tort Law"].

[45] *Anns*, *supra* note 15. The facts of *Norsk* are recited at *infra* note 180 and following.

[46] *Bow Valley*, *supra* note 37. Here, two companies incorporated a third company to take ownership of a drilling rig, for whose construction they had contracted with the defendant shipyard. The parent companies then contracted with the new company to lease the rig to conduct offshore drilling operations. The contract required them to continue to pay day rates to the new company in the event the rig was rendered inoperable. A heat trace system made by the defendant manufacturer was improperly installed by the defendant shipyard, resulting in a fire that rendered the rig unusable for several months, during which time the parent companies were contractually bound to continue paying day rates. They sued, *inter alia*, for recovery of those day rates when the oil rig was damaged by fire. The court rejected the claim and also the case-specific approach of the majority in *Norsk*, in favour of recognizing certain distinct areas of recovery (general averaging, joint ventures, and cases where the plaintiff has a possessory or proprietary interest in the damaged property).

[47] See note 5 for a definition of "relational economic loss." Note that Bruce Feldthusen and Fleming James both say that it can also be consequent upon injury to the economic interest of a third party.

[48] Perry, "Protected Interests", *supra* note 30, at 266.

principled basis for these tests ultimately means that these tests, involving inherently ambiguous terms, ultimately foster only greater uncertainty in practical application.[49]

It is, however, important to keep these issues in perspective. Indeterminate liability, while a source of frequently-expressed judicial concern in most cases of pure economic loss, only assists in explaining the different concerns that arise in cases of pure economic loss as opposed to cases of physical damage, and does not justify the law's distinctive treatment of economic loss. Its presence or absence is not a principled basis for determining whether or not a duty of care exists. It is merely a consideration in assessing the proximity that may exist between a plaintiff and a defendant. Courts, however, when applying the *Anns* test, will inevitably encounter difficulties of indeterminate liability in applying a *prima facie*, proximity-based duty of care to cases of pure economic loss, which can only be resolved by reference to sometimes ambiguous and arbitrary limiting criteria. As I will discuss below, the Supreme Court of Canada, in *Edwards v. Law Society of Upper Canada* and more particularly in *Cooper v. Hobart* sought to rectify this problem.

The same point can, of course, be made about the irony of juxtaposing unpunished intentionally-caused economic harm and tort sanctions against unintentional economic harm; while the observation that economic interests are inevitably subject to interference as an inherent function of a market-based economy is edifying as an intuitive insight, it

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[49] I am in agreement on this point with Bruce Feldthusen. See Feldthusen, *Economic Negligence*, *supra* note 22 at 212.

does not explain why the law distinguishes between economic and non-economic harm. Peter Birks' observation is an instructive first step in the necessary inquiry:

> ... one supermarket may set out to capture the business of another and ruin the latter's owners, but if there is no legal duty not to compete – or not to compete in the chosen mode or with the chosen purpose – there can be no legal wrong. [50]

The starting point, then, is that that the distinction arises because the law does not recognize a duty not to compete. But what is the justification for this failure to protect economic interests by imposing the duty of care not to injure such interests? The judicial trend, especially since *Anns*, has been to assume that the justification for a duty is to be discerned not in any underlying precepts that arise from common law principles and theoretical concepts of responsibility, but rather in policy considerations such as I have already briefly canvassed. Before proceeding to consider the recent Supreme Court of Canada reformulation of the *prima facie* duty in *Cooper v. Hobart* and *Edwards v. Law Society of Upper Canada*, however, we must test that assumption by posing a fundamental question: can the legal distinction between pure economic and non-economic loss be justified by an historical reference to tort law principles, as opposed to policy considerations that constrain the otherwise principled application of tort law?

b. Origins, Evolution and Justification for the Duty

The notion of liability for breach of a duty has been traced to the Aristotelian concept of the plaintiff's "loss" and the defendant's "gain."[51] The plaintiff's loss lies in him or her being materially worse off than before, and also worse off than he or she should be,

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[50] Birks, "Civil Wrong", *supra* note 23 at 37.

[51] This is drawn from the *Nicomachean Ethics*, but is well canvassed by Professor James Gordley in "Tort Law in the Aristotelian Tradition" in David Owen, *Philosophical Foundations of Tort Law* (Oxford, 1995) 131 at 137 [Gordley, "Aristotelian Tradition"].

assuming a normative prescription against injuring others.[52] Conversely, the defendant is seen as having more, to a degree equal to the plaintiff's loss, than he or she ought to have, as a result of having breached the norm against injuring others. Aristotelian liability would thus compel the defendant to surrender the excess over his or her due. While the notion of a loss suffered by the plaintiff is easily understood, the concomitant notion of material gain to the plaintiff derived from injuring others was elusive,[53] until Thomas Aquinas explained that a miscreant's "gain" in inflicting a loss on another is derived from having fulfilled his or her own will by expropriating the other's resources; by choosing to harm the plaintiff, a defendant is seen as having fulfilled his or her will with the plaintiff's resources by using them.[54]

This Aristotelian conception of the basis for a duty applied exclusively to intentional harm. Writing 1,500 years after Aristotle, Thomas Aquinas was influenced by Roman law and mediaeval canon law, both of which recognized liability for negligently caused harm. While conceding that harm caused negligently and harm caused intentionally were distinct in that the former arises from an "accidental intention" and the latter arises from a "direct intention", Aquinas argued that they both occur by reason of a voluntary act on the part of the miscreant and thus both negligent and intentional liability should attract liability. Thus in extending the Aristotelian justification to negligent conduct, Aquinas

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[52] See Ernest J. Weinrib, "The Gains and Losses of Corrective Justice" (1995) 44 Duke L.J. 277 at 282-83.
[53] Indeed, Aristotle's reference to gain and loss still puzzle sympathetic scholars. For example, Stephen R. Perry, in "The Moral Foundations of Tort Law" (1992) 77 Iowa L. Rev. 449 at 457, says that Aristotle's concept "does not seem to apply where the gainer's gain is not equal to the loser's loss." In this chapter, I am not espousing the Aristotelian concept of loss and gain as anything more than an historical origin of the notion of duty of care in the law of torts. For a response to Perry, however, see *Ibid.*
[54] Gordley, "Aristotelian Tradition", *supra* note 51 at 138.

did so by invoking the Aristotelian theory of voluntary action,[55] by which one is understood to be rational, capable of understanding and assessing one's potential courses of action, and of choosing among them. The basis for liability for negligence, then, is that the defendant has chosen an action that is wrong because harm may occur. Thus was a defendant's duty, understood (but not necessarily expressed) as one of "care."

These concepts of "loss" and "gain" are fundamental to tort law, and are typically cited as correlative elements of injustice.[56] The point I am emphasizing, however, is more specific, and less normative than descriptive: the defendant's liability is seen as flowing from his or her *use* of the *plaintiff's resources*. In the Aquinean tradition, the defendant's use of the plaintiff's resource is central to the defendant's liability; it represents the nature of the interest that has been injured, and requires that we take account of that nature in determining whether, and to what extent, that specific interest ought to be protected by the law. Take for example the specific illustration which Aquinas employed, which was an intentional battery: a person "striking or killing" is seen as having fulfilled his will by harming another's resources for his or her own end.[57] The plaintiff's physical integrity, therefore, is a resource which the plaintiff owns, and in respect of which the plaintiff can, as an incident of ownership, assert a right of *use*,

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[55] *Ibid.* at 141.

[56] See Ernest J. Weinrib, "The Jurisprudence of Legal Formalism" (1993) 16:3 Harv. J.L. & Pub. Pol'y 128. This notion also finds expression in the common law. See, for example, the reasons of Lush J. in *Seale v. Perry*, [1982] V.R. 193 at 200 (S.C.), where he said:

> A duty, however, cannot exist by itself. To the duty seen as imposed on the defendant, there must be a correlative right in the plaintiff: for either to exist, both must be capable of being identified.

[57] Gordley, "Aristotelian Tradition", *supra* note 51 at 138.

exclusive to the plaintiff, as against the defendant.[58] Where the defendant "gains" – that is, interferes, even if only negligently, with the plaintiff's exclusive right to use that resource by expropriating it to his or her own use, the plaintiff's loss is compensable. In that sense, physical integrity assumes a proprietary aspect; as a "resource", it represents an asset which the law will protect.

The proprietary quality of the resource is a critical point. At common law, a person can only assert an exclusive claim to use of something if he or she has a proprietary right in it that is superior to any entitlement that another can assert.[59] It is that proprietary right that Aquinas theorized was being asserted against the defendant in the instance of battery. The defendant, fulfilling his or her own will, seeks to use something in which the plaintiff has, as against the defendant, an exclusive right of use. The legal protection of the plaintiff's exclusive proprietary right of use also logically extended to realty and personalty. Here again, the plaintiff's superior proprietary interest in his or her realty or personalty is protected by law, and thus the defendant who expropriates it to his or her own use is liable to compensate the plaintiff.[60]

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[58] Courts continue to ascribe innovative proprietary notions to physical integrity. For example, courts in British Columbia, in personal injury cases, regularly award damages reflecting a diminished capital asset of income earning ability (as distinct from future income loss). See, for example, *Kwei v. Boisclair* (1991), 60 B.C.L.R. (2d) 393 (C.A.), and *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.).

[59] Mark DeWolfe Howe, ed., *Oliver Wendell Holmes, The Common Law* (Cambridge, MA: Belknap Press, 1963) at 169. See also Benson, "Economic Loss in Tort Law", *supra* note 38 at 435.

[60] Besides a proprietary interest, a contract is an additional common law device upon which to ground an exclusive right of use. However, as Peter Benson has observed, this gives rise to a right among the contracting parties only, and may not in and of itself preclude the use by non-parties who can assert and equivalent or superior proprietary right. (See Benson, "Economic Loss in Tort Law", *supra*, note 44 at 435.

Conversely, if a plaintiff cannot assert an equivalent or superior proprietary interest in a resource, then he or she cannot prevent a defendant from, negligently or intentionally, fulfilling his will and thereby "gaining" through its use, even if the plaintiff has "lost" in the sense that his or her interests have been damaged. In those circumstances, the defendant will not be liable to the plaintiff. This simple but important proposition carries two important implications. First, where the claim is for physical injury to person or property, a plaintiff who cannot demonstrate a proprietary right to the unimpaired use of the resource, exclusive as against the defendant, will not succeed in having liability imposed as against a defendant. In *Margarine Union GmbH v. Cambay Prince Steamship Co. Ltd., The Wear Breeze*, Roskill J. extensively reviewed the English authorities and reached the same conclusion:

> ... the law of this country is and always has been than an action for negligence in respect of loss of or damage to goods cannot succeed unless the plaintiff is at the time of the tort complained of the owner of the goods or the person entitled to possession.[61]

The second implication reveals the basis for the law's general distinction between economic loss and non-economic loss. Specifically, the legal inquiry is this: was the plaintiff deprived of the use, grounded in a proprietary right superior to that held by the defendant, of a resource? Recall the irony of the hypothetical juxtaposition of unpunished intentionally caused economic harm (outside the narrow, exceptional ambit of intentional economic torts and breach of contract), and tort sanctions against unintentional economic harm. Recall also Lord Reid's observation that competition entitles traders to "damage their rivals' interests by promoting their own", and its logical conclusion that, assuming the impugned conduct does not arise from deceit, fraud or

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[61] [1969] 1 Q.B. 219, [1967] 3 All ER 775 at 793 (Q.B.) [*The Wear Breeze* cited to All E.R.].

other proscribed intentional acts, competition is a legitimate pursuit of self-interest. The essential goal of competition is to attract more customers, including customers already participating in the market who are patronizing competitors.

This inherent competitive enterprise of attraction reveals that there is no property in a customer or in a market share. If Supplier X loses a customer by reason of Supplier Y's lower prices, effective advertising, better quality or any other factor making Supplier Y more attractive to the customer or if Supplier X's share of the market is otherwise negatively impacted by competition from Supplier Y, Supplier X, in law, has no cause of action against Supplier Y. In other words, Supplier X cannot assert a proprietary right, exclusive as against Supplier Y (or anyone else), to use of the customer's patronage. The legal conception of duty cannot justify imposing liability in these circumstances, because the customer is not a resource in respect of which Supplier X has a proprietary right. Supplier Y's competitive activity is regarded as a manifestation of legitimate self-interest,[62] which does not interfere with a protected interest.

This "direct" proprietary justification for the distinction between economic and non-economic loss can be further understood in considering "relational economic loss", which is the term which the Supreme Court of Canada has given to pure economic loss which, as I have already noted, is consequent upon physical damage to the property of a third

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[62] McHugh J. in *Perre*, *supra* note 34 at 636, suggests that this also explains why the law imposes liability for certain intentionally-inflicted economic loss: "... conduct involving deceit, duress or intentional acts prohibited by law could seldom, if ever, be regarded as done in the legitimate protection or pursuit of one's interests." His reference to acts "prohibited by law" smacks of tautology – that is to say, if an act is prohibited by law, it is not "legitimate." This excerpt, however, immediately followed a reference to his earlier reasons in *Hill v. Van Erp*, *supra* note 33, where he carefully distinguished between proscribed and permitted intentional acts.

party.[63] As I will discuss in Chapter 2, the plaintiff in such cases will have an interest in another's property that falls short of a proprietary right. Not having a proprietary right in the third party's property, the plaintiff cannot claim a right, exclusive as against the defendant, to the use of that property. If Confederation Bridge were damaged by a barge, Prince Edward Island residents who do business in New Brunswick, not having a right to use of the bridge exclusive as against the defendant, would not be compensated for their lost business income, as such loss does not flow from the defendant's use of a resource which they could righteously claim is theirs.

The analysis also applies where a plaintiff's interest in the third party's property is not dependent on the third party's indulgence towards the plaintiff, but rather is formalized by a contract between them.[64] Here too, however, the contractual right, being an *in personam* right which the plaintiff can assert against the third party property-owner, cannot be asserted as against the defendant or anyone else. As against the defendant's use of the resource, the plaintiff, not being the owner of the resource, cannot assert a proprietary right to its use, unimpaired by the defendant's interference.[65] The law, under

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[63] See note 47. This term was employed by La Forest J. in his dissent in *Norsk*, *supra* note 17, and adopted by the full court in *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85, 23 C.C.L.T. (2d) 1, [1995] 3 W.W.R. 85, 121 D.L.R. (4th) 193 [*Winnipeg Condominium* cited to D.L.R.], *D'Amato v. Badger*, [1996] 2 S.C.R. 1071, 31 C.C.L.T. (2d) 1, [1996] 8 W.W.R. 390, 137 D.L.R. (4th) 129 [*D'Amato* cited to DL.R.] and *Bow Valley*, *supra* note 37.

[64] Such was the case, for example, in *Bow Valley*, *supra* note 37.

[65] Here I agree with Peter Benson's assessment (see Benson, "Economic Loss in Tort Law", *supra* note 44 at 435). See also Holmes J.'s classic statement of the issue and his conclusion in *Robins Dry Dock & Repair Co. v. Flint*, 48 S. Ct. 134, 275 U.S. 303 at 308 (1927) [*Robins Dry Dock* cited to U.S.], which addressed the ability of respondent charterparties to recover from a third party whose negligence had damaged the chartered vessel:

> The question is whether the respondents have an interest protected by the law against unintended injuries inflicted upon the vessel by third parties who knew nothing of the charter. If they have, it must be worked out through their contract relations with the owners, not on the postulate that they have a right *in rem* against the ship.

this direct proprietary conception of liability, distinguishes between someone who has a stake in the property, and someone who has a right in it.[66]

Aquinean influence pervaded common law thinking in the early mediaeval age, a principal private law characteristic of which was the development of the action of trespass on the case (for invasive interference to property and the person), which ultimately crystallized, beginning in the early eighteenth century, into notions of "fault" based on notions of "negligence."[67] While liability for a lack of care and failure to perform a duty were well-established notions by the time of *Coggs v. Bernard*, however, there was nothing in the earlier common law that required an analysis of liability that focussed (as Aquinas did) on an antecedent duty of care not to cause harm.[68] Neither was the type of damage expressly considered in terms of its relation to a protected or

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> ...The injury to the propeller was no wrong to the respondents but only to those to whom it belonged.

[66] While not expressly stated, this distinction is starkly illustrated by decision of the District Court of Appeals of Florida in *Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five Inc.*, 114 So.2d 357 (Fla. App. 1959) [*Fontainebleau*], where the plaintiff alleged that its neighbour's construction of a large addition to its hotel, interfered with the plaintiff's enjoyment of its property, as it blocked sunlight and cast a shadow on the beach. *Per curiam*, the court distinguished between the incorrect proposition that "one must never use his own property in such a way as to do any injury to his neighbour", and the correct proposition that "one must use his property so as not to injure the lawful *rights* of another." (Emphasis in original).

[67] *Coggs v. Bernard* (1703), 2 Raym. Ld. 909, 92 E.R. 107 (K.B.) [*Coggs v. Bernard* cited to Raym. Ld.]. Specifically, Holt C.J. said: "The defendant undertakes to remove goods from one cellar to another, and there lay them down safely, and he managed them so negligently, that for want of care in him some of the goods were spoiled. Gould and Powell JJ. Both spoke of "neglect", and the court reporter notes that Powys J. "agreed upon the neglect." This is not to say that a "tort of negligence" was in full bloom by that time, nor would it be for well over a century later. Percy Winfield, in "The History of Negligence in Torts" (1926) 66 Law Q. Rev. 184 posits that, while "to fix dates is to invite instant criticism, ... we are not far out if we select the period from about 1825 onwards as the most fruitful." Winfield's rationale is that this period coincides with rapid industrialization in the United Kingdom. It is fair to say, however, that in some fields, specifically bailment and breach of trust, negligence was by that time recognized as a basis for imposing liability. Indeed, at Appendix A of his article, Winfield accounts for judicial *dicta* dating from 1797 supporting the existence of an independent tort of negligence.

[68] Ibbetson, *supra* note 14 at 165-66.

unprotected interest. Clearly, if these ideas had ever been endemic to the common law, they had withered on the vine centuries earlier.

The introduction of the Aquinean conception of duty of care in respect of protected legal interests occurred through the influence in England of the civilian Natural lawyers (or, more correctly, moral philosophers) of the seventeenth and eighteenth centuries, notably Pufendorf, Grotius and Barbeyrac. In general terms, their inquiry was directed to the norms of human behaviour and the imputation of moral acts, central to which was the idea of duty of care. Pufendorf described it as a "social duty" but, significantly, *not* one to refrain from injuring, but simply to be careful.[69] Yet for fully 150 years after *Coggs v. Bernard*, judicial reasons in "negligence cases" contained little explicit expression of a duty of care as a reference point or organizing device. This had the perhaps inevitable but nevertheless paradoxical result that occasionally relief would be granted, particularly by the equity judges, in cases of pure economic loss (including fraud[70] and even negligent misrepresentation[71]) but denied in cases of physical damage.[72] Notwithstanding these curious results, conceptions of duty espoused by the Natural lawyers, having been incorporated into Francis Buller's *Introduction to the Law of Trials at Nisi Prius*, became increasingly familiar to English lawyers through the nineteenth century, culminating in

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[69] *Ibid.* at 166-67.

[70] *Pasley v. Freeman* (1789), 2 T.R. 51, 100 E.R. 450 (K.B.).

[71] *Burrowes v. Lock* (1805), 10 Ves. Jr. 470, 32 E.R. 927 (Ch.); *Slim v. Croucher* (1860), 1 De. G. F. & J. 518, 45 E.R. 462 (Ch.). See, however, the interesting case of *Brown v. Boorman* (1844), 11 Cl. & F. 1, 8 E.R. 1003 at 1018 (H.L.) where, in a case for negligence in the performance of a contract, Lord Campbell specifically cited the constituent element of duty:

> ... it is a count on the case, setting out the circumstances and facts of which the plaintiff complains; he shows a cause of action, by showing a contract, a duty and a breach; and if so, it is a good count in an action on the case, and he is entitled to his judgment.

[72] *Langridge v. Levy* (1837), 2 M. & W. 519, 150 E.R. 863, [1835-42] All E.R. 586 (Exch.); *Winterbottom v. Wright* (1842), 10 M. & W. 108, 152 E.R. 402 (Exch.).

1862 in the *dicta* of Wilde B. in *Swan v. North British Australasian Company*,[73] where he said:

> The action for negligence proceeds from the idea of an obligation towards the plaintiff to use care, and a breach of that obligation to the plaintiff's injury.[74]

While the notions of duty and rights in cases of pure economic loss remained in certain instances elusive,[75] in other circumstances the court demonstrated a ready grasp of its complexities, inquiring, in cases of misrepresentation, into the connection between the plaintiff's loss and the purpose of the document or statement that formed the basis of the misrepresentation,[76] which I will canvass later in this chapter in discussing the "indirect" proprietary concept of duty in *Hedley Byrne & Co. v. Heller & Partners*. So, in *Peek v. Gurney*,[77] the impugned prospectus, being merely an invitation to join the company at the time of incorporation by obtaining allotments of shares, could not be the subject of an action against its author brought by a member of the public who subsequently purchased shares. Conversely, in *Cann v. Wilson*,[78] where realty valuators retained by a mortgagor

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[73] (1862), 7 H. & N., 8 E.R. 611 (Exch.).
[74] *Ibid.* at 625.
[75] See, for example, the reasons of Hall V.C. in *The British Mutual Investment Company Limited v. Cobbold* (1875), 44 Ch. D. 332, where he absolved a solicitor of liability for negligently advising his client as to the value of certain security offered the client on a loan, on the basis of the (admittedly unusual) remedy sought – specifically, that the solicitor, in addition to making up any shortfall on the loan, also assume the security. Yet, the court, referring solely to the "alarm" that this case might cause other negligent solicitors, declined to even address the matter of the shortfall.
[76] The speeches of Lords Chelmsford and Colonsay in *Peek v. Gurney*, *infra* note 77, are prescient of the Lords' approach to auditors' liability in 1990 in *Caparo Industries plc v. Dickman and others*, [1990] 2 A.C. 605, [1990] 1 All E.R. 568 (H.L.) [*Caparo* cited to All E.R.], in that they qualified the duty of care by considering the purpose of the impugned prospectus.
[77] *Peek v. Gurney* (1873), 43 Ch. App. 19 (H.L.)
[78] (1887), 39 Ch. D. 39. *Cann v. Wilson* was later described as "not now law" by Lord Esher in *Le Lievre v. Gould*, [1893] 1 Q.B. 491 at 497 (C.A.). See also Bowen L.J.'s reasons, which cast doubt on *Cann v. Wilson*. In reaching this conclusion, the court relied on the ratio which it (incorrectly) drew from *Derry v. Peek* (1889), 14 A.C. 337 (H.L.) that, in the absence of a contractual relationship, liability must be grounded in an action in deceit, which requires fraud. In fact, the House of Lords in *Derry v. Peek* merely stated that an action in deceit requires fraud (see Lord Halsbury L.C. at 344, Lord Watson at 345, Lord

knew that their valuation was made for the purpose of obtaining an advance by a mortgagee, the valuators were liable to the mortgagee for the valuation's accuracy.

Duty's reciprocal partner of a "right" in the plaintiff was also apparent in judicial analysis at this time, both in England and in the United States. In *Cattle v. Stockton Waterworks Co.*,[79] a relational economic loss case, the plaintiff sued a water supplier whose pipe had leaked onto a third party's land, resulting in unanticipated expense to the plaintiff in discharging his contractual obligation to the third party to construct a tunnel on that land. Blackburn J., observing that "no authority in favour of the plaintiff's *right*" was cited, concluded that "the law does not give (the plaintiff) redress."[80] This can be understood as a statement that the defendant had not expropriated to his own use the plaintiff's resource, but rather the third party's resource. The plaintiff, having no proprietary right to the third party's land as against the defendant, could not assert that a duty of care was owed to him.

This notion was already well-established in the United States. In *Connecticut Mutual Life Ins. Co. v. N.Y. & N.H. R.R. Co.*,[81] an insurer sued to recover amounts paid under a

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Bramwell at 347 and Lord Fitzgerald at 356). Only in the reasons of Lord Herschell can any proscription of an action outside the realms of contract and deceit be discerned, and even there, only inferentially. None of the Law Lords in *Derry v. Peek* considered *Cann v. Wilson.* The true ratio of *Derry v. Peek* was recognized by Viscount Haldane in *Nocton v. Lord Ashburton*, [1914] A.C. 932, [1914-15] All E.R. 44 at 49f (H.L.) [*Nocton v. Lord Ashburton* cited to All E.R.] . *Cann v. Wilson* was ultimately rehabilitated (and *Le Lievre v. Gould* overruled) by the House of Lords in *Hedley Byrne*, *supra* note 20.

[79] (1875), L.R. 10 Q.B 453, [1874-80] All E.R. Rep. 220 (Q.B.) [*Cattle* cited to All E.R. Rep.].

[80] *Ibid.* at 223 (emphasis added).

[81] [1856] Conn. 265 (Sup. Ct.) [*Connecticut Mutual*].

life insurance policy, which was triggered when the defendant's train plunged into a river, killing the insured.[82] Stating the issue, Storrs J. said:

> The single question is, whether a plaintiff can successfully claim a legal injury to himself from another, because the latter has injured a third person in such a manner that the plaintiff's contract liabilities are thereby affected.[83]

Noting that a death will almost always "affect the pecuniary interest of those to whom the deceased was bound by contract", Storrs J. nonetheless directed that liability must be confined to those persons who can not only claim an injury, but who can claim a *duty* that was breached by the defendant's misfeasance.

Storrs J.'s reasoning is suggestive of the essential connection between the plaintiff's lost right and the defendant's gain, which was echoed by Cardozo J. seventy years later in *Palsgraf v. Long Island R.R. Co.*[84] There, the plaintiff, while standing on a railway platform, was injured as the result of a bizarre chain of events that began at the other end of the railway platform, with a conductor's negligence in helping a passenger board a moving train. While Andrews J. relied on practical limits to the scope of the defendant's liability that emerged from a remoteness analysis, Cardozo J.'s analysis was more fundamental, holding that the defendant's duty has to relate to the plaintiff's right – in other words, the defendant will not be liable unless the plaintiff's loss amounts to an infringement of a legally protected interest.[85] Here, the court is articulating, albeit in the context of a personal injury case, the justification for the distinction between economic

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[82] The insurer in this case sued, not in subrogation, but *qua* insurer.
[83] *Connecticut Mutual*, *supra* note 81 at 274.
[84] 162 N.E. 99 (N.Y. Sup. Ct. 1928).
[85] See, for further analysis, Ernest J. Weinrib, "The Passing of *Palsgraf*?" (2001) 54:3 Vand. L. Rev. 803, and Ernest J. Weinrib, "Does Tort Law have a Future?" (2000) 34 Val. U.L. Rev. 561. But see Bruce Feldthusen, *Economic Negligence*, *supra* note 22 at n. 383.

loss and non-economic loss: the plaintiff cannot, in the latter instance, generally assert that a legally-protected interest was damaged by an act of the plaintiff.

To explicate, recall Lord Atkin's search, in *Donoghue v. Stevenson*,[86] of English law for "some general conception of relations giving rise to a duty of care."[87] I have already described how that search led him to articulate that conception not as a statement of the duty, but of the duty's limitations: no moral code, he said, would "give a right to every person injured ... to demand relief."[88] My point here, however, is that *Donoghue v. Stevenson* also contains a legally coherent justification for the duty it imposes, being the "closeness" and "directness" that form the nexus between the plaintiff's right and the defendant's duty. Foreseeability, then, cannot be enough to establish a duty – the

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[86] *Donoghue v. Stevenson*, *supra* note 9.

[87] *Ibid.* at 580. Lord Atkin's speech in *Donoghue v. Stevenson* was not the first attempt to articulate the general conception of relations that give rise to a duty of care. In 1883, Brett M.R. (later Lord Esher) said in *Heaven v. Pender* (1883), 11 Q.B.D. 503 at 509 (C.A.):

> Whenever one is by circumstances placed in such a position with regard to another that every one of ordinary sense who did not think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.

The other two judges refused to endorse such a broadly-stated duty, and Lord Esher himself articulated a more limited form of the proposition in 1893 in *Le Lievre v. Gould*, *supra* note 78, that emphasized a notion of physical proximity:

> If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to another or may injure his property.

Similarly, in *Nocton v. Lord Ashburton*, *supra* note 78 at 53, Viscount Haldane attempted to extract a broader notion of liability from a (by then) well-established duty of honesty:

> If a man intervenes in the affairs of another he must do so honestly, whatever be the character of that intervention. If he does so fraudulently, and through that fraud damage arises, he is liable to make good the damage. ...
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> ...
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> But side by side with the enforcement of the duty of universal obligation to be honest .... (can be applied to) a person who erred, not necessarily morally but at all events intellectually, from ignorance of a special duty of which the courts would not allow him to say he was ignorant. Such a special duty may arise from the circumstances and relations of the parties.

[88] *Donoghue v. Stevenson*, *supra* note 9 at 580.

plaintiff, unlike Mrs. Palsgraf on the New York railway platform, has to be the defendant's *neighbour*; between her loss and the plaintiff's gain, there must be a "close" and "direct" association. Although linking (but, critically, not equating) duty and proximity, the neighbour principle reinforced the theoretical concepts of "gain" and "loss", in that the injustice is seen not as a product of external considerations such as, for example, public policy, but rather of the defendant's fulfilment of his or her will by a risky act or omission and from its reasonably foreseeable impact upon the plaintiff's use of his or her own resource, the plaintiff being a proximate "neighbour."

Further, *Donoghue v. Stevenson*, consistent with a proprietary conception of a "resource", applied only to "injury to ... life or property."[89] *Hedley Byrne & Co. v. Heller & Partners*,[90] however, required the House of Lords to delve into the realm of pure economic loss. This case has been variously cited as an extension of the *Donoghue v. Stevenson* principle,[91] as a manifestation of "overlap" with the *Donoghue v. Stevenson* principle,[92] and as a basis for liability for pure economic loss resulting from negligent misrepresentation in limited instances.[93] More ambitiously, and as I have already noted, the Supreme Court of Canada has (incorrectly) cited *Hedley Byrne* as authority for the

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[89] *Ibid.* at 599. See also Smith, "Economic Loss" *supra* note 29 at 99.
[90] *Hedley Byrne*, *supra* note 20.
[91] Smith, "Economic Loss", *supra* note 29 at 99. Professor Smith, however, correctly points out that only some of the Lords applied *Donoghue v. Stevenson*. Specifically, Lord Morris of Borth-y-Gest and Lord Hodson founded liability, in part, on the neighbour or proximity principle. Lord Devlin, while stating that the proximity principle would not assist the plaintiff, nevertheless concluded that the relationship was "equivalent to contract", a proposition he regarded as "an application of the general conception of proximity."
[92] Perry, "Protected Interests", *supra* note 30 at 288.
[93] J.C. Smith and Peter Burns, "*Donoghue v. Stevenson* – The Not So Golden Anniversary" (1983) Mod. L. Rev. 147 at 150 [Smith and Burns, "The Not So Golden Anniversary"].

proposition that "where liability is based on negligence the recovery is not limited to physical damage but also extends to economic loss."[94]

The principle that emerged from *Hedley Byrne* was nicely summarized in Lord Morris's speech:

> 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 a 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.[95]

For our purposes, this statement contains two important aspects which, taken together, reveal they justification for protecting what I earlier described as an indirect proprietary interest. First, the court expressed a duty of care as being founded, in part, on a notion of an undertaking,[96] not necessary limited to (mis)representations, to employ a special skill for the assistance of another person. All five Law Lords accepted that an undertaking, voluntary or otherwise, was a critical requirement for a duty of care.[97] The second aspect was that liability depended on the plaintiff having suffered as a result of having reasonably relied on the defendant's undertaking.

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[94] *Rivtow*, *supra* note 4 at 546.
[95] *Hedley Byrne*, *supra* note 20 at 594.
[96] Stephen Perry equates "undertaking" with "assumption of responsibility" – See Perry, "Protected Interests", *supra* note 30 at n. 81. Note that the notion of "undertaking" as a basis, at least in part, of liability was not novel at the time of *Hedley Byrne*. It had its origins in *assumpsit*, and was specifically cited by Holt C.J. and Powell J. in *Coggs v. Bernard*, *supra* note 67, as the basis for the defendant bailee's liability. Lord Abinger, C.B. referred to the necessity of an undertaking to impose liability outside the confines of contract in *Winterbottom v. Wright*, *supra* note 67.
[97] See *Hedley Byrne*, *supra* note 20. Lord Reid spoke of an "undertaking of responsibility." Lord Hodson (at 599) referred to "taking responsibility." Lord Devlin said that "(t)he essence of the matter ... is the acceptance of responsibility" (at 612). Lord Pearce inquired as to whether "a duty of care ... was assumed" (at 618). More fundamentally, all five Law Lords absolved the defendant of liability on the basis of the disclaimer which had accompanied the impugned misrepresentation.

It should be noted that the requirement of an "undertaking" was criticized by the House of Lords in several cases in the late 1980's and early 1990's, beginning with *Smith v. Eric S. Bush*,[98] although not on grounds that should be seen as compromising the notions of undertaking and reliance as espoused in this chapter. There, Lord Templeman cited Lord Denning MR in *Ministry of Housing and Local Government v. Sharp*, where he said:

> ... the duty to use due care in a statement arises, not from any voluntary assumption of responsibility, but from the fact that the person making it knows, or ought to know, that others, being his neighbours in this regard, would act on the faith of the statement being accurate.[99]

Lord Templeman, however, is contemplating a different kind of undertaking. The undertaking I am describing in this chapter is indeed the same undertaking that appears in Lord Denning's reasons, being a statement on which its author should know his neighbours will act, relying on the statement's accuracy or, more precisely, on its maker's having taken reasonable care to ensure its accuracy.[100] The undertaking which the House of Lords in *Smith v. Eric S. Bush* eschewed was an *express* assumption of *legal liability*. Lord Griffiths' speech makes this particularly clear, particularly where he relied on the fact that, in *Hedley Byrne* there was an express disclaimer of responsibility for the defendant's advice.[101] This does not necessarily translate, however, into a converse requirement that the undertaking also be an assumption of legal liability (as opposed to an assumption of responsibility for the statement's accuracy). Indeed, and as Lord Griffiths

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[98] [1990] 1 A.C. 831, [1989] 2 All E.R. 514 (H.L.) [*Eric S. Bush* cited to All E.R.].
[99] [1970] 2 Q.B. 223, [1970] 1 All E.R. 1009 at 1018-19 (C.A.). Cited in *ibid.* at 522.
[100] Hence Stephen Perry's equation (cited at note 90) of an undertaking with an assumption of responsibility which, as a practical matter, can be inferred or implied from the facts using the objective standard of the reasonable person.
[101] *Eric S. Bush*, *supra* note 98 at 529.

said, such an express undertaking "is extremely unlikely in the ordinary course of events."[102] In the result, I suggest that there is no reason that the House of Lords in *Hedley Byrne* intended to be seen as imposing such a requirement, and indeed there is nothing in the Law Lords' speeches in *Hedley Byrne* that even remotely suggests that they did.

This appears to have been recognized by Lord Browne-Wilkinson in *White v. Jones*[103] where, to "allay the doubts of the utility of the concept of assumption of responsibility voiced by Lord Griffiths in *Smith v. Eric S. Bush*" he said that "the assumption of responsibility referred to is the defendants' assumption of responsibility for the task, not the assumption of liability."[104] Ironically, in *Smith v. Eric S. Bush*, both Lords Templeman and Jauncey of Tullichettle can be said to have applied this preferred notion of undertaking, inasmuch as Lord Templeman said:

> I agree that, by obtaining and disclosing a valuation, a mortgagee does not assume responsibility to the purchaser for that valuation. But in my opinion the valuer assumes responsibility to both the mortgagee and purchaser by agreeing to carry out a valuation for mortgage purposes knowing that the valuation fee has been paid by the purchaser and knowing that the valuation will probably be relied on by the purchaser in order to decide whether or not to enter into a contract to purchase the home.[105]

In other words, in undertaking to carry out the valuation, the valuer has induced the purchaser to rely on that valuation.

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[102] *Ibid.* at 534.
[103] [1995] 2 A.C. 207, [1995] 1 All E.R. 691 (H.L.) [*White v. Jones* cited to All E.R.].
[104] *Ibid.* at 715-16. This has since been reaffirmed by the House of Lords in *Williams*, *supra* note 10 at 835.
[105] *Eric S. Bush*, *supra* note 98 at 536. Similarly, Lord Jauncey, citing the valuers' decision to take on the job, said (at 541):

> In these circumstances they must be taken not only to have assumed contractual obligations towards Mrs. Smith, whereby they became (*sic*) under a duty towards her to carry out their work with reasonable care and skill.

The undertaking, then, entails an assumption of responsibility to do something in a reasonable manner. Thus, X's undertaking to carry out a task for Y will be relied on by Y as evidencing that X intends Y to believe that he or she may rely on X to carry out that task. That is, an undertaking indicates an objective manifestation of an intention to induce another to believe that he or she may rely on the undertaker to carry out the task in question.[106] So viewed, *Hedley Byrne* is thus seen as a natural consequence of applying *Donoghue v. Stevenson*'s neighbour principle, in that foreseeable reliance by the plaintiff on a belief that the defendant will not engage in risky conduct is part of the causal sequence leading to liability. The neighbourhood principle is thus more clearly understood as a particular case of a more general principle of tort law, whereby liability for the consequences of one's actions arises from the intentional or knowing inducement of another to rely on the reasonableness of those actions. In the result, the direct and indirect proprietary interests – the former to be protected from injury arising from the defendant's expropriation of the plaintiff's resource to his or her own use, and the latter arising from the defendant's undertaking and the plaintiff's reasonable reliance – are seen as mutually supporting, coherent and unified conceptions of the justification for imposing a duty of care.

Of course, *Hedley Byrne* was not a case of injury to the traditionally protected interests of physical and proprietary integrity, but rather to purely economic interests. Yet, the dual notions of undertaking and reliance, which are critical to understanding *Hedley Byrne* and the basis of the duty which the House of Lords would have imposed on the defendants,

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[106] Here I am agreeing with Stephen Perry's consideration of an undertaking's implications. See Perry, "Protected Interests", *supra* note 30 at 281-82.

also relate directly to the Aristotelian concepts of a defendant's "gain" and a plaintiff's "loss", thereby justifying recovery. Where a defendant has intentionally or knowingly induced a plaintiff to rely to his or her detriment on the defendant's undertaking, the plaintiff has, based on that reliance, altered his or her position. The defendant has thus engendered the plaintiff's dependency on the defendant insofar as, on the basis of the defendant's undertaking, the plaintiff has entrusted to the defendant an aspect of the plaintiff's personal autonomy by foregoing other more beneficial courses of action that were open to the plaintiff. An unfulfilled undertaking therefore constitutes an interference with the plaintiff's proprietary interest in his or her own autonomy to choose from the available opportunities or options. Thus while the *Donoghue v. Stevenson* neighbour principle is employed to address harm consisting of physical damage to person or property, the *Hedley Byrne* principle addresses the defendant's interference with the plaintiff's right, exclusive as against the defendant, of personal autonomy to choose among his or her potential courses of action.[107] In this sense, the distinction which we see the law as drawing between economic and non-economic loss is reflective of a generalized, practical understanding, reflecting the fact that, outside of certain limited circumstances where a plaintiff can demonstrate the defendant's interference with his or her proprietary right, including a right to personal autonomy, the law does not extend protection to pure economic interests.

[107] For a more elaborate explication of the notion of personal autonomy arising from an undertaking and reliance, see Perry's discussion at Perry, "Protected Interests", *supra* note 30 at 289 and following.

Viewed, therefore, in the context of the historical evolution of common law principles, the *prima facie* duty of care, with its reference to foreseeability (or proximity)[108] as the sole determinant of duty, and its incorporation of policy considerations, is inconsistent with a justified distinction that the law has drawn in the treatment of economic loss and non-economic loss. The justification for a duty of care, then, is not to be found in foreseeability or policy considerations, but rather in underlying concepts whose influence can be discerned in the historical evolution of common law principles, directed towards an injury to the plaintiff's rights by a defendant who, through his or her voluntary, careless act, expropriates that right to his or her own use.[109]

After several House of Lords and Privy Council pronouncements that cast doubt on the wisdom of the *prima facie* duty as articulated in the two-stage test,[110] the House of Lords in *Murphy v. Brentwood District Council*[111] rejected *Anns* and the *prima facie* duty as standing for "no principle at all"[112] and, even more significantly and damning, as lacking "justification on any reasonable principle."[113] Subsequently, however, the two-stage test was affirmed by the Supreme Court of Canada as the subsisting test in Canada for

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[108] I discuss the differences between proximity and foreseeability at note 29.

[109] Further, even if I am wrong as to the role of policy considerations, *Anns* cannot support an argument that the determination of a duty of care has to account for policy considerations. Under *Anns*, the duty is determined *before* policy considerations are applied, with the sole stage one inquiry being foreseeability (see discussion at note 29). Policy considerations are only applied after the duty is established and, for that reason, *Anns* does not, for example, require the court to concern itself with policy considerations that support liability. All this said, and as I will canvass later in this chapter, the Supreme Court of Canada has addressed this argument in *Cooper* and *Edwards*, importing certain policy considerations into stage one of the *Anns* test.

[110] See *Curran v. Nor. Ireland Co-Ownership Housing Assn.*, [1987] A.C. 718, [1987] 2 W.L.R. 1043 (H.L.); *Yuen Kun Yeu v. A.G. Hong Kong*, [1988] A.C. 175, [1987] 3 W.L.R. 776 (P.C.); and *Rowling v. Takaro Properties Ltd.*, [1988] A.C. 473 (P.C.).

[111] [1991] 1 A.C. 398, [1990] 3 W.L.R. 414, [1990] 2 All E.R. 908 (H.L.) [*Murphy* cited to All E.R.].

[112] *Ibid.* at 923, Lord Keith of Kinkell.

[113] *Ibid.* at 911, Lord MacKay of Clashfern L.C.

construction of a duty of care.[114] This leads me, therefore, to a consideration of *Cooper v. Hobart* and *Edwards v. Law Society of Upper Canada*, in which that court has since made its most comprehensive statement yet on the two-stage test and on the future of *Anns* in Canadian jurisprudence. That is, having informed our understanding of the duty of care by reference to its origins and an historical review of its common law evolution and, in so doing, having revealed the shortcomings of *Anns* as a basis for determining and justifying whether a duty of care should exist in cases of pure economic loss, my inquiry must now address and account for this reconsideration – and, as will be seen, reformulation – of the *Anns* test.

c. Canadian Reformulation of the *Prima Facie* Duty

In *Cooper v. Hobart*, the plaintiffs, who comprised a class of over 3,000 investors, had lost substantial investments due to the misconduct of a mortgage broker. They sued the British Columbia Registrar of Mortgage Brokers alleging that the Registrar breached a duty of care owed to them, that the Registrar had been aware of offences committed by the mortgage broker and that it had not acted quickly enough to suspend the mortgage broker's licence and to notify investors of an investigation. On an application to certify the class proceeding, the trial judge allowed the case to proceed to trial. The British Columbia Court of Appeal reversed the trial judge's decision. This was affirmed by the Supreme Court of Canada.

Edwards v. Law Society of Upper Canada was also a class action, brought by a group of investors who had been defrauded by a lawyer. The plaintiffs claimed that once the Law

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[114] *Norsk*, *supra* note 17.

Society of Upper Canada learned that the lawyer was using his trust account for an improper purpose, it should have acted to prevent further misconduct or should have warned the public. The action was struck at both the trial court and the Ontario Court of Appeal. This was also affirmed by the Supreme Court of Canada.

In both pronouncements, the Supreme Court of Canada refined the two-stage *Anns* test by dividing stage one (determining whether there is a sufficient proximity to find a duty of care) into two separate questions. In *Cooper v. Hobart*, the new test was stated as follows:

> At the first stage of the *Anns* test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? And (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the *Anns* test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a *prima facie* duty of care arises. At the second stage of the *Anns* test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care. [115]

It is unclear what distinguishes policy factors related to proximity (which form part of the stage one analysis to prevent a *prima facie* duty from arising), and those which form part of the stage two analysis to defeat the established *prima facie* duty from being applied to hold a defendant liable to a plaintiff. As to stage one policy factors that might establish proximity, we are told that they are "diverse and depend on the circumstances of the case. One searches in vain for a single unifying characteristic."[116] They are factors which will allow the court "to determine whether it would be just and fair having regard to (the)

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[115] *Cooper*, *supra* note 18 at 203.
[116] *Ibid.* at 204.

relationship to impose a duty of care in law upon the defendant."[117] The residual, stage two policy considerations address "the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally."[118]

The merits of applying such policy considerations at stage two, once the duty of care is already recognized, may be revealed in future pronouncements. In the interim, however, the basis for two distinct policy analyses is unclear. Indeed, the court's application of the new test in *Cooper v. Hobart* does not assist on this point. There, the court found no duty, based on policy considerations purportedly relating to proximity – specifically, that the recognition of a duty of care would interfere with "other important interests, of efficiency and finally at the expense of public confidence in the system as a whole."[119] These considerations, however, would seem to relate more to the stage two policy considerations of "the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally."

While the court's continued adherence to a proximity-based concept of a *prima facie* duty is disappointing, the pronouncement in *Cooper v. Hobart* suggests that we might in most circumstances avoid the awkward distinctions between stage one and stage two policy considerations, for two reasons. First, in *Cooper v. Hobart*, the Chief Justice and Major J. (for the court) said:

> To some extent these concerns are academic. Provided the proper balancing of the factors relevant to a duty of care are considered, it may not matter, so far as a particular case is concerned, at which "stage" it occurs. The underlying question

[117] *Ibid.* at 204.
[118] *Ibid.* at 206.
[119] *Ibid.* at 209-10.

> is whether a duty of care should be imposed, taking into account all relevant factors disclosed in the circumstances. ...[120]

The court did not elaborate. With respect, however, so long as the court is applying any notion of a *prima facie* duty, it *does* matter whether policy factors relating to proximity or residual policy considerations are applied at the first stage or the second. For example, while, having imposed a duty of care at stage one, the court might ultimately absolve a defendant of liability at stage two, the fact remains that a duty of care has been recognized. Consequently, in our common law system based on precedent and *stare decisis*, it is indeed extremely significant whether policy factors relating to proximity are applied before or after the duty is established; Canada has 25 years of post-*Anns* jurisprudence where policy considerations were not applied until stage two and thus duties of care were established at stage one.[121]

Consider, for example, the court's 1997 pronouncement in *Hercules Management Ltd. v. Ernst & Young*.[122] There, the defendants were hired by two corporations to prepare financial statements to comply with provincial statutory requirements. The plaintiffs, who were shareholders of the companies, alleged that, as a result of the accountants' negligence, they had suffered reduced share values, and also had been detrimentally

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[120] *Ibid.* at 202.

[121] *Ibid.* at 202. The court stated: "we continue in the view, repeatedly expressed by this Court, that the *Anns* two-stage test, properly understood, does not involve duplication because different types of policy considerations are involved at the two stages." With respect, the court has never previously stipulated that certain policy considerations occur at stage one, and indeed has on several occasions expressly stated the very opposite, with the result that *prima facie* duties of care were recognized in circumstances where they might not have been under *Cooper* and *Edwards*. See, for example, *Norsk*, *supra* note 17, Stevenson J.; also *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299, 73 B.C.L.R. (2d) 1, 97 D.L.R. (4th) 261 at 269, La Forest J., and *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, 146 D.L.R. (4th) 577, [1997] 8 W.W.R. 80 [*Hercules* cited to S.C.R.].

[122] *Hercules*, *ibid.*

induced to make additional investments on the basis of the financial statements. The court concluded that a *prima facie* duty of care was in fact owed by the accountants, saying:

> In my view, there can be no question that a *prime facie* duty of care was owed to the appellants by the respondents on the facts of this case. As regards the criterion of reasonable foreseeability, the possibility that the appellants would rely on the audited financial statements in conducting their affairs and that they may suffer harm if the reports were negligently prepared must have been reasonably foreseeable to the respondents. This is confirmed simply by the fact that shareholders generally will often choose to rely on audited financial statements for a wide variety of purposes.[123]

While the court found that the duty of care was ultimately "negatived" at stage two of the *Anns* analysis, the fact remains that the court has recognized a duty of care owed by accountants to potential plaintiffs with whom they had no contractual relationship. How is the court to rationalize this finding with the finding in *Cooper* where, in similar circumstances (specifically, investors suing for reliance on a non-contracting party), the court found that there was no duty?

The second potential basis to avoid the awkward distinctions between stage one and stage two policy considerations that can be discerned in the court's pronouncement in *Cooper* is a novel focus on "categories" of proximity that have been recognized by the court. Specifically, Canadian courts are now directed, in applying the *Anns* test, to consider whether the alleged duty is a new duty or one that falls within a recognized category in which proximity has already been determined. This incremental, categorical approach to establishing a duty of care in negligence should, at least in cases where the issue of a duty of care has already been determined, ultimately bring us much closer to the approach of

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[123] *Hercules*, *ibid.* at 200-01. While beyond the scope of this chapter, the court's reasoning here has been properly criticized in several commentaries. See in particular Feldthusen, "Liability for Pure Economic Loss", *supra*, note 22.

the House of Lords, which expressed a strong preference for established duties of care in *Caparo Industries p.c. v. Dickman.*[124] In *Cooper*, the court identified the established categories as follows:

1. Foreseeable physical harm to the plaintiff or the plaintiff's property.
2. Foreseeable nervous shock.
3. Negligent misstatement.
4. Misfeasance in public office.
5. Duty to warn of risk of danger.
6. Municipality's duty to prospective purchasers of real estate to inspect housing developments without negligence.
7. Governmental authorities who have undertaken a policy of road maintenance owe a duty of care to do so non-negligently.[125]

That said, the utility of categorization depends on its nature. As Stephen Perry has observed, categories, after all, are "defined by principles stated at one or another level of generality."[126] As an example, he notes the danger of overreacting to the courts' previous articulation of a principle that was too broadly expressed, by repudiating general principles altogether. There is, however, also a converse danger, which is that of rendering categorization meaningless by expressing principles too narrowly, and indeed *Cooper* serves as an example; there, the court stated:

> Canadian courts have not thus far recognized the duty of care that the appellants allege in this case. The question is therefore whether the law of negligence

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[124] *Caparo*, *supra* note 76. There, Lord Bridge, relying on the decision of the Australian High Court in *Sutherland Shire Council v. Heyman* (1985), 60 A.L.R. 1, 157 C.L.R. 424 (H.C.A.) [*Sutherland* cited to C.L.R.], said "I think the law has now moved in the direction of attaching greater significance to the more traditional categorization of distinct and recognizable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes." In the House of Lords' later pronouncement in *Murphy*, *supra* note 111, three Law Lords cited with approval this statement made by Mr. Justice Brennan in *Sutherland*:

> 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 persons to whom it is owed.

[125] *Cooper*, *supra* note 18 at 205.

[126] Perry, "Protected Interests", *supra* note 30 at 252.

> should be extended to reach this situation. ... (T)he particular extension sought is novel ... .[127]

If the category is to be defined as one involving the statutory regulation of mortgage brokers, then indeed that is a "novel" claim before the Supreme Court of Canada, falling within none of the categories and to which the *Anns* test (as modified by *Cooper*) must consequently be applied. The liability of statutory public authorities, however, is nothing new for the court, which suggests that two of the *Cooper* categories, being a municipality's duty to prospective purchasers with respect to building inspection, and a governmental authority's duty to reasonably execute road maintenance, are not "categories" at all, but rather case-specific facts that fall within a larger (unarticulated) category.

The court's approach to characterization in *Cooper v. Hobart* is bound to create future difficulties. It would be an interesting exercise to rationalize the municipal duty of care to prospective homeowners with this statement in *Cooper v. Hobart*:

> "The Registrar's duty is rather to the public as a whole. Indeed, a duty to individual investors would potentially conflict with the Registrar's overarching duty to the public."[128]

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[127] *Cooper*, *supra* note 18 at 200-01. This is reminiscent of Lord Diplock's narrow definition of the issue confronting the House of Lords in *Dorset Yacht*, *supra* note 12 at 323-24:

> ... is any duty of care to prevent the escape of a borstal trainee from custody owed by the Home Office to persons whose property would likely be damaged by the tortious acts of the borstal trainee if he escaped? This is the first time that this specific question has been posed at a higher judicial level than that of a country court. ... (Your Lordships now have the task) of deciding whether the English law of civil wrongs should be extended to impose legal liability to make reparation for the loss caused to another by conduct of a kind which has not hitherto been recognized by the courts as entailing any such liability.

While this may well have been the first case where the House of Lords had considered the issue of liability arising from the escape of borstal inmates, it certainly was far from the first time it had considered a claim brought by proximate plaintiffs for foreseeable physical injury to property. Again, the novelty of the claim depends on the breadth of the judicial characterization.

[128] *Cooper*, *supra* note 18 at 208.

Cannot the same argument be made in municipal inspection cases or, for that matter, in road maintenance cases? As a means to avoid the vagaries of the reformulation in *Cooper* of the *Anns* test, therefore, categorization, while at first glance a promising development, may well result in unpredictable and inconsistent judgments.

d. Some Final Observations on Construction and Justification of the Duty of Care

Whether by reference to categories or to case authorities, absent the necessary elements of undertaking and reliance, the law has not recognized a duty of care to avoid causing foreseeable pure economic loss. As Lord Oliver stated in *Murphy v. Brentwood District Council*,

> The infliction of personal injury to the person or property of another universally requires to be justified. The causing of economic loss does not.[129]

I have already argued that the *prima facie* duty as articulated in *Anns* (and as restated in *Cooper* and *Edwards*) requires the court to circumvent the initial inquiry into whether the law recognizes a duty of care on the facts and to go directly to considerations of proximity to determine whether or not a duty of care will be imposed in the circumstances. Alternatively put, in a case of pure economic loss, *Anns*, *Cooper* and *Edwards* direct the court's attention immediately to the nexus of relationship between the parties, instead of to an essential preliminary issue, which is whether the interest which

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[129] *Murphy*, *supra* note 111 at 934. I am not in this chapter attempting to endorse the approach to duty of care as articulated by Lord Oliver in *Murphy*. Indeed, insofar as he relies upon "proximity", the post-*Anns* approach of the House of Lords is no more justifiable, with reference to a principled concept of duty, than the *Anns* test. Nonetheless, *Murphy* is to be preferred over *Anns* in that the former distinguishes between foreseeability and proximity, and rejects a *prima facie* duty.

the plaintiff is seeking to protect is one to which the law extends protection;[130] they require of us the conclusion that, by virtue of the existence of a foreseeable or proximate risk, the law imposes a duty to avoid the risk, irrespective of whether the risk is to an interest that the law seeks to protect. The folly of this approach is that if the law does not recognize a protected interest and therefore does not impose a duty of care, the degree of proximity between the parties should be irrelevant. Conversely, if a protected interest is at stake and duty of care is consequently held to exist, proximity is then relevant to the standard of care – that is, the content of the duty.[131]

A review of the evolution of the common law's treatment of the duty of care reveals some justification for what Professors J.C. Smith and Peter Burns identify as a "right based theory of tort", which refers to the interest which the law seeks to protect, namely an interest which, as against the defendant, the plaintiff can assert an exclusive right.[132] Thus interest in physical integrity of person and property, being something to which the plaintiff is exclusively entitled, is a protected interest which in turn forms the basis of a cause of action and (subject to establishing a breach of the standard of care, causation and damages) recovery. That protected interest, then, justifies the imposition of a duty of care. Justification is, however, conspicuously absent under the *prima facie* duty of care conception, whether or not one uses the *Anns* or the *Cooper/Edwards* formulation, except

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[130] See the reasons of Lush J. in *Seale v. Perry*, *supra* note 56 at 198-99: "In my opinion this Court should hold that the defendant owed no duty to the plaintiffs for the following reasons: ... (t)here was ... no right or interest capable of protection at law or in equity capable of enforcement by any remedy."

[131] Here I am agreeing with Smith, "Economic Loss", *supra* note 29 at 110.

[132] Smith and Burns, "The Not So Golden Anniversary", *supra* note 93. See also, with particular regard to the nature of the right to be protected, Benson, "Economic Loss in Tort Law", *supra* note 44 at 434-37 and *Fontainebleau*, *supra* note 66. See also *J'Aire Corporation v. Gregory*, 157 Cal. Rptr. 407 (Sup. Ct. 1979) [*J'Aire*] which made the same point (at 409), but then found a duty based solely on foreseeability.

insofar as "proximity" justifies the recognition of a duty of care, subject to its arbitrary truncation, at stage one or stage two, by external policy concerns.

The Supreme Court of Canada, since *Anns*, has shown itself to be adept at developing principles that govern recovery for pure economic loss, but has given little attention to justifying those principles as applied to the facts of cases.[133] Take, for example, *Hercules*,[134] where La Forest J., at stage one of the *Anns* test, found that the defendants owed a duty of care. No justification was given, other than foreseeability. La Forest J. then asked some sensible questions – namely, for whom and for what purpose did the defendants provide the impugned information? Those questions, however, were asked at stage two of the analysis, once the duty was established. Similarly, in *Bow Valley,* McLachlin C.J.C. founded a duty to warn not on any rationale drawn from the nature of the activity, but on mere foreseeability:

> Where a duty to warn is alleged, the issue is not reliance (there being nothing to rely upon), but whether the defendants ought reasonably to have foreseen that the plaintiffs might suffer as a result of use of the product about which the warning should have been made. I have already found that the duty to warn extended to (the owner of the damaged rig). The question is, however, whether it extended as far as (its users). The facts establish that this was the case. The defendants knew of the existence of the plaintiffs and others like them and knew or ought to have known that they stood to lose money if the drilling rig was shut down.[135]

The utter absence of any rationale for a duty to warn the users as opposed to the owners of property at risk of physical damage begs the question – why should the defendants owe such a duty? Assuming the absence of concerns for physical safety that, for

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[133] *Norsk*, *supra* note 17, is a significant exception; there, both McLachlin J. (as she then was) and La Forest J. engaged in candid assessments about the reasons for and against liability.
[134] *Hercules*, *supra* note 121.
[135] *Bow Valley*, *supra* note 37 at 411.

example, motivated the Supreme Court of Canada in *Rivtow Marine Ltd. v. Washington Iron Works*,[136] why does a manufacturer have a *prima facie* duty[137] to warn users as well as owners of their product? It may be that the court has its reasons, such as a desire to promote industrial productivity. The court, however, does not tell us, nor does it tell us whether it would find a duty of care in circumstances where there is no safety-related imperative. Finally, if there is in fact no rationale to justify a duty of care, then why do we need to rely on the factor of indeterminate liability to deny liability?[138]

Two decisions of the British Columbia Court of Appeal demonstrate this particular aspect of the practical difficulties posed by a *prima facie* duty in pure economic loss cases. In

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[136] *Rivtow*, *supra* note 4.

[137] The duty of care in *Bow Valley* was negatived at stage two by policy concerns, specifically indeterminate liability.

[138] To the extent Lord Wilberforce in *Anns* relied on *Donoghue v. Stevenson* in articulating the *prima facie* duty of care, the absence of justification for a duty of care, which is inherent in the two stage *Anns* test is inconsistent with *Donoghue v. Stevenson*, where Lord MacMillan justified the imposition of a duty of care in the circumstances of that case (at *supra*, note 9, at 619-20):

> For a manufacturer of aerated water to store his empty bottles in a place where snails can get access to them, and to fill his bottles without taking any adequate precautions by inspection or otherwise to ensure that they contain no deleterious foreign matter, may reasonably be characterized as carelessness without applying too exacting a standard. ... Now I have no hesitation in affirming that a person who for gain engages in the business of manufacturing articles of food and drink intended for consumption by members of the public in the form in which he issues to them is under a duty to take care in the manufacture of those articles.

Lord Oliver's speech at the Court of Appeal in *Leigh & Sillavan Ltd. v. The Aliakmon Shipping Ltd.*, (1984), [1985] Q.B. 350, [1985] 2 All E.R. 44 at 58 (C.A.), aff'd [1986] A.C. 785, [1986] 2 All E.R. 145 (H.L.) [*The Aliakmon* cited to All E.R.] also criticized the absence of duty justification engendered by the *Anns* test:

> The formula "proximity = foreseeability = duty, unless policy otherwise dictates" may be a very broadly accurate description of the point to which the law of tortious negligence has now progressed, but it is not, if I may say so respectfully, particularly helpful as an analysis, for it is only another way of saying that there are situations in which proximity (in the sense of foreseeability in fact) is not necessarily synonymous with duty and that the reason why it is not is because the law says that it is not. *In itself it tells us nothing about the situation in which the law says that it is not, nor why the law says so. Unless, then, liability is to be left to depend upon the uncertain criterion of the individual judge's view of policy, some further analysis seems to be required in order to determine not only where the line is to be drawn, but why it is to be drawn there.* (Emphasis added).

1989, Taylor J.A. pronounced for the court in *Kamahap Ent. Ltd. v. Chu's Central Market Ltd.*,[139] where a tenant held a right of first refusal on the leased premises. When the landlord entered into an interim agreement for sale with a third party, the tenant purported to exercise its first refusal rights. The landlord received (incorrect) advice from its solicitors that the tenant had not validly exercised its right of pre-emption. When litigation commenced, the tenant issued third party proceedings against the landlord's solicitor.

Taylor J.A. expressly declined to follow *Anns* and its principle that proximity (which, he noted, Lord Wilberforce had articulated as foreseeability) gives rise to a *prima facie* duty, observing that the series of House of Lords and Privy Council cases in the late 1980's that had cast doubt on that principle.[140] Freed from the proximity-limited scope of inquiry of the *prima facie* duty analysis, he asked:

> Why, then, should the solicitors in this case be held to a duty of care to the party with whom their client dealt?[141]

After considering (and rejecting) two possible rationales (conferral of a benefit and reliance), Taylor J.A. again asked:

> Where, then, is the basis for the creation of a duty of care in such a situation as this – that is to say, as between the lawyers acting for one party to a commercial dealing and the other party to that transaction?[142]

Ultimately, and after further candid reflection, the court found no rationale justifying the imposition of a duty of care.

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[139] (1989), 64 D.L.R. (4th) 167, 40 B.C.L.R. (2d) 288 (C.A.) [*Kamahap* cited to B.C.L.R.].
[140] See note 110.
[141] *Kamahap*, *supra* note 139 at 293.
[142] *Ibid.* at 294.

Contrast that informing, inquiring approach, however, with that of the same court (indeed, the same judge) in *Kripps v. Touche Ross & Co.*,[143] where the court had to account for *CNR v. Norsk* and its rejuvenation of the *Anns* test. There, the Superintendent of Brokers had issued receipts for prospectuses which had been reviewed for compliance by accountants, thus authorizing a debenture sale to certain investors. Those investors lost their investments when the Superintendent later issued a cease trading order. They sued, among others, the accountants.

Taylor J.A., for the court, acknowledged that he now had to account for "the '*prima facie* duty of care' rule in *Anns*, a rule which may, at least to some extent, have been approved ... in (*CNR v. Norsk*)."[144] He was, nonetheless, still reluctant to apply it in circumstances of pure economic loss (or, as he distinguished it from relational economic loss, pure economic loss "simpliciter"):

> The rule emerges from the speech in *Anns* of Lord Wilberforce. Its application in cases of pure economic loss simpliciter is incongruous ... . The difficulty arises from the fact that there cannot be a general duty to avoid causing pure economic loss simpliciter. Such a duty can arise only in exceptional cases.[145]

Taylor J.A. did, however, concede that this argument was lost, given that the Supreme Court of Canada, in *CNR v. Norsk*, had concluded that *Anns* involved a generally applicable theory of liability. Instead, he employed *Donoghue v. Stevenson*'s notions of "closeness and directness" to find that there was no proximity and thus no duty of care at the first stage. No reasons for the denial of a duty, other than proximity considerations, were offered until, just before concluding, Taylor J.A. said this:

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[143] (1992), 94 D.L.R. (4th) 284, 69 B.C.L.R. (2d) 62 (C.A.) [*Kripps* cited to B.C.L.R.].
[144] *Ibid.* at 69.
[145] *Ibid.* at 71-72.

> To impose liability in such a case would not only be to violate the fundamental requirement for "proximity" in the ordinary sense of a "close" and "direct" relation between loss suffered and negligent act but *also to create a mechanism for risk reallocation in commercial transactions of potentially farreaching consequences based on a conception of duty which must be regarded as foreign to the operation of the free market.*[146]

In addition to the consideration of "proximity", therefore, the court articulated, albeit in passing, the rationale of appropriate risk allocation in commercial transactions. That statement obviously begs explication, which the court did not provide.[147] My point, however, is that, owing to Canada's continued adherence, unchanged by *Coopers* and *Edwards*, to the *Anns* conception of a *prima facie* duty, Taylor J.A.'s additional rationale, and all other considerations that go beyond "proximity", are superfluous in any inquiry into the imposition of a duty of care. Thus the explicit and thorough canvassing of arguments for and against a duty of care that was undertaken in *Kamahap* became, in *Kripps*, first an inevitably unsuccessful struggle to avoid the confines of *Anns* and then a brief, passing (and strictly speaking, unnecessary) reference to an important consideration in determining whether a duty of care should be imposed, made in a rare attempt, understandable and praiseworthy, yet incompatible with *Anns*, *Cooper* and *Edwards*, to justify the court's pronouncement.

Cooper v. Hobart and *Edwards v. Law Society of Upper Canada* betray evident and serious concern among Canada's high court justices about the practical application of *Anns* in cases of pure economic loss, and it is conceivable that their reformulation of the *prima facie* duty may well alleviate some of that concern. For example, the stage one

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[146] *Ibid.* at 86 (emphasis added).

[147] For example, it might be argued that, unlike physical damage cases, many economic losses can be allocated by contract.

incorporation of proximity-based policy considerations might open the door for the court to apply a wider range of policy considerations at stage one, ultimately consigning stage two to irrelevance. Although that may be an inevitable consequence given the difficulties created by certain incidents of the *prima facie* duty, as a solution it is neither coherent nor honest. The underlying difficulties require not a tinkering with the *prima facie* duty of care, but its rejection in favour of a more theoretically consistent and orthodox conception of the duty of care. Similarly, the court may ultimately find some comfort in its newly adopted categorization approach, although it will require more careful judicial refinement to find a balance between the dangers of over-generalizing the duty, and the futility of too-narrow definitions. One cannot help being hopeful that the court's reference to categorization might evolve over the next few years to prove a helpful reference tool to identify classes of cases where duties of care have or have not been found to exist.

More generally, however, my objective in this chapter has been to demonstrate that, outside of those established categories, the imposition of a duty of care should entail a principled inquiry into the basis for that duty, and specifically into a justification for the duty, grounded in a protected legal interest. Through that inquiry, a coherent notion emerges in the form of a duty of care in respect of proprietary interests, through which "direct" proprietary injury can be viewed not only as an independent and justifiable basis for recovery in the law of torts, but also as a particular case of a more general principle of liability, founded on an "indirect" proprietary interest, which arises from the intentional or knowing inducement of another to rely on the reasonableness of one's actions. In the

second chapter, I will consider relational economic loss as an exemplar of the confining effects of the duty of care where the plaintiff can demonstrate an injury to a proprietary interest, either in the particular, direct sense or in its broader, indirect expression.

III. ENGAGING THE DIRECT PROPRIETARY INTEREST: RELATIONAL ECONOMIC LOSS

In Chapter 1, I noted that relational economic loss is a term adopted by the Supreme Court of Canada to describe economic loss that has resulted from the physical damage to the person or property of a third party.[148] Here, the proprietary nature of the resource, whose "use" by the defendant is placed at issue by the plaintiff's claim under the law of torts, is central. Recall that a plaintiff may only assert a claim to the use of something, exclusive as against the defendant, if he or she has a proprietary right therein that is superior to the right, if any, which the defendant can assert. Thus the law protects the plaintiff's superior interest, and the defendant, who has expropriated it to his or her own use is impressed with liability and required to pay compensation. Conversely, a plaintiff who cannot assert such superiority cannot prevent, or be compensated by reason of, the defendant's negligent use of something, even if such use has harmed the plaintiff's interests. Hence the significance of the duty of care inquiry, which reveals that the only resource, in the proprietary sense which I have canvassed in Chapter 1, that is damaged belongs neither to the plaintiff nor the defendant.

My analysis of the law's distinctive treatment of pure economic loss arising specifically from this type of claim will consist, at the outset, of a general review of the common law's consistent historical resistance to its recoverability, amplified by comparison with

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[148] See notes 47, 63. This term was employed by La Forest J. in his dissent in *Norsk*, *supra* note 10, and adopted by the full court in *Winnipeg Condominium*, *supra*, note 63, *D'Amato v. Badger*, *supra* note 63 and *Bow Valley*, note 37. Bruce Feldthusen notes that it can also be consequent upon injury to the economic interest of a third party. (See Feldthusen, *Economic Negligence, supra* note 22 at 194, n. 2). This is also implicit in the treatment of economic loss by Fleming James. (James, "A Pragmatic Appraisal", *supra* note 36).

recoverable economic loss that is consequential upon interference with a proprietary interest. With reference to more recent pronouncements of the Supreme Court of Canada and the High Court of Australia in relational economic loss cases, I will canvass and assess the commonly-employed reference points of "foreseeability" and "proximity" invoked therein as "controlling concepts" by which indeterminate liability might be avoided. Ultimately, through this analysis, I intend to demonstrate the theoretical and practical limitations of the current judicial reliance on proximity. I will also discuss certain circumstances where a principled approach to relational economic loss, consistent with the origins and historical evolution of the common law duty of care, would allow for recovery.

a. The General Rule: No Recovery

Courts have generally denied recovery for relational economic loss. In Chapter 1, I briefly canvassed the facts of *Cattle v. Stockton Waterworks Co.*,[149] and the decision of Blackburn J., which is the common reference point. Assuming, for the purpose of Blackburn J.'s analysis, that the landowner might have maintained an action in his own name for damage to his land, Blackburn J. defined the issue as whether the plaintiff could sue in his own name for the loss he sustained "in consequence of the damage which the defendants have done to (the landowner's property), causing the plaintiff to lose money under his contract(.)"[150] Denying recovery, he said:

> In the present case the objection is technical and against the merits, and we should be glad to avoid giving it effect. But if we did so we should establish an authority for saying that in such a case as that of *Fletcher v. Rylands*, the defendant would be liable, not only to an action by the owner of the drowned mine, and by such of his workmen as had their tools or clothes destroyed, but

[149] *Cattle*, *supra* note 79. The facts of *Cattle* are also canvassed at note 79.
[150] *Ibid.* at 223.

> also to an action by every workman and person employed in the mine, who in consequence of its stoppage made less wages than he otherwise would have done.
> ...
> The plaintiff's claim is to recover the damage which he has sustained by his contract with (the landowner) becoming less profitable; ... We think this does not give him any right of action.[151]

Unlike the workers whose tools or clothes were destroyed, and whose proprietary right in those chattels would have conferred a right of action, the plaintiff had not suffered interference with a proprietary right and consequently had no right of action. His was an interest that fell short of such a right, even inasmuch as the defendant's direct interference with another's proprietary right affected his own interests in a way that detracted from the advantage he had derived from it. Consequently, he had suffered no actionable injury at the hands of the defendant.[152]

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[151] *Ibid.* at 223-24. The rule's pith was also expressed by Viscount Simonds for the Privy Council in *Attorney General for New South Wales v. Perpetual Trustee Ltd.*, [1955] A.C. 457, [1955] All E.R. 846 at 854:

> It is fundamental ... that the mere fact that an injury to A prevents a third party from getting A a benefit which he would otherwise have obtained, does not invest the third party with a right of action against the wrongdoer.

[152] Non-recovery was also the early rule in the United States. Recall that in *Connecticut Mutual, supra* note 81, Storrs J., considered an insurer's claim for recovery of amounts paid under a life insurance policy after the defendant's train plunged into a river, killing the insured. He noted (at 274) the plaintiffs' argument that "their loss is ... distinctly traceable and solely due to the misconduct of the defendants." An important observation, which I have already cited in part at note 83 (but I repeat it and set it out in full here in order to emphasize the point), followed (at 274):

> The completeness of the proof of connection between the acts of the defendants and the loss of the plaintiffs, does not vary, although it may tend to confuse the aspects of the case. The single question is, whether a plaintiff can successfully claim a legal injury to himself from another, because the latter has injured a third person in such a manner that the plaintiffs' contract liabilities are thereby affected.

In other words, the establishment of a causal link, far from determining the issue, distracts from the critical inquiry of whether a duty of care arises in such circumstances. As to that duty, Storrs J. concluded (at 276):

> We decide, that in the absence of any privity of contract between the plaintiffs and the defendants, and of any direct obligation of the latter to the former growing out of the contract or relation between the insured and the defendants, the loss of the plaintiffs, although due to the acts of the railroad company, was a remote and indirect consequence of the misconduct of the defendants, and was not actionable.

This case is often incorrectly cited as having affirmed an exclusionary rule where there is no privity between the plaintiff and the defendant. In fact, Storrs J. expressly contemplates liability in non-privity cases, but conditions such liability upon a defendant's "direct obligation" to a plaintiff that arises out of the

Judicial hostility to claims derived from interference with another's proprietary interest is also apparent in more recent cases. In *Weller & Co. v. Foot and Mouth Disease Research Institute*,[153] the defendants had conducted experiments in connection with foot and mouth disease, causing cattle in the vicinity of their premises to become infected. When the Ministry of Agriculture ordered closure of area markets, the plaintiff auctioneers sued, alleging foreseeable injury. Widgery J., in denying recovery, held that "a defendant cannot recover if the act or omission did not directly injure, or at least threaten directly to injure, the plaintiff's person or property but merely caused *consequential* loss ... ."[154]

The term "consequential" can confuse in this instance, as it is a legal term of art, discussed below, referring to a distinct type of loss. What Widgery J. was referring to in *Weller* was loss that is consequential upon (that is, relational to) loss suffered by a third party who was, in his words, "directly" (that is, not consequentially or relationally) injured. As to the nature of that direct injury necessary to engender a duty of care,

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contract or relationship between the plaintiff and the third party. It is also interesting that, in this case, one sees judicial expression of an "undertaking" as a necessary element of duty of care (at 275-76):

> It would be unfair to argue, that when two parties make a contract, they design to provide for an obligation to any other persons than themselves and those named expressly therein, or to such as are naturally within the direct scope of the duties and obligations prescribed by the agreement. On this point, it is enough to say, that when an agreement is entered into, neither party contemplates the requirement from the other, of a duty towards all the persons to whom he may have a relation by numberless private contracts, and who may therefore be affected by the breach of the others' undertakings.

This analysis, while intriguing, was unnecessary as the cases involving "relational economic loss" can be explained on the plaintiff's inability to demonstrate injury to a proprietary right, without resort to *Hedley Byrne*, *supra* note 14. Furthermore, and as La Forest J. points out in *Norsk*, *supra* note 17 at 341, relational economic loss typically involves accidents, involving no intention to affect the plaintiff. As the defendant cannot be said to have contemplated that effect, he or she cannot be viewed as having undertaken or assumed responsibility for the consequences to the plaintiff.

[153] [1966] 1 Q.B. 569, [1965] 3 All E.R. 560 [*Weller* cited to Q.B.].

[154] *Ibid.* at 577. (Emphasis added).

Widgery J. relied upon the speech of Lord Penzance in *Simpson v. Thomson*,[155] where underwriters, suing in their own name, sought to recover for the amounts paid under two contracts of insurance to the owner of a vessel injured by the negligent operation of another vessel.[156] Lord Penzance's consideration of the interest asserted by the plaintiffs, and of the principle at stake, is instructive:

> ... (The plaintiffs contend that they), by virtue of the policy which they entered into in respect of this ship, had an interest of their own in her welfare and protection, inasmuch as any injury or loss sustained by her would indirectly fall upon them as a consequence of their contract; and that this interest was such as would support an action by them in their own names and behalf against a wrongdoer. This proposition virtually affirms a principle which I think your Lordships will do well to consider with some care, as it will be found to have a much wider application and signification than any which may be involved in the incidents of a contract of insurance. The principle involved seems to me to be this – that where damage is done by a wrongdoer to a chattel not only the owner of that chattel, but all those who by contract with the owner have bound themselves to obligations which are rendered more onerous, or have secured to themselves advantages which are rendered less beneficial by the damage done to the chattel, have a right of action against the wrongdoer although they have no immediate or reversionary property in the chattel, and no possessory right by reason of any contract attaching to the chattel itself, such as by lien or hypothecation.
>
> This, I say, is the principle involved in the Respondents' contention. ...
> ...
> But the ground upon which I will ask your Lordships to reject this contention of the Respondents' counsel is this – that upon the cases cited no precedent or authority has been found or produced to the House for an action against the wrongdoer except in the name, and therefore, in point of law, on the part of one who had either some property in, or possession of, the chattel injured.[157]

In other words, the fundamental justification for non-recovery in cases of relational economic loss in tort law is that the plaintiff has no proprietary right, whether immediate, reversionary or possessory, in the property that suffered physical damage. Having

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[155] (1877), 3 App. Cas. 279 (P.C.) [*Simpson*].

[156] The insurers could not subrogate in this instance, as the injured vessel's owner also owned the negligently-operated vessel.

[157] *Simpson, supra* note 155 at 289-90. I am not suggesting here that jurists espousing other conceptions of the duty of care in the law of torts, for example a proximity-based duty of care, base liability on mere causal connection. Proximity theorists would also presumably emphasize that the plaintiff's loss must be within the ambit of the risk posed by the defendant's conduct. I agree that this is ultimately a prerequisite to the imposition of liability, but as I will explain later in this chapter, I do not view proximity as a useful or principled justification for imposing a duty of care.

informed Widgery J.'s conception of an actionable direct injury to person or property, this justification was then more starkly illustrated in *The Wear Breeze*,[158] where Roskill J. considered the claim of holders of delivery orders for cargo, to which they had no title while in transit; however, since they had had to pay for the goods prior to delivery, the loss or damage that in fact occurred while in transit was at their contractual risk. After reviewing all the authorities, including *Hedley Byrne*, Roskill J. concluded that the shipowners owed no duty of care in the carriage of goods to persons other than to one who owned them or had an immediate possessory right.[159] Similarly, in *The Aliakmon*,[160] Sir John Donaldson M.R., noting Roskill J.'s "classic judgment"[161] in *The Wear Breeze*, concurred in the dismissal of an action brought by purchasers of steel coils which were damaged during stowage by stevedores, at a time when the buyers were at risk, but had not yet taken delivery, at which time they were to exchange their bill of exchange for a bill of lading, investing them of a right of possession in the coils.[162]

The doctrinal strength of the proprietary justification for excluding liability in cases of relational economic loss is similarly apparent in the United States where, in *Robins Dry*

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[158] *The Wear Breeze*, *supra* note 61.
[159] *Ibid.* at 794. See also the decision of Geoffrey Lane J. in *Electrochrome Ltd. v. Welsh Plastics*, [1968] 2 All E.R. 205 (Q.B.) [*Electrochrome*], dismissing a claim arising from pure economic loss incurred by the plaintiffs' factory when production ceased after the defendant's employee negligently drove his truck into a fire hydrant, cutting off water supply for several hours. As the plaintiffs had "no proprietary rights or possessory rights of any sort either in the hydrant or the main", the court, again relying on Lord Penzance's speech in *Simpson v. Thomson*, concluded that the plaintiffs had suffered *damnum sine injuria* – that is, while they suffered *damnum*, or damages, recovery of *damnum* is contingent upon having suffered *injuria*. Here, the *injuria* had been suffered by the owner of the hydrant.
[160] *The Aliakmon*, *supra* note 138.
[161] *Ibid.* (C.A.) at 52.
[162] The Master of the Rolls also felt constrained to apply the *Anns* test. Finding that the parties were proximate, he nonetheless precluded the application of a *prima facie* duty at stage two, citing certain policies underlying the Hague Rules and indeterminate liability.

Dock & Repair Co. v. Flint,[163] Holmes J. reversed the trial judge's allowance of a vessel charterer's claim for compensation for the loss of use of the vessel, while it was out of service as a result of the defendant's negligence in damaging a propeller during repairs. Although Holmes J.'s reasons are sparse,[164] a revealing passage states:

> The District Court allowed recovery on the on the ground that the respondents had a "property right" in the vessel, although it is not argued that there was a demise, and the owners remained in possession. This notion is also repudiated by the Circuit Court of Appeals and rightly. The question is whether the respondents have an interest protected by the law against unintended injuries inflicted upon the vessel by third persons who know nothing of the charter. If they have, it must be worked out through their contract relations with the owners, not on the postulate that they have a right *in rem* against the ship.[165]

The reference to a "demise" charter[166] raises the subject of certain recoverable relational economic loss that will be discussed below. Suffice to say, for the purposes of this analysis, that it gives the charterer an exclusive right of possession, to which right Holmes J. obviously attached significance as a "protected interest", as he similarly did respecting the possession which the vessel owners maintained in this case. Thus the plaintiff, having no possessory right in the vessel, suffered no actionable loss flowing from the damage to the propeller. Holmes J.'s "protected interest" is thus seen to be the same thing as the District Court's "property right", meaning that the District Court had applied the correct test but, the charterers having no right of possession exclusive as against the defendant, arrived at the wrong conclusion. Indeed, Goddard J.'s reasons at

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[163] *Robins Dry Dock, supra* note 65.

[164] One appellate justice, in dissent, has described the pronouncement in *Robins Dry Dock* as that of "a great judge ... (having) an off-day." See *State of Louisiana ex. Rel. Guste v. M/V Testbank*, 728 F.2d 748 at 750 (5th Cir. 1983, Wisdom J.); aff'd *en banc* 752 F.2d 1019 (5th Cir. 1984) [*Testbank*] where, (at 1035) arguing that *Robins Dry Dock* has been applied too widely, he refers to it as the "Tar Baby of tort law." Higginbotham J., for the majority, affirmed the *Robins Dry Dock* principle precluding recovery for economic damage absent injury to a proprietary interest.

[165] *Robins Dry Dock, supra*, note 65 at 308.

[166] Also called "bareboat" charters.

the District Court reveal that his inquiry conformed to Holmes J.'s strictures as to the test to be applied:

> Is the right to the use of a vessel a property right which the law recognizes and protects? If a third party, not the owner of the vessel, through negligence, deprives the charterer of this right, has he any remedy?[167]

Goddard J.'s error, Holmes J. found, was in concluding that a charter giving no possessory right confers on the charterer a "property right" sufficient to establish a right of action for negligently-caused damage to the vessel. The damage to the propeller, while causative of the charterer's loss, was seen as a loss only to the owner. Causation would not suffice; as Holmes J. said, "a tort to the person or property of one man does not make the tortfeasor liable to another merely because the injured person was under a contract with that other",[168] meaning that, absent the additional factor of a contractual duty or a proprietary interest giving rise to a tort law duty of care, the charterer could not recover.

The general non-recoverability of relational economic loss stands in contrast to the law's treatment of economic loss that is consequential upon physical damage to a proprietary interest held by the plaintiff, and the distinction between these two types of damage is crucial to understanding the law's treatment of pure economic loss. The distinction is

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[167] The opinion of Goddard J. are cited in 38 *Cases and Points* for 275 S. Ct. (hereafter *Cases and Points*). This excerpt was taken from *Cases and Points* at 21-22. For a more sympathetic analysis of the lower courts' decisions in *Robins Dry Dock*, see Victor P. Goldberg, "Recovery for Pure Economic Loss in Tort: Another Look at *Robins Dry Dock v. Flint*" (1991) J. Legal Stud. 249 [Goldberg, "Recovery for Pure Economic Loss"]. For reasons already expressed in this thesis (in addressing Bruce Feldthusen's methodology), I disagree with Professor Goldberg's observations which lead him to call for categorization of economic loss.

[168] *Robins Dry Dock*, *supra* note 65, at 309.

illustrated by the facts of *S.C.M. (United Kingdom) Ltd. v. W.J. Whittall and Sons Ltd.*,[169] where the defendants' employee, while rebuilding a boundary wall, damaged an electrical cable, resulting in a seven hour power failure to the plaintiffs' typewriter factory. Lord Denning's speech revealed that the plaintiffs' damages were of three types: (1) damage to some of the factory machinery; (2) lost production incurred by reason of damage to the machinery; and (3) lost production unrelated to the damage to the machinery, and incurred solely by reason of the power outage.[170] Having noted the plaintiffs' concession as to the non-recoverability of type (3), Lord Denning then articulated the distinction between pure and consequential economic loss in the circumstances of that case:

> It is well settled that when a defendant by his negligence causes *physical* damage to the person or property of the plaintiff, in such circumstances that the plaintiff is entitled to compensation for physical damage, then he can claim, in addition, for economic loss consequent on it. Thus a plaintiff who suffers personal injuries recovers his loss of earnings: and a shipowner, whose ship is sunk or damaged, recovers for his loss of freight. If and in so far as Mr. Dehn is entitled to claim for the material damage, then he can claim for the loss of production which was truly consequential on the material damage. But, if the loss of production was really due to the cutting off of electricity for seven hours and 17 minutes – and the plaintiff took the opportunity during that time of remedying the physical damage – then the claim for loss of production would depend on whether, in this type of case, economic loss is recoverable.[171]

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[169] [1971] 1 Q.B. 337, [1970] 3 All E.R. 245 (C.A.) [*S.C.M.* cited to Q.B.].

[170] *Ibid.* at 341. It is worth noting Lord Denning's recital of damages *in extenso* as it clarifies the distinction between the last two types of damage:

> They suffered particularly because they had molten materials in their machines. These materials solidified owing to lack of electrical heat. The company was put to much trouble in getting the machines clear. They had to strip them down, and chip away the solidified material, and reassemble the machines. It took them much of the time while the current was off. In addition, some parts of the machines were damaged beyond recovery. The company lost the value of those items and also the profit from one full day's production. They claim damages from the contractors for all that loss.
> ...
> During the course of the argument a question arose whether the loss of production was due to the shutting down of the works (thus causing economic loss only) or whether it was due to the physical damage to the machines which had to be repaired. Mr. Dehn, for the factory, made inquiries of his clients and assured the court that he confined the claim to the material damage done to the machines, plus the loss of production consequent on that damage.

[171] *Ibid.* at 341-42. (Emphasis in original).

In the result, insofar as the lost production was *consequential* upon damage to factory machinery, it was not pure economic loss and thus was recoverable, so long as the physical damage was recoverable.

Two years later, the same court again confronted the distinction between consequential and pure economic loss in *Spartan Steel & Alloys Ltd. v. Martin & Co. (Contractors) Ltd.*[172] There, while digging up a road, the defendant's employees negligently damaged an electrical cable belonging to the local utility board, cutting off power to the plaintiff's factory for approximately 14 hours. The plaintiffs, manufacturers of stainless steel alloys, alleged three different heads of damage: (1) lost value of the molten steel "melt" that was in the furnace at the time of the outage, which had been physically damaged; (2) lost profit on that damaged melt; and (3) lost profit on four further melts which could have been manufactured during the outage. Counsel for the defendants, citing *S.C.M.*, admitted liability for the lost value arising from the physical damage done to the melt that was in the furnace at the time,[173] but resisted liability for lost profits associated with that melt or the four other melts that would have been produced but for the defendant's employees' negligence. Agreeing in the result with Lawton L.J., Lord Denning again affirmed the distinction between pure and consequential economic loss that had governed recovery in *S.C.M.*:

> ... If the defendant is guilty of negligence which cuts off the electricity supply and causes actual physical damage to person or property, that physical damage can be recovered ... and also any economic loss truly consequential on the material damage ... .

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[172] [1973] 1 Q.B. 27, [1972] 3 All E.R. 557 (C.A.) [*Spartan Steel* cited to Q.B.].

[173] The recoverability of physical damage in such cases was also affirmed by Johnson J. of the 5th Circuit in *Consolidated Aluminum Corporation v. C.F. Bean Corporation*, 772 F.2d 1217 at 1212 (5th Cir. 1985), which also involved the interruption of fuel supply to an industrial plant.

> These considerations lead me to the conclusion that the plaintiffs should recover for the physical damage to the one melt ... and the loss of profit on that melt consequent thereon...: but not for the loss of profit on the four melts ..., because that was economic loss independent of physical damage. ...[174]

The law's distinction between "consequential" economic loss and pure economic loss is based, then, on the former's genesis as the foreseeable consequence of interference with a proprietary interest, exclusive as against the defendant, which thus confers a right of recovery. Hence the lost profit derived from the first melt was recoverable in *Spartan Steel*, flowing as it did from the physical damage to the melt, as was the lost production derived from physical damage to the machinery in *S.C.M.*. Any claim arising from the four unmanufactured melts in *Spartan Steel*, however, or derived from the power outage in *S.C.M.* was unrecoverable, as it flowed in both cases from damage to an electrical cable in which neither the plaintiffs in *S.C.M.* nor the plaintiff in *Spartan Steel* had any proprietary rights.

While the English Court of Appeal appreciated this distinction in those cases, it has occasionally eluded other jurists. In *Seaway Hotels Ltd. v. Cragg (Can.) Ltd.*,[175] the Ontario Court of Appeal affirmed McLennan J.'s decision to allow recovery where an underground power line was negligently broken by contractors installing a new gas pipeline. Yet, its basis for doing so was that the injury "ought reasonably to have been foreseen by the defendants."[176] McLennan J.'s reasons, however, had not relied on

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[174] *Spartan Steel*, *supra* note 172 at 39. At 47, Lawton L.J. similarly acknowledged the recoverability of economic loss which is "consequential upon foreseeable physical injury or damage to property." As to "these considerations", however, Lord Denning's reasons also canvassed at length his view that the recoverability of pure economic loss is determined by reference to policy, both to determine and to limit the duty. In that sense, along with Lord Reid's speech in *Dorset Yacht*, Lord Denning's reasons in *Spartan Steel* were a harbinger of *Anns*.

[175] (1959), 17 D.L.R. (2d) 292 (Ont. H.C.), aff'd (1959), 21 D.L.R. (2d) 264 (Ont. C.A.) [*Seaway*].

[176] *Ibid.* at 266 (Ont. C.A.).

foreseeability, but rather had reflected the distinction between consequential and pure economic loss:

> In this case there was direct damage to the plaintiff's property in the food which was spoiled by reason of the refrigeration equipment failing to operate. ... But if an actionable wrong has been done to the plaintiff he is entitled to recover all the damages resulting from it even if some part of the damage considered by itself would not be recoverable ... .[177]

Inasmuch then as the damages sought were for physical damage to property - that is, spoiled food - or economic loss flowing from the spoiled food, the plaintiff could recover.[178] It is McLennan J.'s principled judgment, and not the appellate pronouncement, that has been recognized in Canada as the better statement of legal principle in *Seaway*.[179]

Confusion over these concepts has even extended to the equally fundamental distinction between physical damage and pure economic loss. In *Attorney General for Ontario v. Fatehi*,[180] the majority of the Ontario Court of Appeal denied recovery to the Province of Ontario in its action against a negligent driver who caused an accident which resulted in

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[177] *Ibid.* at 296-97 (Ont. H.C.).

[178] This is, of course, subject to the defendant's negligence having been determined to be the proximate cause of the damage. For an example of that analysis, see *Newlin v. New England Telephone & Telegraph Co.*, 316 Mass. 400, 54 N.E. 929 (Sup. Ct. 1944), where the court allowed recovery in circumstances where the defendant's pole had fallen on the local utility provider's power line, interrupting power to the plaintiff's plant and causing a crop of mushrooms to be spoiled.

[179] See *Hunt v. Johnstone* (1976), 12 O.R. (2d) 623, 69 D.L.R. (3d) 639 at 661 (H.C.) [*Hunt v. Johnstone* cited to D.L.R.] and both the pronouncements of the Ontario Court of Appeal and the Supreme Court of Canada in *Fatehi*, *supra* note 44 at 608 (Ont. C.A.) and at 137 (S.C.C.). The defendants' submissions in *Dominion Tape*, *supra* note 43 at 301 also emphasized the explicit finding of property damage in *Seaway*. See, however, the reasons of Mason J. in *Caltex*, *supra* note 33 at 270 where, citing only the Court of Appeal's pronouncement, he described *Seaway* as a claim "for financial loss *not* consequential upon property damage ... ." (Emphasis added). Mason J., however, is in error, and his sole reference to the appellate pronouncement suggests that he did not review the trial judgment where the facts were thoroughly recited. There is, however, a reference, albeit brief, in the appellate pronouncement in *Seaway* as to the true nature of the plaintiff's damage (*Seaway*, *supra* note 175, at 265):

> In the course of construction the duct was broken by the contractors of the Consumers Gas Co. and as a result the electrical power used for the operation of appliances in the plaintiff's properties was cut off and property damage was caused thereby.

[180] *Fatehi*, *supra* note 44.

gasoline flowing onto the highway and broken glass and debris being strewn onto the highway. Because of the danger of fire damage to the highway surface and of the debris impeding traffic, the Province incurred expense to have the highway surface washed and the debris removed. Wilson J.A. specifically found that the Province's damage was *not* property damage, but rather a pure economic loss, albeit "one incurred in order to avert physical damage to property."[181] In her view, the loss incurred here was purely economic, unrelated to physical damage to property and thus not arising from interference with the Province's proprietary rights. This would seem to be wrong on two counts: first, with respect, contamination of property by gasoline is undeniably a physical impairment of property. Further, debris on a highway is a physical imposition on an owner's right of use and enjoyment and, as such, constitutes an interference with a proprietary right. Estey J., for the Supreme Court of Canada, recognized this in discussing the nature of the Province's loss:

> It is said by the respondent, and by the majority below, that the appellant must fail as its loss was pure economic loss, thus far unrecoverable at law. Whether that is so depends upon questions of both fact and law. On the facts as agreed, the road was blocked by the negligent actions of the respondent. It ceased to be a road in the sense of a traffic-carrying facility. Whether the respondent achieved this result by deliberately tearing up a section of the surface, or by negligently operating his vehicle so as to drop a large load of rocks on the road, or so as to strew broken auto parts, debris and gasoline on the road, as was here the case, makes no difference in fact. The road, by reason of the respondent's wrongful acts, ceased to be a road.

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[181] *Ibid.* at 616 (Ont. C.A.). The concept of damages incurred to "avert physical damage to property" is introduced and described by Peter Benson, "Economic Loss in Tort Law", *supra* note 44, as "unavoidable economic loss" and he prescribes its recoverability. I agree with Professor Benson and disagree with Wilson J.A.'s pronouncement, as the economic loss is incurred to extricate the property from the ambit of the very risk that the defendant's negligent conduct would impose – that is, a risk of injury to an interest in property in which the plaintiff as a right of use which, as against the defendant, he or she can assert an exclusive right. Brooke J.A., in dissent in *Fatehi*, acknowledged (at 606) that "(t)he Crown as the owner of the property had the right to take reasonable steps to protect its property from damage and pursue this claim against the defendant whose negligence had caused the loss." I do not consider this to be an example of relational economic loss, but rather an incident of property ownership, and I discuss it later in this chapter, in canvassing recovery for "general average" contributions.

> The appellant as the owner of the road has thereby suffered damage to its property. The appellant suffered this direct damage in the same manner as any other property owner ... (and) would be entitled to recover for these direct damages so suffered. ... (T)he appellant was required to expend its resources in order to make whole its property which had been significantly degraded by the actions of the respondent. ...
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> In contract to this direct injury to the property of the appellant, is the instance in what in law is sometimes called "pure economic loss." All property damage incurred with reference to property of a plaintiff is economic loss which entitles the plaintiff to be made whole so far as a monetary award can do. However, in the case of pure economic loss, the courts have historically taken a different approach. By "pure economic loss" the courts have usually been taken to refer to a diminution of worth incurred without any physical injury to any asset of the plaintiff.[182]

Alternatively put, the Province had suffered physical damage to property, distinct from any devaluation incurred by reason of its degradation. Accordingly, Estey J. held, the Province could recover.

b. Recent Alternative Approaches – The Search for "Controlling Concepts"

The English position on pure economic loss generally and relational economic loss specifically has changed considerably since *Anns* and, as a result of a series of House of Lords pronouncements in the late 1980's culminating in *Murphy*,[183] relational economic loss is England is unrecoverable except where it arises from a maritime law claim for general average loss.[184] Canada's gradual evolution over the past decade to a similarly (but not as) restrictive approach, and Australia's apparent current inclination towards a more generous case-specific approach, however, offer instructive demonstrations of the pitfalls of seeking to allow recovery of relational economic loss specifically, and pure economic loss generally, while relying on notions of foreseeability and proximity as

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[182] *Fatehi*, *ibid.* at 136-37 (S.C.C.).
[183] *Murphy*, *supra* note 111.
[184] I discuss general average later in this chapter.

means of limiting the scope of the duty of care. The most recent Canadian authorities also reveal a converse flaw, being the reactive, rigid categorization approach to pure economic loss, which, while abjuring abstract concepts such as proximity (except to determine whether a new category ought to be recognized), does not allow for recovery in certain circumstances where recovery ought to be granted.[185]

The Supreme Court of Canada's 1992 pronouncement in *Norsk*[186] arose from a barge collision with a railway bridge, whose sole purpose was to serve rail traffic. The bridge, which sustained extensive damage, was closed for several weeks, forcing the four railway companies that used the bridge to reroute their railcars. In addition to an action brought by the bridge owner, Public Works Canada ("PWC"), three of the four railway users sued for pure economic loss. In *Norsk*, however, by agreement of the parties only the claim asserted by the largest user, Canadian National Railway ("CNR") was in issue.[187] CNR's use of the bridge, the sole direct rail link between the north and south shores of the Fraser River, had been continuous since 1915. While CNR owned land and rail track close to the bridge, its licence affirmed that full property rights in the bridge remained in PWC. CNR did, however, agree to provide PWC with repair, maintenance, consulting and inspection services under contract. The trial judge's conclusion that Norsk was liable for CNR's economic loss was affirmed at the Federal Court of Appeal.[188]

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[185] See *infra* note 273 and following.
[186] *Norsk*, *supra* note 17.
[187] *Ibid.* at 293. CNR is described as having accounted for 85% to 86% of the railway cars using the bridge in the year of the accident.
[188] 65 D.L.R. (4th) 321, [1990] F.C. 114 (C.A.), aff'g 26 F.T.R. 81, 49 C.C.L.T. 1 (F.C.C.).

The lead judgment at the Supreme Court of Canada was a dissent by La Forest J., which sought to distinguish relational economic loss from other economic and non-economic loss claims on the pragmatic basis of inclining towards certainty in judicial decision-making.[189] Indeed, he described his enterprise as one that "is necessarily pragmatic and involves drawing a line that will exclude at least some people who have been undeniably injured, owing to the tortfeasor's admitted failure to meet the requisite standard of care."[190] Seizing on the categorization approach of Bruce Feldthusen,[191] he identified this case as a contractual "variant" of relational economic loss,[192] and restricted his analysis to that type of case, to which he applied potential rules to govern recovery by "(dividing) the winners and the losers in the best possible manner."[193]

As to the possible tests for "drawing a line", La Forest J. first considered foreseeability of the individual plaintiff or of an ascertained class of plaintiffs.[194] Most courts have

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[189] La Forest J.'s dissent has been widely hailed in terms one usually would associate with less academic and more popular enterprises, such as a "veritable *tour de force*" (B.S. Markesinis, "Compensation for Negligently Inflicted Pure Economic Loss: Some Canadian Views" (1993) 109 Law Q. Rev. 5 at 9 and "powerful" (Carl F. Stychin, "'Principled Flexibility': An Analysis of Relational Economic Loss in Negligence" (1996) 25 Anglo-Am. L. Rev. 318 at 325 [Stychin, "Relational Economic Loss"]).

[190] *Norsk*, *supra* note 17 at 302.

[191] Feldthusen, "Economic Loss in the Supreme Court of Canada", *supra* note 6.

[192] La Forest J. added, however, "the different types of relational economic loss cases generally appear to be dealt with in the same way by the courts."). See *Norsk*, *supra*, note 17 at 300-01.

[193] *Ibid.* at 336. As to the rule itself, a good rule, he said, should do three things – first, it should "distinguish on a rational basis between potential plaintiffs, ... offer a convincing and practical rationale for distinguishing its claim from those other claims, contractual or otherwise, which are to be rejected." Secondly, it should "place some incentive on both parties to act in an economically rational manner to reduce total accident costs." Finally, it must "confront the problem of indeterminacy."

[194] *Norsk*, *supra* note 17. La Forest J. considered four possible tests: (1) foreseeability of the individual plaintiff or of an ascertained class of plaintiffs; (2) the defendant's foresight with respect to the specific nature of the loss incurred by the plaintiff; (3) physical propinquity; and (4) proximity. I do not propose to add to La Forest J.'s treatment of the second test (at 342), and in this essay I will treat physical propinquity as a form of proximity, consistent with McLachlin J.'s adoption of geographic proximity as a factor in her proximity analysis.

rejected foreseeability as a test;[195] indeed, in most actions, whether for pure economic loss or for physical damage, the loss itself is "foreseeable", but the claims are dismissed. Hence La Forest J. refrained from even considering foreseeability *simpliciter* and proceeded directly to potential refinements of foreseeability that would restrict the consequent scope of liability. In doing so, he drew from the approaches of two of the five High Court of Australia justices in *Caltex*.[196] Caltex, which had contracted with the plaintiff AOR for refinement of Caltex's oil (which would then be transported to Caltex's terminal through an underwater pipeline owned by AOR) suffered relational economic loss when the defendants negligently damaged the pipeline, disrupting the flow of oil to Caltex. Caltex sought in particular to recover the cost of arranging alternative transportation of oil to the terminal during the pipeline repairs. Each of the justices,

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[195] A significant exception is the 1979 decision of the Supreme Court of California in *J'Aire*, *supra* note 132, where liability was imposed on a contractor whose delays in completing work for which a building owner had hired him caused a building tenant foreseeable relational economic loss. At 411, Bird C.J. held:

> Where the risk of harm is foreseeable, as it was in the present case, an injury to the plaintiff's economic interests should not go uncompensated merely because it was unaccompanied by any injury to his person or property.

J'Aire, however, has been subject to significant academic criticism (See, in particular, Robert L. Rabin, "Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment" (1985) 37 Stan. L. Rev. 1512. While I disagree with Rabin's view of the defendant as having been retained by the landlord to confer a benefit on the plaintiff (thus bringing it within the scope of an earlier California Supreme Court decision of *Biakanja v. Irving*, 49 Cal. 2d 647, 320 P.2d 16 (Sup. Ct. 1958), which involved a lawyer's negligence in connection with the attestation of a will), I agree with his criticism (at 1522) of *J'Aire*'s substitution of foreseeability for "traditional duty limitations." Moreover, *J'Aire* goes against the weight of judicial authority, both in the Commonwealth and in the United States. See, for example, the comments of Wilson J.A. in *Fatehi*, *supra* note 44 at 608. See also *Amaya v. Home Ice, Fuel & Supply Co.*, 59 Cal.2d 295, 379 P.2d 513 (Sup. Ct. 1963) (*Amaya* cited to P.2d), a nervous shock case, where the court said (at 520-21):

> (m)uch confusion has been engendered ... by a misplaced reliance on the "foreseeability" formula. It is not enough to say that the duty has often been defined in terms of "foreseeability", that reasonable minds might differ as to whether the injury in the present term was "foreseeable."
>
> ...
>
> There are sound reasons for the established rule that the determination of the existence and scope of the defendant's duty to the plaintiff ... does not depend only on "foreseeability".

See also the comments of Widgery J. in *Weller*, *supra* note 153 at 587, where he affirms that *Hedley Byrne* requires, not "an ability to foresee indirect or economic loss", but rather a "duty of care owed to the plaintiff".

[196] *Caltex*, *supra* note 39.

grappling with what Stephen J. called "the search for some principle of law which will operate as a sufficient restraint upon excessively wide liability",[197] enunciated reasons that were variously consistent and contradictory, but which in general focussed on moulding foreseeability into a more restrictive form.

Gibbs J. focussed on knowledge or foreseeability of the likelihood of economic loss that would be sustained by Caltex as a member of an ascertained class, specifically, a user (but not necessarily the only user, although that was the case in *Caltex*) of that pipeline. The ascertained class, through which the defendant knows or has the means of knowing that a person may be affected by his or her acts or omissions, was seen by Gibbs J. as key to recovery:

> In my opinion it is still right to say that as a general rule damages are not recoverable for economic loss which is not consequential upon injury to the plaintiff's person or property. The fact that the loss was foreseeable is not enough to make it recoverable. However, there are exceptional cases in which the defendant has knowledge or means of knowledge that the plaintiff individually, and not merely as a member of an unascertained class, will be likely to suffer economic loss as a consequence of his negligence, and owes the plaintiff a duty to take care not to cause him such danger by his negligent act.[198]

Mason J., also seeking to impose specific confines upon foreseeability, but without referring to Gibbs J.'s test, said:

> A defendant will then be liable for economic damage due to his negligent conduct when he can reasonably foresee that a specific individual, as opposed to a class of persons, will suffer financial loss as a consequence of his conduct.[199]

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[197] *Ibid.* at 258.

[198] *Ibid.* at 245. This was also the approach of Handler J. in *People Express*, *supra* note 42 at 115, where he imposed liability on the basis that the plaintiff, an airline who sued (*inter alia*) a railroad for pure economic loss suffered due arising from an office evacuation precipitated by a rail tank car accident, could recover as "the defendants knew or reasonably should have foreseen both that particular plaintiffs or an identifiable class of plaintiffs were at risk and that ascertainable economic damages would ensue from the conduct."

[199] *Caltex*, *ibid.* at 276. In *Norsk*, *supra* note 17 at 387, Stevenson J. expressly adopted Mason J.'s test. Interestingly, Mason J. was not purporting to restrict the foreseeability test, but to reject it, in favour of what he described as the duty of care "approach" (at 274). The reasoning underlying the incorporation of

Neither Gibbs J. nor Mason J. attempted to justify the former's "ascertained class" test or the latter's "individual plaintiff" test respectively in terms of the particular significance to be ascribed to the plaintiff's membership in an ascertained class or to the plaintiff's exclusivity. Such justification would have been particularly important, given that the justices in *Caltex* were treating that case as one of pure economic loss generally, and not of relational economic loss as a specific category of pure economic loss, and thus they were purporting to enunciate correspondingly general tests to govern recovery. Further, the justification for these tests is not self evident; for example, were Mason J.'s "individual plaintiff" test to have governed, the House of Lords in *Hedley Byrne* would not have had to resort to the disclaimer given by the defendant in order to absolve it of liability.

Moreover, Lord Wilberforce, in enunciating his test in *Anns*, did not appear concerned about restricting claims to those asserted by members of an ascertained class. The "individual plaintiff" and "ascertained class" test appear to defy justification, except as functional means to control the scope of liability;[200] as to their merits relative to other controlling devices such as proximity, no unique value is apparent. Further yet, considered on its own merits the "individual plaintiff" test seems neither logical nor just in its mandate that we judge a case involving one plaintiff differently than a case

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foreseeability in the test he ultimately enunciates is unclear; while he was obviously influenced by the centrality of foreseeability in framing the duty of care in cases of physical damage, he does not justify in clear terms his "individual plaintiff" test. La Forest J., in *Norsk*, recognized this influence, and described Stevenson J. (at 339) as having "relie(d) on this factor as his principal ground for finding liability in this case."

[200] La Forest J. also rejected these tests, stating that their only utility was "to limit liability". (See *Norsk*, *supra* note 17 at 340).

involving two. The "ascertained class" test is similarly illogical and unjust in granting recovery where the plaintiff is a member of an ascertained class that the defendant can happen to identify; there is no legal significance to be found in a tortfeasor knowing or being able to know that the people likely to be harmed by his or her negligence consist of a specific number of people whom he or she can identify, whether by name or by association (such as members of a club, or operators of businesses on a street), as opposed to a tortfeasor knowing only that there are an unknown number of potential plaintiffs, not all of whom he or she can identify by name or association and are therefore part of an unascertained class. Furthermore, the requirement of ascertainment does not address the ubiquitously-expressed concern of indeterminacy; an ascertained class can be large – for example, all users of a particular bridge, or all occupants of a large office building.[201]

La Forest J., then, observing little value in foreseeability, howsoever refined, except as a means of restricting the class of claimants to a small group or a defined (small or large) group, turned to the other principal test on offer, being proximity. A specific definition of this concept has eluded jurists;[202] indeed, in *Caltex*, two justices, Jacobs and Stephen

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[201] This point is also made by the Privy Council in *Candlewood Navigation Corp. Ltd. v. Mitsui O.S.K. Lines Ltd.*, [1986] A.C. 1, [1985] 2 All E.R. 935 at 944-45 (P.C.) [*Candlewood* cited to All E.R.].

[202] As I have already observed (at note 29), Lord Wilberforce, in *Anns*, appeared to equate proximity with foreseeability, a fact which moved Oliver L.J. (as he then was) in the relational economic loss case of *The Aliakmon*, *supra* note 138 at 57-58 (C.A.) to attempt to clarify the distinction between foreseeability and proximity:

> ... while foreseeability *in fact* is always an essential ingredient, the established fact of foreseeability does not, of itself and by itself, establish a duty of care. Whether one goes on to say that it does not of itself establish the requisite degree of proximity depends on whether one treats "proximity" and "duty" as synonyms. That is a matter of semantics. The essential concept, it seems to me, is that the duty of care, based as it is on the hypothetical reasonable person employing hindsight, itself involves or may involve the consideration of ingredients other than mere factual foreseeability, and whether one tests the

JJ., offered their own contrasting conceptions of proximity. Relying on the fact that the physical damage to the pipeline carrying Caltex's oil had the effect of preventing "operation of property" or "physical movement" of property owned by Caltex, Jacobs J. grounded the duty of care in a geographical conception of proximity:

> The relevant duty of care in the present case is the duty of care owed to those whose persons or property are in such physical propinquity to the place where an act or omission of the defendant has its physical effect that a physical effect on the person or property of the plaintiff is foreseeable as the result of the defendant's act or omission.[203]

In other words, if the accident is within physical proximity (or "propinquity") to the plaintiff's property, a duty of care arises. (In *Norsk*, CNR had property adjoining either end of the bridge although, as La Forest J. observed, to the extent this test assumes immobilization or inoperativeness of the plaintiff's property, those considerations did not

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existence of the duty by a one-stage or two-stage process is really immaterial; ... . (Emphasis in original).

This clarification, however, specifically contemplates the possibility that foreseeability *may* equate proximity as a device employed by "the hypothetical reasonable person employing hindsight." Indeed, Oliver L.J. later acknowledged (at 58), as a "very broadly accurate description of the point to which the law of tortious negligence has now progressed", this statement: "proximity = foreseeability = duty."

[203] *Caltex*, *supra* note 39, at 278. The notion of geographic proximity suggests the existence of other kinds of "proximities", similar to multiple-faceted proximity analysis of nervous shock cases in the 1980's. In *McLoughlin v. O'Brian*, [1983] A.C. 410, [1982] 2 All E.R. 298 (H.L.) [*McLoughlin* cited to All E.R.], Lord Wilberforce cited a general rule (at 303) that recovery ought to be confined "to those within sight and sound of an event ... or, at least, to those in close, or very close, proximity to such a situation." At 304, he added that the plaintiff must be "close in both time and space" to the accident. In *Jaensch v. Coffey* (1984), 155 C.L.R. 549, 54 A.L.R. 417 (H.C.A.) [*Jaensch v. Coffey* cited to AL.R.], Brennan J. preferred to apply Lord Wilberforce's geographic and temporal proximity as relevant considerations but "not (as) principles limiting liability", and (at 434) he resisted the creation of "new criteria of limitation" of the scope of liability, relying instead on intuition: "(t)he thing will stop where good sense in the finding of fact stops it." Deane J., however, identified (at 444) several "proximities" engaged by Lord Atkin's test in *Donoghue v. Stevenson*, including "physical proximity" (later referred to (at 462) as "geographical proximity"), "circumstantial proximity" (such as "an overriding relationship of employer and employee") and "causal proximity" (later referred to (at 462) as "logical or causal proximity") (in the sense of "the relationship between the particular act or cause of action and the injury sustained"). He later expressed a preference for reliance upon "logical or causal proximity" as the sole requirement, a preference echoed by majority pronouncement of the British Columbia Court of Appeal in *Beecham v. Hughes* (1988), 52 D.L.R. (4th) 625, 27 B.C.L.R. (2d) 1 at 40-42 (C.A.). (Lambert J.A., in separate concurring reasons (at 43), cautioned against putting "the entire emphasis on 'causal proximity', to the exclusion of 'temporal proximity', 'geographical (*sic*) proximity', or 'emotional proximity'.")

apply to CNR whose trains were not immobilized or inoperative.)[204] Admittedly, this test has a conceptual attraction to it, seeking as it does to relate economic loss to the possibility of, if not actual, physical interference with a proprietary interest.[205] If, however, the legal significance of geographic proximity lay in the associated risk to the plaintiff's property of physical injury, why would the law impose liability for the plaintiff's loss when it is purely economic and merely relational to physical damage to another's property? The test fails, therefore, to make the link between the plaintiff's loss and the injured proprietary interest a necessary one – that is, while Jacobs J.'s test acknowledges the distinction between interference with the protected legal interest in physical integrity of property, and economic loss that derives from physical damage to another's property, recovery is not necessarily conditioned upon the former, but merely upon a "physical effect" on that property (which "effect", as the facts of *Caltex* demonstrate, may not amount to interference with a protected legal interest).

Further, it is not apparent that Jacobs J.'s geographic proximity test would actually lead to compensation for the loss it purports to recognize. Insofar as he limited the compensable damages that flow from a finding of geographic proximity to those which result from the physical effect, compensation as determined by geographic proximity will often be less than the actual economic loss. Whereas, for example, the property in *Caltex*

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[204] *Norsk*, *supra* note 17 at 343.

[205] Here I disagree, albeit inconsequentially, with La Forest J., where he finds no "policy significance" in a plaintiff's ownership of property in proximity to an accident. Indeed, its acknowledgment of the significance of the plaintiff's interest in its own property in *Norsk* was potentially significant, but ultimately this test's weakness lies in its failure to carry the point to its ultimate conclusion by prescribing a necessary (as opposed to possible) connection between property damage and pure economic loss. That said, Jacobs J.'s test is to that extent more instructive and influenced by principle than, for example, the quasi-foreseeability tests of Gibbs and Mason JJ., which make no conceptual link between recovery and physical damage.

was the oil, presumably Caltex's inability to access such oil that was not already in transit from AOR to Caltex would not be the basis of recovery, as that oil was not in "physical propinquity" to the damaged pipeline.[206]

Stephen J., in *Caltex*, offered a more generally understood conception of proximity,[207] identifying in the facts a "close degree of proximity" between the defendant's conduct and Caltex's economic loss, founded upon several "salient features", which were:

> (1) The defendant's knowledge that the property damaged ... was of a kind inherently likely, when damaged, to be productive of consequential economic loss ... .
>
> (2) The defendants' knowledge or means of knowledge ... that the pipelines extended ... to (Caltex's terminal).
>
> (3) The infliction of damage ... to the property of (AOR) ...
>
> (4) The nature of the detriment suffered by the plaintiff; that is to say its loss of use, in the above sense, of the pipeline.
>
> (5) The nature of the damages claimed, which reflect that loss of use, representing not some loss of profits arising because collateral commercial arrangements are adversely affected but the quite direct consequence of the detriment suffered, namely the expense directly incurred in employing alternative modes of transport.

The first two factors go to Caltex's foreseeability, although they do so in a manner that suggests that, even though foreseeability and proximity are distinct concepts, they have a

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[206] One might even extend this argument to the oil that was already in transit, but yet at some distance from the damaged portion of the pipeline. La Forest J., in considering the rail cars in *Norsk*, *supra* note 17 at 343 concluded that "(h)ow close they would have to be is a matter for speculation."

[207] *Caltex*, *supra* note 39 at 262. In doing so, however, Stephen J.'s analysis begins curiously; in considering the injunction of Lord Denning in *Spartan Steel*, *supra* note 172, that recovery of pure economic loss is "a matter of policy", Stephen J. (at 255) offered some important criticisms of that approach, leading to his conclusion that uncertainty will result from a "case-by-case application of a general policy, itself flexible and ill-defined and dependent upon a survey of quite variable group of considerations, many of which will be susceptible of the production of differing, subjective judicial reactions." The curiosity, however, and as I will discuss below, is in his preferred test of proximity, which bears those same characteristics.

mutual conceptual affinity.[208] The other three factors, I suggest, do little to assist jurists in developing a common and commonly-applicable understanding of the meaning of proximity as a device to limit liability with reference to the relationship between the plaintiff and the defendant. Indeed, the third factor does not involve the plaintiff at all; moreover, as an essential quality of relational economic loss, the infliction of damage on a third party's property does not lend any insight into the circumstances under which such property damage can lead to recovery by a non-owner. The fourth and fifth factors are indistinguishable in that they refer to the nature of the plaintiff's loss, which was one of *use*. In this regard, and aside from whether or not use is a protected legal interest,[209] the nature of the damage itself tells us nothing about the relationship between the plaintiff and the defendant or about the significance of use as a factor in that case or in any other circumstances. Thus, and the absence of an injured proprietary right aside, Stephen J.'s factors do not contribute to our understanding of the cases or to an inductive application of that understanding. Giving no guidance to the application of a proximity test in other fact situations, they suggest that proximity, as a test, invariably entails a case-specific analysis of general and undefined factors, and the generation of subjective decision-making that lends no guidance to litigants or jurists.

Academic commentary on McLachlin J.'s reasons in *Norsk* have focussed on her adherence to proximity's arbitrary and subjective analysis her reliance upon future cases

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[208] *Caltex*, *ibid.* at 262. Pipelines inevitably connect to property owned by others. Therefore, to cause physical damage to a pipeline is inevitably to cause loss, even if only pure economic loss, to the owner of that to which the pipeline connects. *Proximity* theorists, then, would derive significance from the *foreseeable* effects to the plaintiff of damage to the pipeline.

[209] See note 59, and following.

for a more precise elaboration of particular circumstances leading to recovery.[210] Indeed, McLachlin J. acknowledged proximity's weaknesses in fostering certainty and predictability, but predicted that, despite the case-specific analysis employed by proximity advocates such as Stephen J., "as the courts recognize new categories of cases where economic recovery is available, rules will emerge."[211] The adoption of such new categories, she said, will require consideration first from "the doctrinal point of view of duty and proximity" which will introduce considerations are commonly grouped under the single concept of proximity. Continuing, she elaborated on the nature of proximity as a "controlling concept":

> Proximity may be usefully viewed, not so much as a test in itself, but as a broad concept which is capable of subsuming different categories of cases involving different factors. ...
>
> The matter may be put this: before the law will impose liability there must be a connection between the defendant's conduct and plaintiff's loss which makes it just for the defendant to indemnify the plaintiff. In contract, the contractual relationship provides this link. In trust, it is the fiduciary obligation which establishes the necessary connection. In tort, the equivalent notion is proximity. Proximity may consist of various forms of closeness – physical, circumstantial, causal or assumed – which serve to identify the categories of cases in which liability lies.
>
> Viewed thus, the concept of proximity may be seen as an umbrella, covering a number of disparate circumstances in which the relationship between the parties is so close that it is just and reasonable to permit recovery in tort. The complexity and diversity of the circumstances in which tort liability may arise defy identification of a single criterion capable of serving as the universal hallmark of liability. The meaning of "proximity" is to be found rather in viewing the circumstances in which it has been found to exist and determining whether the cases at issue is similar enough to justify a similar finding.
>
> In summary, it is my view that the authorities suggest that pure economic loss is *prima facie* recoverable where, in addition to negligence and foreseeable loss, there is sufficient proximity between the negligent act and the loss. Proximity is the controlling concept which avoids the spectre of unlimited liability. Proximity may be established by a variety of factors, depending on the nature of the case. ... But the categories are not closed. As more cases are decided, we can expect further definition on what factors give rise to

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[210] See, for example, Norman Siebrasse, "Economic Analysis of Economic Loss in the Supreme Court of Canada: Fault, Deterrence and Channelling of Losses in *CNR v. Norsk Pacific Steamship Co.*" (1994) 20 Queen's L. J. 1 at 9.

[211] *Norsk*, *supra* note 17 at 367.

> liability for pure economic loss in particular categories of cases. *In determining whether liability should be extended to a new situation, courts will have regard to the factors traditionally relevant to proximity such as the relationship between the parties, physical propinquity, assumed or imposed obligations and close causal connection. ...*
>
> I add the following observations on proximity. The absolute exclusionary rule adopted in *Cattle v. Stockton* and affirmed in *Murphy* (subject to *Hedley Byrne*) can itself be seen as an indicator of proximity. Where there is physical injury or damage, one posits proximity on the ground that if one is close enough to someone or something to do physical damage to it, one is close enough to be held legally responsible for the consequences. Physical injury has the advantage of being a clear and simple indicator of proximity.
> ...
> Viewed in this way, proximity may be seen as paralleling the requirement in civil law that damages be direct and certain. Proximity, like the requirement of directness, posits a close link between the negligent act and the resultant loss. Distant losses which arise from collateral relationships do not qualify for recovery.[212]

In McLachlin J.'s view, therefore, proximity expresses a connection between the defendant's conduct and the plaintiff's loss, by flexibly encompassing a panoply of factors to justify recovery in tort in "new situations", while simultaneously limiting the scope of liability to avoid indeterminacy. It is, however, precisely that flexibility (that so clearly attracted McLachlin J. to proximity as a "controlling concept") which is also its weakness; while proximity "*may* consist of various forms of closeness" (she identifies four forms, any of which might justify an "absolute exclusionary rule" by relying on physical injury as a "clear and simple indicator of proximity"), its true meaning is to be determined with reference to cases where liability was imposed, and by determining whether the case at bar is "similar enough" to justify the imposition of liability in those circumstances. The common law judicial inquiry in any tort case is thus reduced to the search for "proximity", discerned in similarities that may be found in past judicial awards, and whose concepts, being flexibly established "by a variety of factors,

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[212] *Ibid.* at 368-70.

depending on the nature of the case", is viewed as justifying all tortious liability. Hence McLachlin J.'s statement:

> To date, sufficient proximity has been found in the case of negligent misstatements where there is an undertaking and correlative reliance (*Hedley Byrne*); where there is a duty to warn (*Rivtow*), and where a statute imposes a responsibility on a municipality toward the owners and occupiers of land (*Kamloops*).[213]

Proximity, then, as expressed by McLachlin J., operates as an *ex post* justification for the imposition of liability, drawing on a vague and malleable set of factors that refer us to the benchmark of past judicial decisions. As an *ex ante* test, however, it gives no practical or even theoretical guidance. She pronounced, for example, that it exists "where there is a duty to warn" and we are referred, without commentary, to *Rivtow* and *Hedley Byrne*.[214] This, however, is hopelessly unhelpful; it tells us nothing about proximity, and it tells us nothing about the basis upon which liability was imposed in *Rivtow* or would have been imposed (but for the disclaimer) in *Hedley Byrne*. Proximity is not revealed to be a useful test to determine *ex ante* the existence of, for example, a duty to warn, by citing a case where a duty to warn was found to exist and simply pronouncing it to be a case where sufficient proximity existed. So expressed, proximity does not represent a coherent principle that will allow jurists or litigants to reasonably predict the circumstances under which liability will be imposed, but rather to an arbitrary, result-determined rationale based upon, in each case, a particular court's idiosyncratic view.[215]

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[213] *Ibid.* at 369-70.
[214] *Rivtow*, *supra* note 4 and *Hedley Byrne*, *supra* note 20, respectively.
[215] Here I am in general agreement with Carl F. Stychin. (See Stychin, "Relational Economic Loss", *supra* note 189 at 331.

For that reason, Stevenson and La Forest JJ. were agreed in *Norsk* that proximity expresses "a conclusion, a judgment, a result, rather than a principle."[216]

The Canadian position has since evolved considerably towards La Forest J.'s expression of judicial pragmatism in *Norsk*. In *D'Amato v. Badger*,[217] Major J., for the court, noted that the court had since adopted Feldthusen's distinct categories of economic loss advocated by La Forest J. in *Norsk*, albeit in a case of "negligent supply of shoddy goods or structures."[218] He affirmed that this would also apply to cases of relational economic loss, but correctly observed that adoption of the categories still leaves open the issue of the circumstances under which recovery may be allowed within each category.[219] As to those circumstances, however, the *Norsk* divisions seemed to linger in *D'Amato*; rather than authoritatively enunciating a single test, Major J. tried to minimize the differences between the two approaches in *Norsk*, noting that while they differ in principle, "they will most often achieve the same result."[220] Thus whether by reference to McLachlin J.'s incremental, case-specific approach, using proximity to avoid indeterminacy and limit

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[216] *Norsk*, *supra* note 17 at 387, *per* Stevenson J. See also La Forest J.'s endorsement at 344:

> I agree with my colleague Stevenson J. that the concept of proximity is incapable of providing a principled basis for drawing the line on the issue of liability for the reasons expressed by him (*post*, pp. 386-7). As he notes it, it expresses a result, rather than a principle.

[217] *D'Amato*, *supra* note 63. This is the most prominent example in the cases of relational economic loss arising from physical injury to a third party's person. There, the corporate plaintiff was jointly owned by the individual plaintiff and another person, both of whom performed the company's business work. The defendant negligently injured the individual plaintiff in a motor vehicle accident, disabling him from working. The corporate plaintiff sued for the cost of engaging replacement labour. The trial judge, citing McLachlin J. in *Norsk*, found the parties "proximate", imposed liability and awarded $73,299. The Court of Appeal reversed the lower court judgment, in part because the trial judge, in purporting to apply the proximity test as enunciated by McLachlin J., had failed to consider whether the loss was reasonably foreseeable.

[218] *Winnipeg Condominium*, *supra* note 63.

[219] *D'Amato*, *supra* note 63 at 137.

[220] *Ibid.* at 138. Major J. conceded (at 139) that, McLachlin J.'s approach being "somewhat broader", "(a) party may have better prospects of recovering pure economic loss" under it.

recovery, or to La Forest's limited exclusionary rule to relational economic loss cases, the court would arrive at the same result in *D'Amato*, which was to deny recovery.

The current Canadian position was more definitively stated by McLachlin J. in *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*[221] Here, McLachlin J., speaking for the court, held that relational economic loss is recoverable where it arises from within any of three categories: possessory or proprietary interest, general average, and joint venture.[222] Where the facts of a case do not fall within any of these categories, recovery is still possible under "new categories", although "courts should not assiduously seek (them)."[223] As a means of fostering "a clear rule predicting when recovery is available", McLachlin J. held, extra-categorical recovery would be governed by reference to the proximity-based *prima facie* duty of care test prescribed in *Anns*.[224]

McLachlin J.'s case-specific approach in *Norsk*, whereby, outside certain established categories,[225] liability is determined with reference to a case-by-case analysis, has arguably been revived in seven separate judgments of the High Court of Australia justices

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[221] *Bow Valley*, *supra* note 37. The facts of *Bow Valley* are recited at note 40.
[222] *Ibid.* at 406. I will discuss these "exceptions" to what is commonly referred to as the "exclusionary rule" later in this chapter.
[223] *Ibid.* at 407.
[224] This represented a further concession to La Forest J. In *Hercules*, *supra* note 122, La Forest J., speaking for the court, had relied on *Anns* in dismissing an action brought by shareholders of a company against the company's auditors for failing to disclose in their annual audits matters detrimental to the company and, when the company failed, the shareholders suffered pure economic loss. While the case has generally been considered as one of negligent misrepresentation, both La Forest J. in *Hercules* and McLachlin J. in *Bow Valley* treated it as one of relational economic loss – that is, loss that derived from, or was relational to, the company's loss that arose from its contract with the auditors. McLachlin J. in *Bow Valley*, *supra* note 37 at 407-08, conceded that La Forest J. in *Hercules* had "set out the methodology that courts should follow in determining whether a tort action lies for relational economic loss", referring to *Anns*' two-stage test.
[225] Negligent misstatement, duty to warn, independent liability of public authorities and, *per* McLachlin J. in *Norsk*, *supra* note 17, the relational economic loss suffered by a "joint venturer".

in *Perre v. Apand.*[226] Beyond that common case-specificity, however, there was little unanimity about the "controlling concept" to be applied in each case.[227] The merits or difficulties of a case-specific approach, however, not having been canvassed by the High Court justices, were secondary to the larger issue of the principles to be referenced in its application.

La Forest J.'s description in *Norsk* of the plaintiff's relational economic loss as "contractual" raises the issue of whether the general non-recoverability of relational economic loss also applies where a plaintiff's interest in the third party's property is not dependent on the third party's indulgence towards the plaintiff, but rather is formalized by a contract between them.[228] *Cattle v. Stockton* demonstrates, however, an historical judicial reluctance to allow recovery in cases where relational economic loss has arisen by virtue of a plaintiff's contractual connection to the damaged proprietary interest, which has remained through the twentieth century, running from the orthodox expression

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[226] *Perre*, *supra* note 34. The defendant had supplied diseased potato seed to a South Australian grower, who then produced a crop infected with bacterial wilt. The plaintiffs were potato growers and processors operating within 20 kilometres of the infected crop. While their properties were not infected, their principal market for potatoes, Western Australia, prohibited the entry of potatoes which had been grown or processed within 20 kilometres of a known outbreak of bacterial wilt. As a consequence, the plaintiffs suffered economic loss.

[227] *Ibid.* An overall theme, however, of "vulnerability" emerges, although not all the justices specifically used that term. Gaudron J., for example, emphasized (at 618) the plaintiff who cannot protect his or her own interests, and Hayne J. spoke (at 700) of the appellants as a limited class likely to suffer economic loss as a consequence of negligence. McHugh J. was more explicit, identifying (at 632) vulnerability as the relevant criterion. Other factors besides vulnerability were cited as well; Gummow J. (joined by Gleeson C.J.) articulated (beginning at 660) a series of factors constituting proximity (including foreseeability of consequences, the defendant's knowledge of Western Australia's requirements, the defendant's knowledge of the plaintiff's dependence on exports to Western Australia and the inability of the plaintiff to protect against the risk inherent in the defendant's conduct). Callinan J. emphasized (at 717) the respondent's role in the potato market, placing it in a "special position", and Kirby J., while not relying on recent House of Lords pronouncements such as *Caparo*, *supra* note 76, adopted (at 676) a similar three-step liability analysis of foreseeability, proximity and arguments of policy.

[228] Such was also the case, for example, in *Bow Valley*, insofar as the plaintiffs were contractual users of the oil rig. La Forest J., however, clearly viewed past judicial treatment and the "underlying policies" as identical in cases of contractual and non-contractual relational economic loss. (See note 192 and *Norsk*, *supra* note 17 at 300-01).

of duty of care by Hamilton J. in *La Société Anonyme de Remorquage à Hélice v. Bennetts*[229], through to more recent cases such as *Stromer v. Yuba City*,[230] *Hunt v. Johnstone*,[231] and *The Aliakmon*,[232] the last of which specifically rejected *Caltex* which, along with *Norsk*, stands alone in contradiction to the governing weight of authority in the "contractual relational economic loss" cases.[233] Indeed, the facts of *Caltex* bring it within a line of cases involving utility supply, including *Electrochrome Ltd. v. Welsh Plastics*,[234] *S.C.M.*,[235] and *Spartan Steel*,[236] where recovery for relational economic loss is generally precluded.

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[229] [1911] 1 K.B. 243 (K.B.). There, the plaintiff's tug was contractually engaged in towing a vessel when, about four-fifths of the way through the voyage, the defendant's negligently operated vessel collided with and sank the towed vessel. No damage was caused to the tug in this collision. The defendant's counsel offered this specific submission:

> The defendant was guilty of no breach of duty towards the plaintiffs. It was the duty of the defendant's vessel to take reasonable care not to come into collision with the plaintiff's tug. She did not touch the tug or the towing hawser. Negligence is not actionable unless it causes damage to the person or property.

Hamilton J. agreed, holding (at 248-49):

> In order to give the plaintiffs a cause of action arising out of that breach they must shew not only an injuria, namely, the breach of the defendant's obligation, but also damnum to themselves in the sense of damage recognized by law. ... It can make no substantial difference whether a contract which has been entered into is already in the course of performance or is only about to be performed.

[230] 225 Cal. App. 2d 886, 37 Cal.Rptr. 240 (1964). This is a curious case, where the plaintiff realtor, who co-owned a prune orchard, was employed by fellow owners to find a purchaser for the orchard. Shortly before a prospective purchase agreement was concluded, the defendant municipality negligently felled prune trees in the orchard, causing the prospective purchaser to withdraw. Pierce J. found for the defendant, relying on earlier caselaw precluding liability for negligent interference with contractual relations. While arguably the plaintiff's loss could have been compensable as consequential economic loss, as he owned the property, in my view Pierce J. came to the correct decision, as the plaintiff's claim was not truly derivative of the physical damage. That is, the claim was not dependent on the plaintiff's status as a landowner, but rather as a realtor.

[231] *Hunt v. Johnstone*, *supra* note 179. Here, the plaintiff owned two companies, one suffering physical damage and the other pure economic loss as the result of a fire. The court concluded that, notwithstanding the contractual relationship between the two companies, the latter company could not recover where it owned nothing that was destroyed in the fire. (The court also, however, based its decision on policy – the common owner, who had erected the corporate shield between the two companies for his pecuniary benefit, was compelled to adhere to it where it operated to his disadvantage).

[232] *The Aliakmon*, *supra* note 138.

[233] See also *Candlewood*, *supra* note 202, where the Privy Council declined to follow *Caltex*.

[234] *Electrochrome*, *supra* note 159.

[235] *S.C.M.*, *supra* note 169.

Concerns for indeterminate liability would admittedly be mitigated in cases arising from contractual use, as the class of plaintiffs would be restricted to those in privity, and thus not invoke Fleming James' "pragmatic objection";[237] moreover, the loss would almost certainly be foreseeable.[238] Nonetheless, the non-recoverability of relational economic loss is even more compelling in contractual cases, where recovery would interfere with the parties' contractual allocation of risk.[239] The better view, and the view consistent with the origins and common law evolution of the duty of care, is that the contractual right, being an *in personam* right which the plaintiff can assert against the third party

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[236] *Spartan Steel* note 172.

[237] James, "A Pragmatic Appraisal", *supra* note 36.

[238] Recall in *Norsk* that the negligent navigator associated CNR so closely with PWC's bridge that he assumed CNR owned it, referring to it as the "CNR bridge."

[239] This rationale is implied in Robert Goff L.J.'s observation in *The Aliakmon*, *supra* note 138 (C.A.) at 70-71, specifically:

> The loss which is the subject matter of the buyer's claim against the shipowner is therefore not merely a purely economic loss, but is one which can legitimately be described as arising from the obligations which the buyer has undertaken to the seller under his contract of sale.

Lord Roskill's judgment in *The Wear Breeze*, *supra* note 55 at 794, made the same observation:

> When parties to a contract for the sale of goods contemplate risk in goods passing, they are contemplating a contractual concept between buyer and seller involving that when the risk passes(,) the buyer, should the goods thereafter be lost or damaged, must bear the resulting loss himself and cannot look to the seller for compensation for that loss. The buyer may get compensation from his underwriter or he may get it elsewhere, but that is a matter solely connected with the contract for the sale and purchase of goods. As counsel for the defendants said this morning towards the close of his argument, that the plaintiffs' reliance on the passing of risk as giving them a cause of action in tort against the defendants really amounts to the plaintiffs saying that because the sale contract between the plaintiffs and their sellers required them in the circumstances to accept damaged goods without compensation from the sellers, the defendants have to make good to the plaintiffs the loss which the plaintiffs cannot get under their sale contract.

Here I am also agreeing with Carl F. Stychin (see Stychin, "Relational Economic Loss", *supra* note 189 at 338) where, commenting on McLachlin J.'s reasons in *Norsk*, he said:

> It seems paradoxical to devise a rule that allows CN to recover for relational economic loss as a result of a contractual relationship pursuant to which it reasonably might be concluded that the parties have already allocated that risk. Other claims, where an implicit risk allocation is less plausible (whether contractually based or not), would be less likely to recover *because* of the absence of that close contractual matrix. The "justice" of a set of rules that facilitates such results, in my view, is questionable. (Emphasis in original).

property-owner, cannot be asserted *in rem* as against the negligent defendant. As against the defendant's use of the resource, the plaintiff, not being the owner of the resource, cannot assert a proprietary right to its use, unimpaired by the defendant's negligent interference.[240] So understood, then, the law can be seen as distinguishing between someone who has a stake in the property, and someone who has a right in it.[241]

Regardless of whether foreseeability, proximity, categorization or another "controlling concept" governs as a test, however, judicial thinking in respect of pure economic loss generally and relational economic loss in particular has, since the 1970's, been characterized by the impulse to seek practical limits to liability. Over the past decade, at the Supreme Court of Canada, this search has gradually led to the assumption of a reactive, rigid categorization which, while certainly limiting liability by confining it to the parameters of certain specific exceptions, can neither justify recovery nor non-recovery by reference to any legal principle. Relational economic loss is generally unrecoverable, we are told, not because of any legal principle, but because of *policy* concerns, principally over indeterminate liability.[242]

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[240] This is also Peter Benson's assessment (see Benson, "Economic Loss in Tort Law", *supra* note 44 at 435). See also Holmes J.'s classic statement of the issue and his conclusion in *Robins Dry Dock*, *supra* note 65 at 308, which addressed the ability of respondent charterparties to recover from a third party whose negligence had damaged the chartered vessel:

> The question is whether the respondents have an interest protected by the law against unintended injuries inflicted upon the vessel by third parties who knew nothing of the charter. If they have, it must be worked out through their contract relations with the owners, not on the postulate that they have a right *in rem* against the ship.
>
> ...
>
> ...The injury to the propeller was no wrong to the respondents but only to those to whom it belonged.

[241] See note 66, and its discussion of *Fontainebleau*.

[242] Hence in *Bow Valley*, *supra* note 37 at 411) a duty of care was actually found to exist, but was negatived at stage two of the *Anns* test by reasons of policy considerations, principally "the problem of indeterminate liability."

In seeking a limiting device in response to those policy concerns, however, judicial decisions grounded in policy have eschewed the historical common law principle of according significance to physical damage to one's own person or property. As McLachlin J. explained in *Norsk*, "the criterion of physical damage ... suffered from the defect that it arbitrarily, and in some cases, arguably unjustly, deprived deserving plaintiffs of recovery."[243] To explicate, she added:

> Someone who invests in a bridge in order to use it cannot be distinguished from someone who leases a bridge in order to use it. If the bridge is lot they have both lost something of value: the use of the bridge.[244]

With respect, the distinction that the law has drawn between damage to property and pure economic loss is not arbitrary, but is grounded in principle, based on longstanding

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[243] *Norsk*, *supra* note 17 at 359. This argument, which recalls Lord Devlin's assertion in *Hedley Byrne*, *supra* note 20, that the distinction between physical damage and economic loss cannot be justified "on any intelligible principle", was also advanced by the Supreme Court of New Jersey in *People Express*, *supra* note 42 at 111, where Handler J. said:

> The physical harm requirement capriciously showers compensation along the path of physical destruction, regardless of the status or circumstances of individual claimants. Purely economic losses are borne by innocent victims, who may not be able to absorb their losses.

The dissents of Wisdom J. in *Testbank*, *supra* note 164 both in granting the rehearing *en banc* (at 750), and in the actual rehearing *en banc* (at 1039, 1044) challenged the distinction, as did the dissent of Edmund Davies L.J. in *Spartan Steel*, *supra* note 172 at 41. Edmund Davies L.J. would have allowed recovery of the lost profit on the four further "melts" which could have been manufactured during the power outage, in addition to the lost profit on the damaged melt, stating:

> It is common ground that both types of loss were equally foreseeable and equally direct consequences of the defendants' admitted negligence, and the only distinction drawn is that the former figure represents the profit lost as a result of the physical damage done to the material in the furnace at the time the power was cut off. But what has that purely fortuitous fact to do with legal principle?

It is not surprising, therefore, that Jane Stapleton, in "A Wider Agenda", *supra* note 3 at 258, has identified a "current orthodoxy" which, drawing from Lord Devlin in *Hedley Byrne*, eschews the physical harm requirement, and focuses instead on carefully delineating the circumstances engendering recovery.

[244] *Supra* note 17 at 360.

preferences for extension of legal protection to proprietary interests.[245] Even at a less theoretical level, the justification for giving higher priority to the physical integrity of persons and tangible property than that of a purely economic interest is easily, almost intuitively, comprehended, solely with reference to the value that we place on our corporeal autonomy. The merit of the principle's underlying normative preferences can be the subject of debate, but that their juristic expression is reflective of a legal principle is indisputable. As to that debate, McLachlin J.'s criticism may reflect a fundamental misapprehension of the judicial enterprise in determining a duty of care in tort law generally; that a plaintiff is "deserving", leaving aside the opaqueness of that quality), is irrelevant, or at least only a part of the duty of care equation. Left unasked is whether that plaintiff, howsoever meritorious, was owed a duty of care by that defendant.[246] Similarly, to the extent the plaintiff's award in *Norsk* arose from having lost "the use of the bridge", McLachlin J. reveals a common recent judicial failing to grasp the essential basis for the legal principle that explains the law's distinct treatment of pure economic loss; the plaintiff in *Norsk*, she says, "cannot be distinguished"[247] from the bridge's owner, because "they have both lost something of value: the use of the bridge." In fact, however, the bridge owner has lost something more: the bridge and, more saliently, the right to use the bridge, exclusive as against the defendant.

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[245] By "grounded in principle", I am referring to, and agreeing with, the definition of "principled" articulated by Carl F. Stychin as consistent with "a coherent set of legal rules." (See Stychin, "Relational Economic Loss", *supra* note 189 at 331). Stychin correctly ascribes to a "principled" distinction the very characteristic that has eluded courts in their various applications of foreseeability, proximity and other "controlling concepts": a "reliable measure of predictability and certainty as to the circumstances under which recovery will be allowed."

[246] Similarly, a plaintiff's "innocence", cited by Handler J. in *People Express*, *supra* note 42 at 111, as a rationale to discard the physical damage requirement, omits the other essential half of the duty, being the defendant's culpable breach of a duty of care which it owed to the plaintiff.

[247] *Norsk*, *supra* note 17 at 360.

What can be described as arbitrary, however, are recent judicial substitutions for legal principle, such as the application in *Caltex* and in McLachlin J.'s reasons in *Norsk* of malleable devices such as proximity to justify a result, whether predictable or not. As Higginbotham J. stated for the majority of the 5th Circuit in *Testbank*, case-specific "questions of remoteness" offer "no rule or principle" on which to ground decisions:

> Courts can decide cases without preexisting normative guidance but the result becomes less judicial and more the product of a managerial, legislative or negotiated function.[248]

The line drawing enterprise, lacking a principled basis, justifies nothing *ex ante* and serves no normative function *ex post*, whether the inquiry is directed to recovery, non-recovery or predictability, other than the function of limiting the scope of liability in some fashion. This leaves open for inquiry whether the specific categories of recoverable relational economic loss identified in *Bow Valley* in cases of relational economic loss can be justified on principle or similarly rejected as arbitrary.

c. Recoverable Relational Economic Loss

As I have already noted, the Supreme Court of Canada in *Bow Valley* recognized three categories giving rise to the "special circumstances" which are conditional to recovery of relational economic loss:

> (1) cases where the claimant has a possessory or proprietary interest in the damaged property; (2) general average cases; and (3) cases where the

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[248] *Testbank*, *supra* note 164 at 1028 (*en banc*). Higginbotham J. goes on to cite James A. Henderson's uncharitable assessment set out in "Expanding the Negligence Concept: Retreating from the Rule of Law" (1976) 51 Ind. L.J. 467 at 476-77:

> When asked, cajoled, and finally forced to try to solve unadjudicable problems, courts will inevitably respond in the only manner possible – they will begin exercising managerial authority and the discretion that goes with it. Attempts will be made to disguise the substitution, to preserve appearances, but the process which evolves should (and no doubt eventually will) be recognized for what it is – not adjudication, but an elaborate, expansive masquerade.

> relationship between the claimant and property owner constitutes a joint venture.[249]

i. *Possessory or Proprietary Interest*

For the purposes of the three categories of recoverable relational economic loss enunciated by the Supreme Court of Canada, a possessory interest is interchangeable with a proprietary interest. The two, however, are not mutually alternative; rather, a possessory interest is a form of a proprietary interest and, to that extent, a claim based on interference with a possessory interest is not a form of relational economic loss at all.[250] That is, the plaintiff's claim does not depend on its derivation from, or relation to, an injury to the proprietary interest of another, but rather on a right which the plaintiff has in its own property and can, as an incident of that right, assert against the defendant. Thus an "exception" or a "special circumstance" based on a possessory or proprietary interest is superfluous, that interest being already compensable, in the enduring language of Lord Penzance in *Simpson v. Thomson*,[251] to "one who had either some property in, or *possession of*, the chattel injured."[252]

Consider, for example, the distinction which the law draws between a time charter of a vessel, and a demise or bareboat charter. Under a time charter,

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[249] See Note 222.

[250] Inasmuch as a possessory interest is a form of proprietary interest, I agree with Bruce Feldthusen's statement (see Feldthusen, *Economic Negligence*, *supra* note 22 at 234, n. 224):

> One might say this is property damage, not economic loss. Regardless, the rationale is to treat the loss as if it were property damage.

My point, however, is more fundamental. If it *is* property damage, then there is no sense to "the rationale to treat the loss as if it were property damage", as it is, in fact, property damage, and is not properly treated by jurists as pure economic loss, relational or otherwise.

[251] *Simpson*, *supra* note 155.

[252] *Ibid.* at 290. (Emphasis added).

> *the owner's people continue to navigate and manage the vessel*, but her carrying capacity is taken by the charterer for a fixed time for the carriage of goods anywhere in the world (or anywhere within stipulated geographic limits) ... . She is therefore under the charter's orders as to the ports touched, cargo loaded, and other business matters.[253]

The time charterer, has no right of possession and, therefore, Holmes J. held in *Robins Dry Dock*,[254] "no interest protected by law against unintended injuries inflicted upon the vessel by third persons ... ."[255] Under a demise or bareboat charter, however,

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[253] Grant Gilmore and Charles Black, *The Law of Admiralty*, 2d ed. (Mineoly, NY: Foundation Press 1975) [Gilmore and Black, *The Law of Admiralty*] at 194. (Emphasis added).

[254] *Robins Dry Dock*, *supra* note 65 at 308.

[255] Interestingly, Holmes J. did not consider the earlier New York decision of *Re The Aquitania*, 270 F. 239 (S.D. N.Y. 1920), which represents the only case of which I am aware where a loss of use claim by a time charterer succeeded. I disagree with Bruce Feldthusen who argues that Holmes J. can be taken to have excluded all loss of use claims by ship charterers (whether time or bareboat), and that we thus have to distinguish the result in *Robins Dry Dock* by reference to the fact that the vessel was in the physical possession of its owners for repairs and maintenance at the time the propeller was damaged. (See Feldthusen, *Economic Negligence*, *supra* note 22 at 237). In fact, Holmes J. in *Robins Dry Dock* specifically remarked on the nature of the charter on two occasions (*supra* note 65): at 307 ("This is a libel by *time charterers*"), and, more to the point, at 308 ("*it is not argued that there was a demise, and the owners remained in possession.*") The charter only being a time charter, therefore, the owners maintained possession, whether or not the vessel was in drydock for repairs and maintenance, and the charterer could not sustain an action for loss of use. Had the charter been a bareboat charter, the result would have (or at least should have) been different. Thus the British Columbia Supreme Court, in *Courtenay v. Knutson* (1957), 26 D.L.R. (2d) 768 (B.C.S.C.) has correctly cited *Robins Dry Dock* as applying only where the charterer lacked possession.

Some academic commentary has suggested that time charterers ought to recover for loss of use incurred during the term of their charter. Fleming James, for example, focusses on the tortfeasor's finite liability in such cases, precluding invocation of his "pragmatic objection" to indeterminate liability. (James, "A Pragmatic Appraisal", *supra* note 36). Victor Goldberg argues for a property right "by analogy"; that is, he suggests that we analogize the problem to the taking of eminent domain in leasehold interests, thus conferring on the charterer a compensable proprietary right, just as a tenant has a legally protected interest in leased property taken under eminent domain and a concomitant right to compensation for a third party's negligent interference with that interest. (Goldberg, "Recovery of Pure Economic Loss", *supra* note 167 at 258 and 263). Conversely, while Bruce Feldthusen argues that time charterers and bareboat charterers should be treated equally, his suggestion is that they both be excluded from recovery, based on a risk-spreading analysis he applies to vessel charterers generally leading him to conclude that they should be able to insure against loss. (Feldthusen, *Economic Negligence*, *supra* note 16 at 238). Ultimately, the recoverability for loss of use by any user of property depends on whether their interest can be said to be "possessory" or otherwise "proprietary". To the extent, however, that a time charter by definition exercises no "possession or control" it is difficult to see how a time charterer can be said to have an interest that would allow it to sustain an action for physical damage to the vessel. In any event, the old distinctions die hard; the position of time charters was confirmed by Lord Fraser of Tulleybelton in *Candlewood*, *supra* note 201 at 938:

> The issue is one of fundamental importance in maritime law and in the law of negligence generally. There is a long line of authority in the United Kingdom for the proposition that a time charter is not entitled to recover for pecuniary loss caused by a third party to the chartered vessel. The reason is that a time

> the charterer takes over the ship, lock, stock and barrel, and mans her with his own people. He becomes, in effect, the owner *pro hac vice*, just as does the lessee of a house and lot, to whom the demise charter is analogous.[256]

A demise or bareboat charter, then, entails the owner "part(ing) entirely with the command, possession and control" of his or her vessel.[257] Possessory rights having been conferred upon the bareboat charterer, he or she has a proprietary interest in the vessel. Whether in the maritime or non-maritime context,[258] a possessory or proprietary interest, understood in principled terms, is not a "special circumstance" of recoverable relational economic loss – rather, it is an instance of physical damage to a proprietary interest arising from, again in the language of Lord Penzance, a "possessory right by reason of (a) contract attaching to the chattel itself, such as by lien or hypothecation."[259] Thus, a bareboat charterer, like any lessor or legal possessor of property, can claim for the loss of use of that property as can, for that matter, the owner who continues to hold a reversionary interest in the damaged property.[260]

ii. *General Average and Joint Venture*

"General average" is a maritime law device which refers to "voluntary sacrifice or extraordinary expenses necessarily made or incurred" to avert an "imminent peril"

> charterer has no proprietary or possessory right in the chartered vessel; his only right in relation to the vessel is contractual; ...

[256] Gilmore and Black, *The Law of Admiralty*, *supra* note 253 at 194.

[257] *Benedict on Admiralty*, at § 52, 7th ed. (NY: Bender, Matthew & Co. 1973). In practical terms, this means that the charterer hires the captain and crew, and is liable for their negligence whereas, under a time charter, the vessel owner supplies the captain and crew. See also *Candlewood*, *supra* note 195, and also *Elliot Steam Tug v. The Shipping Controller*, [1922] 1 K.B. 127 (C.A.) and *R. v. Warner Quinlan Asphalt Co.*, [1924] 2 D.L.R. 853 (S.C.C.).

[258] Note Goldberg's analogy, at note 255, to the lessee of a house.

[259] *Simpson*, *supra* note 155 at 289.

[260] Here again, Lord Penzance's speech in *Simpson*, *supra* note 155 at 289, is instructive, insofar as he infers that the following three classes of plaintiffs can recover: (1) those with an immediate right in the property, (2) those with a reversionary interest in the property and (3) those with a possessory right in the property.

common to the cargo and transporting vehicle, with "a resulting common benefit to the adventure."[261] Typically, these expenses involve costs for towage, wharfage and stevedoring to effect repairs so that cargo may be transported safely. The United States Supreme Court held in *Aktieleskabet Cuzco v. The Sucarseco* that post-collision expenses associated with putting into a port of refuge, discharging and reloading cargo, all of which were incurred to protecting a vessel's cargo, fall upon the whole adventure, including the cargo owner, and consequently a cargo owner may recover for general contribution made where repairs to a damaged vessel is necessary to preserve the cargo.[262] The *Sucarseco* was followed by the House of Lords' pronouncement in *Morrison Steamship Co. Ltd. v. Greystoke Castle*,[263] where cargo owners were allowed to recover from the owners of a negligent vessel which struck the vessel carrying the plaintiffs' cargo, over (*inter alia*) Viscount Simon's dissent, thus *rejecting* this description of the plaintiffs' interest:

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[261] *Aktieselskabet Cuzco v. The Sucarseco*, 55 S. Ct. 218, 294 U.S. 394 at 401 (1935) [*The Sucarseco*].

[262] *Ibid.* at 401. *The Sucarseco* arose from a collision between two vessels, resulting in the cargo owners suing the negligent vessel for recovery for damaged cargo, and for contributions made by them towards port of refuge expenses. The defendants admitted liability for the damaged cargo, but resisted liability for the contributions made. The vessel owner objected that its recovery from the negligent vessel would be reduced if the cargo owner's suit succeeded. In this regard, it relied on prior caselaw which had relegated the cargo owner's status in cases of general average contribution to that of a subrogator whose right of action was dependent upon and derivative from that of the owner of the damaged vessel's owner (who would recover the expenses on behalf of the cargo owner as a bailee – see, for example, *Poole Shipping Co. v. U.S.*, 33 F.2d 275 (2d Cir. 1929). The court allowed the suit, holding (at 404) that the cargo owner's cause of action was independent, and the subrogation analogy was incorrect:

> The claim of the cargo owners for their general average contributions is not in any sense a derivative claim. It accrues to the cargo owners in their own right. It accrues because of the cargo's own participation in the common adventure and the action taken on behalf of cargo and by its representative to avert a peril with which that adventure was threatened.

(The reference to "common adventure" carries implications for the Supreme Court of Canada's "special circumstance" of joint venturers, discussed later in this chapter.)

(Each of the two vessels in *The Sucarseco* was found to be equally at fault, but the cargo owner was permitted to recover its full loss from the non-carrying vessel as, to the extent that loss included a full general average contribution, half of that recovery would be borne by the carrying vessel).

[263] [1947] A.C. 265, [1946] 1 All E.R. 696 (H.L.) [*Greystoke* cited to A.C.].

> I venture also to think that some confusion may result from treating the cargo owner's direct claim in respect of his contribution to general average expenditure as analogous to his claim when his goods are damaged by negligence. In the latter case there is an invasion of his proprietary right, and questions of the claims of bailor and bailee may arise. In the former case neither ownership nor possession is involved, and the question is merely as to the means of getting back a money payment made to a third party.[264]

The correct view, according to Lords Porter and Roche, was founded on the necessity of the expenditure to protect the plaintiffs' proprietary interest in the cargo. Lord Porter's analysis viewed the vessel's owner as the cargo owner's agent "of necessity", whereby, owing to the property owner's inevitable absence in such circumstances, "the character of agent respecting the cargo is thrown upon the master, ... acting on the necessity of the circumstance in which he is placed."[265] Consequently, the cargo owner could sue the tortfeasor directly for the expenses necessarily incurred by the vessel owner as the cargo owner's agent, such expenses extending to expenditure

> incurred to preserve those interests, viz., the ship's safety and carrying capacity, the cargo's preservation and safe arrival, and the earning of the freight.[266]

Lord Roche, quoting earlier maritime authority,[267] also adopted this agency conception:

> The position is this, that the shipowner, on the one hand, has his ship and freight at risk; on the other hand, the cargo owner has his cargo at risk; and going back to the way in which this matter is discussed in some of the old books, if both of the parties were there at the time each responsible for the difficulty in which they found themselves, that is to say, each of them bearing the loss which would result from it, they would naturally say "We must spend some money to get out of this difficulty and that we must share in proportion to the benefit to be derived from it."[268]

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[264] *Ibid.* at 277.
[265] *Ibid.* at 288, citing *The Gratitudine*, (1801), 165 E.R. 450, 3 Ch. Rob. 240, at 260 (Instance Ct.). The Instance Court was the former name of the Admiralty Court, in the exercise of its jurisdiction other than cases in prize (arising from seizure of vessels by belligerent warship commanders).
[266] *Greystoke, ibid.* at 297.
[267] Specifically, Lord Roche relied on the language of "a judge very learned in the maritime law", Gorell Barnes J., as employed both in *The Toward*, Shipping Gazette, May 8, 1899 and *The Mary Thomas*, [1894] P. 108 at 117.
[268] *Greystoke, supra* note 263 at 282-83.

Such expenditure was, therefore, in Lord Roche's view, perfectly in accord with a principled view of the common law's distinct treatment of pure economic loss that arises in the absence of physical injury to a proprietary interest:

> There remains for consideration the contention on behalf of the appellants that the respondents had no direct right of suit because it was said that: (a) their cargo sustained no material or physical damage and an expense occasioned to them after the collision in connexion with a contract was not actionable; (b) they were really in the same position as underwriters and the doctrine of *Simpson & Co. v. Thompson* (*sic*) negativing the right of underwriters to any direct cause of action against a wrongdoer applied to the case of the respondents. ... I would observe that in my judgment if the expense is occasioned by the collision and if it is the expense in whole or in part of the cargo owners ... then no authority was cited to support the proposition that whether by land or by sea physical or material damage is necessary to support a cause of action in a case like this.[269]

General average expenditure, then, is viewed as a means of indemnifying property owners for necessary steps taken to mitigate or preclude damage to a proprietary, and therefore legally protected, interest. Thus it is not surprising that Lord Roche also viewed general average as affording a principled justification for recovery of such expense arising not exclusively in the maritime context but also "by land":

> ... if two lorries A and B are meeting one another on the road, I cannot bring myself to doubt that the driver of lorry A owes a duty to both the owner of lorry B and to the owner of goods then carried in lorry B. Those owners are engaged in a common adventure with or by means of lorry B and if lorry A is negligently driven and damages lorry B so severely that whilst no damage is done to the goods in it the goods have to be unloaded for the repair of the lorry and then reloaded or carried forward in some other way and the consequent expense is by reason of his contract or otherwise the expense of the goods owner, then in my judgment the goods owner has a direct cause of action to recover such expense. No authority to the contrary was cited and I know of none relating to land transport.[270]

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[269] *Ibid.* at 279-80.

[270] *Ibid.* at 280. Note, however, that Lord Roche later said, without explanation (at 284), that "in my judgment it is a mistake to assume that it can be expected in all respect (*sic*) to conform to the rules which are applied to transactions on dry land." Nevertheless, his land-based example of recoverable loss was cited by Lord Denning in *S.C.M.*, *supra* note 169 at 346; he first offered a rationale which, consistent with his later approach in *Spartan Steel*, relied on notions of remoteness, but he then made the instructive observation that "(i)t is *analogous to physical damage*: because the goods themselves had to be unloaded." (Emphasis added). The power of this analogy, I suggest, is in its discernment of the essence of the recovery allowed by Lord Roche in *Greystoke*, being the expense incurred to preserve property that has not

Lord Roche's invocation of a "common adventure" suggests a blurring of the lines which the Supreme Court of Canada has drawn but, with the exception of La Forest J.'s dissent in *Norsk*,[271] not justified, between "general average" and "joint venture".[272] The merits of such blurring become apparent when one considers instances outside cargo transport cases, whether land or sea-based, where expense is incurred to mitigate the threat of physical damage to a proprietary interest. In *Seaway*, for example, had the plaintiff discovered, before its food spoiled, that the power supply had been interrupted, it might have been able, by calling on paid assistance, to transfer the food to powered refrigeration units before it spoiled. The same fundamental rationale for recovery applies in this instance as in claims for general average: to indemnify the plaintiff for expenses necessarily incurred to protect its proprietary interest from an imminent threat of physical damage.[273] It might be objected, however, that a plaintiff, to assert such a claim, must

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been damaged but is in imminent danger of damage, owing to the transport failure. See also *Weller*, *supra* note 153 at 583, where Widgery J. relied on *Greystoke* for the proposition that "only those whose property is injured, or is *at least directly threatened with injury*, can recover." (Emphasis added). This point is amplified by Grady Jolly J. of the 5th Circuit in *Corpus Christi Oil & Gas Co. v. Zapata Gulf Marine Corp.*, 71 F.3d 198 (5th Cir. 1995) [*Corpus Christi*], where (at 202) he viewed an offshore platform owner's costs in flaring its gas to save its wells as "physical damage to a proprietary interest" that was "directly attributable to its efforts to avoid the physical damages that would have rendered (the) defendant liable for much larger sums", being "great physical damages to its wells ... ."

[271] I canvass whether there ought to be such a "blurring" later in this chapter, at note 276 and following.

[272] I do not intend to be taken as suggesting that claims based on a "joint venture" are restricted to those arising from general average-type expenses – that is, expenses incurred to protect a proprietary interest from imminent harm; indeed, the Higginbotham J. of the 5th Circuit has stated that a joint venturer can also claim for pure economic loss arising from physical damage to a co-joint venturer's property which is utilized in the joint venture, as the former joint venturer acquires a proprietary interest therein. (*Domar Ocean Transp. v. M/V Andrew Martin*, 754 F.2d 616 at 619 (5th Cir. 1985).)

[273] Here I am agreeing with Peter Benson who expresses this as "unavoidable" relational economic loss, properly recoverable as deriving from the plaintiff's invocation of a right to be free from injury caused to his person or property. (Benson, "Economic Loss", *supra* note 44 at 438 and following). This recalls Widgery J.'s statement in *Weller*, *supra* note 147 (but which statement I have specifically cited at note 154), allowing recovery not only where there is an injury to one's person or property, but where there is a *threat* of such injury.

purport to assert a right of use of property, exclusive as against the defendant, which is not his or her own, thus bringing this circumstance within the realm of unrecoverable relational economic loss. The interest at stake here, however, is distinct from claims such as those in *Norsk* or *Caltex*: here, the plaintiff is not asserting a right to use another's

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Note, however, that recovery of expenses necessarily incurred to protect a proprietary interest from an imminent threat of physical damage does not justify recovery of expense arising from the delay caused by the defendant's negligence. That is, a distinction is made between, for example, wages paid to employees engaged in steps to preserve property (which is recoverable as an expense incurred to preserve property), and wages paid to employees while they were idled (which is unrecoverable relational economic loss). I disagree, then, with Chartrand Co. Ct. J. in *Dominion Tape*, *supra* note 43 at 302 where he allowed recovery for the "positive outlays by the plaintiff to his employees while they unproductively milled around the plant awaiting the return of the electrical current." That his reasoning is incorrect is demonstrated by his reliance on Lord Denning's explication in *S.C.M.*, *supra* note 169, of unloading for repairs as analogous to "actual outlays for wages to idled employees." Lords Denning and Roche, however, were concerned with imminent threats to property. The claim before Chartrand Co. Ct. J., however, was an extension of what he described (at 303) as "a mere deprivation of an opportunity to earn an income."

The issue of the limits of this basis of recovery is also raised in two contrasting 1972 decisions (involving strikingly similar facts) of the Fifth Circuit of the United States Court of Appeals. In *J. Ray McDermott & Co. v. The SS Egero*, 453 F.2d 1202 (5th Cir. 1972) [*SS Egero*], a pipeline contractor sued to recover damages when a vessel's crew negligently dropped the vessel's anchor on or near one of two pipelines which the contractor was installing across a river, resulting in a ten hour shutdown. Gewin J., in allowing recovery, distinguished *Robins Dry Dock* as having been a claim for the profits which the charterer might have earned but for the delay. He viewed this case as involving the "outlays" for which Chartrand Co. Ct. J. in *Dominion Tape* had allowed recovery. "The present case", Gewin J. held (at 1204),

> is not a suit ... for the lost profits which it might have earned from the use of the dredges ... . To such a suit *Robins* would squarely apply. The case at bar is a suit by the "owner" of the pipeline seeking reimbursement of expenses incurred under its subcontract when the project was delayed.

Two months later, Bell, Dyer and Clark JJ. pronounced *per curiam* in *Kaiser Aluminum & Chemical Corporation v. Marshland Dredging Company*, 455 F.2d 957 (5th Cir. 1972) [*Kaiser Aluminum*]. There, the defendant's barge, while cleaning a canal, dropped its anchor which punctured a gas pipeline that supplied fuel to the plaintiff's factory. The plaintiff sued for undescribed "shutdown expenses and production losses." Without referring to *SS Egero*, the court, citing *Robins Dry Dock*, dismissed the action. If the "shutdown expenses" and "production losses" were necessary to preserve factory equipment or product, then this case is wrongly-decided. If, however, they arose from the lost production time, then *Kaiser Aluminum* contradicts *SS Egero*.

In an important and more recent (1995) pronouncement, Grady Jolly J. of the 5th Circuit has given judicial expression to the distinction between recoverable relational economic loss incurred to preserve a proprietary interest, and unrecoverable relational economic loss arising from "outlays" or other forms of lost revenue. The plaintiff's claims in *Corpus Christi*, *supra* note 270, arose from its ownership of an offshore platform, to which a third party's gas riser was connected. When the defendant's barge struck the platform, the gas riser (but not the platform) was damaged. The plaintiff advanced two claims: the costs incurred in flaring its gas to save its wells, and revenues lost as a result of the two week shutdown arising from damage to the gas riser. As to the second claim, the court, relying on its earlier pronouncement in *Testbank*, affirmed that "physical damage to a proprietary interest (is) a prerequisite to recovery for economic loss in cases of unintentional tort." The costs of flaring gas, however, were recoverable by virtue of (at 200) "the proprietary interest of (the) plaintiffs in their wells" which required the gas to be "flared in order to prevent the wells themselves from being lost."

property, but rather a right to require that the defendant not affect another's property in such a way as to interfere with the plaintiff's right in his or her own property.[274]

It may be that the conception of "joint venture" was employed by the Supreme Court of Canada in order to transcend the maritime confines of general average – that is, in seeking to apply the general average principle to a non-maritime claim, it also sought a non-maritime term.[275] The loose conception of joint venture articulated by McLachlin J. as the basis for recovery in *Norsk*, suggests, however, that the "joint venture" exception to non-recovery was intended to refer to something quite distinct from a recovery for a land-based *quasi*-general average expenditure incurred to protect a proprietary interest from an imminent threat.[276] That conception, however, has been narrowed considerably

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[274] This type of damage, insofar as it is not reflected in Bruce Feldthusen's categories of economic loss, reveals that the Canadian reactive evolution from adjudication of economic loss claims by reference to proximity notions to a categorization approach, may well have the effect of denying recovery where recovery in fact would be consistent with fundamental principles of tort law.

[275] In this regard, another possible explanation for Lord Roche's use in *Greystoke* of the term "common adventure" is that, rather than attempting to expand general average into a non-maritime context, he was recognizing "common adventure" as a wholly separate category to allow recovery in circumstances akin to general average but which arise in the non-maritime context.

[276] *Norsk*, *supra* note 17 at 376. McLachlin J. based her finding of a "joint" or "common venture" on the basis that:

> ... sufficient proximity (existed) on a number of factors related to CN's connection with the property damaged, the bridge, including the fact that C.N.'s property was in close proximity to the bridge, that C.N.'s property could not be enjoyed without the link of the bridge, which was an integral part of its railway system and that CN supplied materials, inspection and consulting services for the bridge, was its preponderant user, and was recognized in the periodic negotiations surrounding the closing of the bridge.

McLachlin J.'s conception of "joint venture" could apply to a variety of circumstances, including *Caltex*, yet she does not explain, for example, the significance of the factors she identified in supporting a finding of joint venture. Her brief treatment of this issue – which contrasts with her candour and thoroughness in *Norsk* in addressing the relevant jurisprudence – suggests that invocation of the joint venture exception to non-recovery was an afterthought; indeed, it was superfluous, given that she had already found the plaintiff's loss and the defendant's conduct to have been mutually proximate.

by the court, first inferentially in *D'Amato*,[277] then in *Bow Valley*[278] where McLachlin J., without reference to the facts of the case, stated, without elaboration, that the Court of Appeal had "correctly held that the plaintiff and the property owner cannot, on any view of the term, be viewed as joint venturers."[279] The Court of Appeal in *Bow Valley* had adopted indicia of a joint venture enunciated in *Graham v. Central Mortgage and Housing Corp.*:[280]

> 1. A contribution by the parties of money, property, effort, knowledge, skill or other assets to a common undertaking;
> 2. A joint property interest in the subject matter of the venture;
> 3. A right of mutual control or management of the enterprise;
> 4. Expectation of profit, or the presence of "adventure", as it is sometimes called;
> 5. A right to participate in the profits; and
> 6. Most usually, limitation of the objective to a single undertaking or ad hoc enterprise.

None of these indicia were apparent in *Norsk* (with the possible exception of the first indicator, as CNR provided services for the bridge, albeit for reward), nor were any present in *Bow Valley*. The second, and fourth through sixth indicia are generally present in typical arrangements for cargo transport, however. The other two indicia, however, will almost invariably be absent, suggesting that "joint venture" is meant to be something different than a "special circumstance" arising from the imminent need to protect a proprietary interest. On that basis, it is doubtful that the court is attempting to foster the joint venture exception to non-recovery as a land-based *quasi*-general average concept.

Conversely, however, the Court of Appeal in *Bow Valley* appeared to prefer La Forest J.'s approach in *Norsk* to joint ventures, which expressly required that a "joint" or

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[277] *D'Amato*, *supra* note 63. There, although not expressly, the court refrained from describing as a "joint venture" circumstances that were more strongly suggestive than those in *Norsk* of a joint or common venture between the corporate plaintiff and the individual plaintiff (who had suffered physical injury).
[278] *Bow Valley*, *supra* note 37.
[279] *Ibid.* at 406.
[280] (1973), 43 D.L.R. (3d) 686 at 707 (N.S.S.C.T.D.), citing Walter H.E. Jaeger, *Williston on Contracts*, 3rd ed. (Rochester, NY: The Lawyers Cooperative Publishing Co. 1959) at 563-65.

"common" adventure "(equate) to the relationship between ship and cargo in a general average case."[281] La Forest J., citing *Sucarseco* and *Greystoke*, observed that "a requirement exists that the expenses be incurred in avoiding or mitigating personal or property damage threatened by the defendant's negligence ... ",[282] and applied this very rationale to CNR's claim in *Norsk* of participation with PWC in a joint venture:

> In my view, these general average cases are not applicable to the facts of this case. There was no common imminent peril. C.N. was not required to contribute to P.W.C.'s loss. The loss fell exactly where the contract between C.N. and P.W.C. attributed it. It cannot suffice that losses were incurred by both parties, for that is always the case in this type of situation.[283]

Inasmuch, therefore, as the legal principle justifying recovery for such expense, whether arising in or outside a maritime context, is based on a "common adventure", the parameters of "joint venture" as a "special circumstance" permitting recovery are also better understood as protection of, also in the language of La Forest J., a "specific interest of the plaintiff different in nature from that of the typical contractual claimant",[284] being "(person) or property." Indeed, and in contrast to the care taken by La Forest J. to justify the joint venture exception to non-recovery as necessary to preserve the plaintiff's proprietary interest, no justification is offered by McLachlin J., in *Norsk* or *Bow Valley* in respect of the extension of "joint venture" to any circumstances beyond the parameters suggested in La Forest J.'s dissent in *Norsk*. We are not told, for example, why the features she relied on, or why the first and third of the indicia relied on in *Graham* or by the Court of Appeal in *Bow Valley*, are relevant to the recoverability of relational economic loss, whether on the basis of a posited coherence with the origins and common

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[281] *Norsk*, *supra* note 17 at 332.
[282] *Ibid.* at 333.
[283] *Ibid.* at 334.
[284] *Ibid.* at 312.

law evolution of duty of care, or even on more fleeting notions of contemporary public policy. Absent such justification, a more principled view of recoverability of relational economic loss would enable us to discard the distinction between general average and joint venture, in favour of a universal *quasi*-general average rationale founded on compensating for the necessary preservation of a proprietary interest, to justify recovery to plaintiffs involved in any enterprise, whether land or sea-based, who have incurred expense to protect their proprietary interest from imminent threat of physical damage.

In this chapter, I have focussed on the principles discerned in my earlier inquiry into the historical common law and theoretical justification for a duty of care to a type of loss which addressees the direct injury to a proprietary interest. Thus I have attempted to demonstrate how the law does not generally permit a plaintiff to recover relational economic loss, whether proximate or not, but, concomitantly, I have also attempted to demonstrate how the classes of recoverable "exceptions" of relational economic loss can be understood as coherent, and can be justified by reference to direct proprietary conceptions. In the third chapter, in the course of examining claims arising from defective products or building structures, I attempt to construct a case for recovery based on indirect proprietary conceptions arising from the defendant having made an undertaking to the plaintiff, upon which the plaintiff has reasonably and detrimentally relied.

IV. ENGAGING THE INDIRECT PROPRIETARY INTEREST: DEFECTIVE PRODUCTS AND BUILDING STRUCTURES

Issues of liability in tort law for defective products or building structures[285] generally arise in two circumstances, both of which emphasize strong links in the Anglo-American legal tradition between this particular variant of tort claim for pure economic loss and the law of contract.[286] A tort claim for such loss might be advanced by a consumer plaintiff where a prior purchaser or a supplier is interposed between the manufacturer and the plaintiff – that is, where no contractual privity subsists between the allegedly negligent manufacturer and the plaintiff.[287] Alternatively, a plaintiff might attempt to obtain such recovery in order to take advantage of the doctrine of "discoverability" of the tort, by which the running of the applicable statutory limitation period is delayed until the

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[285] For the purpose of this analysis, I will treat products and defective building structures identically. That is, I will assume that the law's requirements are equally and interchangeably applicable to both defective products and to defective building structures. As Lord Keith noted in *Murphy*, *supra* note 111 at 921, "(i)f the builder of the house is to be (subject to a duty of care), there can be no grounds in logic or in principle for not extending liability on like grounds to the manufacturer of a chattel." (See also S.M. Waddams, *Products Liability*, 3d ed. (Toronto: Carswell, 1993) at 25-26. [Waddams, *Products Liability*])

[286] Blackmun J. of the United States Supreme Court recognized the dual contractual and delictual nature of product liability cases, but viewed contractual principles as exclusively applicable, "the injury suffered" being "the essence of a warranty action, through which a contracting party can seek to recoup the benefit of the bargain." See *East River Steamship Corp. v. Transamerica Delaval Inc.*, 106 S. Ct. 2295, 476 U.S. 858 at 868 (1986) [*East River* cited to U.S.]. As will be seen *infra*, however, resort to tort may be had where there is no privity between the plaintiff and the manufacturer.

[287] Peter Cane, "Physical Loss, Economic Loss and Products Liability" (1979) 95 Law Q. Rev. 117 [Cane, "Products Liability"]. For an interesting and multifaceted refinement of privity in products liability cases, see William C. Pelster, "The Contractual Aspect of Consumer Protection: Recent Developments in the Law of Sales Warranties" (1966) 64 Mich. L. Rev. 1430 at 1443-52 [Pelster, "Consumer Protection"]. He distinguishes among "vertical" privity (which corresponds to the common understanding of privity, in that it deals with the relationship between parties to a transaction), "horizontal" privity, which relates to the situation where a third person injured by the defective product seeks compensation from the seller, and "diagonal" privity, where a purchaser seeks compensation from the manufacturer or someone else (such as a wholesaler or distributor) in the distributive chain ahead of the final seller. While Pelster's analysis is helpful to understanding the variants of cases and of relationships among potential parties embraced by this type of damage, these modified conceptions of privity do not, I suggest, assist us in understanding the basis for tort liability in terms other than a relaxation of the privity rule which is inconsistent with the foundational duty notions of undertaking and reliance.

plaintiff can reasonably discern the fact of damage – not an insignificant consideration in the case of latent manufacturing defects.

In considering this particular type of economic loss,[288] I will first establish the confines of my analysis by comparing the loss at issue here with consequential economic loss,[289] and with property damage, with a view to distinguishing among those three concepts and to establishing that the law treats "defects" as pure economic loss. I will then embark on the chapter's central inquiry, being with reference to the dual notions of undertaking and reliance, which were critical to understanding *Hedley Byrne* and basis of the duty of care which the House of Lords would have imposed on the defendants in that case; specifically, I will then apply those same notions as a basis for imposing a duty of care, in a manner demonstrably consistent with its historical and common law evolution, to cases of pure economic loss arising from defective products or building structures.[290] That is,

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[288] Defective products and building structures can also be considered from the perspective of other "categories" espoused by Bruce Feldthusen, such as negligent misrepresentation or negligent performance of a service, a relation which Professor Feldthusen has acknowledged. (Feldthusen, *Economic Negligence*, *supra* note 22 at 160.

[289] While I have already canvassed in Chapter 2 the distinction between pure economic loss and consequential economic loss, it is important to consider these contrasting types of damage in the specific context of cases of manufacturing defects, which raise their own unique issues when that distinction is applied.

[290] While I will be arguing *infra* that a manufacturer's undertaking and the plaintiff's reliance represent legally significant elements in the foundation of a duty of care, it must be acknowledged that the opposite view has, at least in recent scholarship, governed. See, for example, Feldthusen, *Economic Negligence*, *supra* note 22 at 19:

> Express warranty aside, it seems strained and without descriptive or explanatory power to describe the cases which impose liability as based on the manufacturer's undertaking a service with the object of benefiting the plaintiff. At the very least, it would be an undertaking of a very different type from that considered useful in the misrepresentation and services cases. ... (O)n balance this seems to be a distinctive problem best addressed with its own arguments and solutions.

I will argue later in this chapter, however, that an "express warranty", understood in its historical delictual (as opposed to contractual) sense of warranty, can be founded on the plaintiff's reliance on the defendant's undertaking or assumption of responsibility for the accuracy of its contents.

liability will be shown to properly flow from a manufacturer's representation to an ultimate consumer who, thereby detrimentally induced, purchases what turns out to be a defective product or building structure. Concluding, I will then measure that duty of care against the current inclusionary position of various Commonwealth jurisdictions and, in particular, against the intermediate "dangerous defect" requirement currently imposed by the Supreme Court of Canada and, in so doing, I will inquire as to whether recovery for a defect, "dangerous" or not, is compatible with fundamental tort law principles.

a. Is it "Pure Economic Loss"?

As in the case of relational economic loss, the law's distinct treatment of pure economic loss arising from defective manufacture of products or building structures stands in contrast to that of physical damage to a proprietary interest, as well as economic damage that is consequential upon such physical damage. Thus, where damages for physical loss arising from defective manufacture are recoverable, damages for economic loss consequential upon the physical loss, such as lost income or profits, are also recoverable as an incident of the plaintiff's right to compensation from the defendant for the lost use of his or her resource.[291] Further, and also as in the case of relational economic loss, the distinction between consequential economic loss and pure economic loss arising from defective manufacturing has proven elusive. In *Bowen v. Paramount Builders (Hamilton) Ltd.*,[292] the plaintiff, a "subsequent purchaser"[293] of a building comprising two

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[291] Cane, "Products Liability", *supra* note 287 at 119.
[292] (1976), [1977] 1 N.Z.L.R. 394 (C.A.) [*Bowen*].
[293] In this chapter, I will refer to a purchaser after the original purchaser on the distributive chain as a "subsequent purchaser." The significance of this subsequence is that such a purchaser is not in a relationship of privity with the manufacturer and thus cannot assert a claim for damages under the law of contract.

apartments, sued *inter alia* the builder for damage, including depreciation or diminution in value of the home, caused when the home subsided due to inadequate foundations and subsoil composition. While Richmond P. dissented in the majority's finding of liability on the facts, as to the plaintiff's ability to recover such damage, he and the majority were agreed that the plaintiffs' damages constituted consequential economic loss. This conclusion, his reasons reveal, engaged another elusive but conceptually necessary distinction between pure economic loss and loss arising from physical damage:

> Apart from the actual cost of the alterations, there is a sum of $2,000 claimed as depreciation or diminution in value. This sum represents the difference between the market value of the property after all repairs are done and the market value had there been no subsidence. This claim, in my opinion, should be allowed. In one sense it can be described as economic loss, but it is economic loss directly and immediately connected with the structural damage to the building and as such it is properly recoverable.[294]

The diminution in value, then, being "directly and immediately connected with the structural damage", was, by implication, recoverable as the type of economic loss consequential upon actual physical damage to person or property, as described by Lord Denning in *S.C.M.*[295] and *Spartan Steel.*[296] Indeed, Lord Denning echoed Richmond P.'s conclusion in *Dutton v. Bognor Regis United Building Co. Ltd.*,[297] another defective foundations case (again for, *inter alia*, an alleged diminution in value of the home) brought by a subsequent owner, this time against the local authority which had employed the allegedly negligent building inspector. Noting defence counsel's submission that the loss alleged was purely economic, Lord Denning said:

> I cannot accept this submission. The damage done here was not solely economic loss. It was physical damage to the house. If counsel's submissions

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[294] *Bowen*, *supra* note 292 at 411.
[295] *S.C.M.*, *supra* note 169.
[296] *Spartan Steel*, *supra* note 172.
[297] [1972] 1 Q.B. 373, [1972] 1 All E.R. 462 (C.A.) [*Dutton* cited to All E.R.].

> were right, it would mean that, if the inspector passes the house as properly built and it collapses and injures a person, the council are liable; but, if the owner discovers the defect in time to repair it – and he does repair it – the council are not liable. That is an impossible distinction. They are liable in either case. I would say the same about the manufacturer of an article. If he makes it negligently, with a latent defect (so that it breaks to pieces and injures someone), he is undoubtedly liable. Suppose that the defect is discovered in time to prevent the injury. Surely he is liable for the cost of repair.[298]

Lord Denning's statement was cited favourably by Lord Wilberforce in *Anns*,[299] another deficient foundations case, where Lord Wilberforce held:

> The damages recoverable include all those which foreseeably arise from the breach of the duty of care which, as regards the council, I have held to be a duty to take reasonable care to secure compliance with the byelaws. Subject always to adequate proof of causation, these damages may include damages for personal injury and damage to property. In my opinion they may also include damage to the dwelling-house itself; for the whole purpose of the byelaws in requiring foundations to be of a certain standard is to prevent damage arising from weakness of the foundations which is certain to endanger the health or safety of occupants. To allow recovery for such damage to the house follows, in my opinion, from normal principle. *If classification is required, the relevant damage is in my opinion material, physical damage*, and what is recoverable is the amount of expenditure necessary to restore the dwelling to a condition in which it is no longer a danger to the health or safety of persons occupying and possibly (depending on the circumstances) expenses arising from necessary displacement.[300]

To assess or even accept such a conclusion, however, one must address the distinction, implicit in Richmond P.'s reasons in *Bowen*, between pure economic loss and loss arising from physical damage. This can be a conceptually difficult distinction to make in the case of defective manufacture, which invariably involves claims arising from the use or ownership of property, whether realty or personalty, and can thus, superficially at least, be understood as a type of loss arising from an injury to a proprietary interest. Implicit,

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[298] *Ibid.* at 474. Sachs L.J. also referred (at 481) to the submission as a "subtle line of argument" which "failed to attract … ."
[299] *Anns*, *supra* note 15.
[300] *Ibid.* at 505.

for example, in Lord Wilberforce's reference to "damage *to* the dwelling-house itself"[301] is an assumption that the house sustained damage as a result not of an internal defect, but rather of the impact of an external source;[302] hence the finding that the plaintiff sustained physical damage to a proprietary interest (his or her house) and that the associated economic loss (whether limited *per* Lord Wilberforce to the cost of removing "danger to the health and safety of persons", or whether it includes, *per* Lord Denning and Richmond P., the more expansive diminution in value) is recoverable as consequential economic loss.[303]

As conceptually difficult as the contrasts between pure economic loss arising from defective manufacture and property damage may be to understand, they are fundamental to understanding the law's distinct treatment of pure economic loss. The nature of a

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[301] *Ibid.* at 505. (Emphasis added).

[302] *Anns* was criticized for this in *Murphy*, *supra* note 111, by Lord Keith (at 920, citing Deane J.'s reasons in *Sutherland*, *supra* note 124) and Lord Oliver (at 933).

[303] A somewhat inconsistent but nonetheless instructive approach to the distinction between pure economic loss and loss arising from physical damage is offered by Megaw L.J. in *Batty v. Metropolitan Property Realisations Ltd.*, (1977), [1978] 1 Q.B. 554, [1978] 2 All E.R. 445 (C.A.) [*Batty* cited to Q.B.]. There, the plaintiffs had taken a 999 year lease of a house from the defendant developers who had in turn purchased the land from the defendant builders. The builders, with the developer, had, in advance of construction, carried out an inspection of the land comprising the building site. The evidence was that further inspection might have revealed the presence in boulder clay of a stratum of "varved" clay, which was likely to move, meaning that the subsoils were prone to landslides. Three years after the plaintiffs took possession, a landslide damaged their garden. While it did not affect the house or its foundations, the evidence also was that, within ten years, further movement would affect the foundations and the house was certain to be gravely damaged. In finding the builders liable to the plaintiffs, Megaw L.J. found that this was a case of physical damage, referring to damage which occurred in the landslide. He continued (at 571):

> True, the foundations of the house for the time being remained undisturbed. But there was physical damage to the garden – a part of the property conveyed. If physical damage be necessary in order to found the action, there was physical damage.

Megaw L.J.'s reasoning, however, is unsatisfying. Assuming the garden was physically damaged by the landslide, such damage was not an injury caused by the defendants' negligence. Rather, it was caused by the landslide. Moreover, and as Megaw L.J. acknowledges, it did not damage the foundations. Rather than being "directly and immediately connected" with the forecasted future damage to the structure, it was entirely independent of it, although it was caused by the same type of problem that was predicted to cause further subsidence sometime within the next ten years. The further rationale employed by Megaw L.J. in this regard, being the "imminent danger to the health or safety of persons occupying the house", will be considered *infra*.

defect is that its "damage" is internal, depriving the whole of an essential component,[304] as opposed to the loss that arises from externally-caused and imposed physical damage. Further, "damage", which implies an imposed reduction of quality from what had previously existed, is incompatible with deficient construction, since the product or building in question would never have existed otherwise than in its deficient state.[305] It is, therefore, conceptually unsatisfying and, as will be seen, inconsistent with the governing case authorities, to view the damage caused by , for example, an improperly-constructed building structural foundation to be anything other than pure economic loss arising from a defect – that is, from something internal to the building.

It is this very point that some courts have attempted to address by espousing a "complex structure" theory whereby, if defective construction or a defective component in construction has damaged the entire structure, the loss is treated as having arisen not from economic, but physical damage. This notion was given its most authoritative favourable expression, albeit in *obiter*, in *D&F Estates Ltd. v. Church Commissioners for England*,[306] which arose from plastering work that had been done by a subcontractor engaged by the defendant builders of block of apartments. Fifteen years later, the plaintiffs leased an apartment from the owners, discovered that the plaster on a wall and certain ceilings was loose and falling and, as a consequence, they sued the defendants for the cost of replastering. Having criticized *Anns* for establishing a cause of action against

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[304] *Black's Law Dictionary*, 5th ed. (St. Paul: West Publishing Co., 1979), defines "defect" as:

> The want or absence of something necessary for completeness ... a deficiency in something essential to the proper use for the purpose for which a thing is to be used.

Similarly, *The Concise Oxford Dictionary of Current English*, 6th ed. (Oxford: Oxford University Press, 1979), defines "defect" as the "lack of something essential to completeness."

[305] Here I am agreeing with Deane J. in *Sutherland, supra* note 124 at 490-91.

[306] [1989] 1 A.C. 177, [1988] 2 All E.R. 992 (H.L.) [*D&F* cited to A.C.].

a builder when the only damage alleged to have been suffered by the plaintiff was "a defect in the very structure which the builder erected",[307] Lord Bridge said:

> My example of the garden wall, however, is that of a very simple structure. I can see that more difficult questions may arise in relation to a more complex structure like a dwelling house. One view would be that such a structure should be treated in law as a single indivisible unit. On this basis, if the unit becomes a potential source of danger when a hitherto hidden defect in construction manifests itself, the builder, as in the case of a garden wall, should not in principle be liable for the cost of remedying the defect. It is for this reason that I now question the result, as against the builder, of the decision in *Batty v. Metropolitan Property Realisations Ltd.* ... .
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> However, I can see that it may well be arguable that in the case of complex structures, as indeed possibly in the case of complex chattels, one element of the structure should be regarded for the purpose of the application of the principles under discussion as distinct from another element, so that damage to one part of the structure caused by a hidden defect in another part may qualify to be treated as damage to "other property", and whether the argument should prevail may depend on the circumstances of the case.[308]

A dwelling house or any "complex chattels" then, Lord Bridge suggested, might be viewed, for the purpose of characterizing damage, as an amalgam of different components which, in the course of their interactions, might cause damage that could thus be viewed as damage not internal to the amalgam, but rather as damage inflicted by one component upon another, thus constituting externally caused physical damage to property. The difficulty with the concept of a "complex structure", however, is that virtually any device, whether tactile or machine, has component parts.[309] Lord Bridge, in

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[307] *Ibid.* at 1006.

[308] *Ibid.* at 1006-07. The Court of Appeal's pronouncement in *Batty* is canvassed at note 303.

[309] This was the conclusion of Connor J. of the Supreme Court of Alaska in *Northern Power & Engineering Corp. v. Caterpillar Tractor Co.* (1981), 623 P.2d 324 at 330 [*Northern Power*], where he stated that "such a broad holding would require a finding of 'property damage' in virtually every case where a product damages itself." Conner J.'s view was cited favourably by Blackmun J. of the United States Supreme Court in *East River*, *supra* note 286 at 867.

Although the term "complex structure" was not employed, Lloyd J. in dissent in *Aswan Engineering v. Lupdine Ltd.* (1986), [1987] 1 All E.R. 135 at 152 (C.A.) [*Aswan*], a case which involved waterproofing compound ("Lupguard") that was damaged when the pails in which they were stored overheated and collapsed while in transit, acknowledged his evident difficulty in grappling with the distinction between internal defects and damaged property:

> The peculiarity of the present case is that the position is not so clear. If Aswan had bought empty pails from a third party and then used the pails for exporting the Lupguard, clearly there would have been damage to other

resiling from his support for the "complex structure" theory two years later in *Murphy*[310] made this very point,[311] which also served as the basis for La Forest J.'s conclusion for the Supreme Court of Canada in *Winnipeg Condominium Corp. No. 36 v. Bird*

> property of the plaintiff. But in the present case the property in the pails and the property in the Lupguard passed to the plaintiff simultaneously. Indeed, it is rather artificial to think of the property in the pails passing at all. Aswan was buying Lupguard in pails. It was not buying Lupguard *and* pails. One can think of other cases by way of illustration without much difficulty. If I buy a defective tyre for my car and it bursts, I can sue the manufacturer of the tyre for damage to the car as well as injury to my person. But what if the tyre was part of the original equipment? Presumably the car is *other* property of the plaintiff, even though the tyre was a component part of the car, and property in the tyre and property in the car passed simultaneously. Another example, perhaps even closer to the present case, would be if I buy a bottle of wine and find that the wine is undrinkable owing to a defect in the cork. Is the wine other property, so as to enable me to bring an action against the manufacturer of the cork in tort? Suppose the electric motors in *Muirhead*'s case had overheated and damaged the pumps. Would the plaintiff have recovered for physical damage to the pumps as well as the lobsters?
>
> I do not find these questions easy. There is curiously little authority on the point in England, compared with America, where the law as to product liability is more highly developed. My provisional view is that in all these cases there is damage to the other property of the plaintiff, so that the threshold of liability is crossed. (Emphasis in original)

The *Muirhead* case referred to the Court of Appeal's pronouncement in *Muirhead v. Industrial Tank Specialties Ltd.*, [1986] Q.B. 507, [1985] 3 All E.R. 705 (C.A.), where the plaintiff, a wholesale fish merchant, had installed a lobster tank, which included as a component a pump. When the pump cut out, water recirculation was inadequate, and the lobsters died. The court distinguished between recoverable damage arising from the loss of the lobsters, and the unrecoverable loss of profit. While, in *Aswan*, Lloyd L.J. seemed to accept that outcome (at 152), the distinction was apparently more elusive to him in *Aswan*, and hence he was unable to stake out more than a "provisional" position.

[310] *Murphy*, *supra* note 111.

[311] *Ibid.* at 928. Specifically, Lord Bridge concluded that:

> The reality is that structural elements in any building form a single indivisible unit of which the different parts are essentially interdependent. To the extent that there is any defect in one part of the structure it must to a greater or lesser degree necessarily affect all other parts of the structure. Therefore any defect in the structure is a defect in the quality of the whole and it is quite artificial, in order to impose a legal liability which the law would not otherwise impose, to treat a defect in an integral structure, so far as it weakens the structure, as a dangerous defect liable to cause damage to "other property."

Nonetheless, Lord Bridge was reluctant to completely abandon the ascription of any significance to components of a larger amalgam, and went on (at 928) to distinguish between a component which "positively malfunctions so as to inflict positive damage on the structure in which it is incorporated" and one which simply "does not perform its proper function in sustaining the other parts." By way of illustration, he postulated:

> ... if a defective central heating boiler explodes and damages a house or if a defective electrical installation malfunctions and sets the house on fire, I see no reason to doubt that the owner of the house, if he can prove that the damage was due to the negligence of the boiler manufacturer in the one case or the electrical contractor in the other, can recover damages in tort on *Donoghue v. Stevenson* principles.

Construction Co.[312] that the complex structure theory "serves mainly to circumvent and obscure" what he described as "the underlying policy questions."[313]

Moreover, and as *D&F* demonstrates, the "complex structure" theory does not completely overcome the distinction between an internal defect and externally-caused physical loss. Whereas defects in a building structure's foundation might cause damage to, for example, perimeter structures such as floors, walls and ceilings, in *D&F* the damage comprised solely the defect in the plaster.[314] As a result, Lord Bridge concluded that, even in a "complex structure" such as an apartment building, a defect whose effects were exclusively internal could not be characterized as physical damage.

Both the Supreme Court of Canada[315] and the New Zealand Court of Appeal,[316] which, among Commonwealth courts, have been more inclined to grant recovery in tort law for damages arising from defective manufacture, have also in recent years acknowledged that the damage cannot be characterized as anything other than pure economic loss. Thus the

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[312] *Winnipeg Condominium*, *supra* note 63.

[313] *Ibid.* note 63 at 201. Other critics have been even less charitable. While President of the New Zealand Court of Appeal, Sir Robin Cooke wrote (extra-judicially) of the "metaphysical" debate about the complex structure theory:

> That anything should turn on this, that it should be a subject of grave discussion in the highest court of a land, gives it curiosity value and the charm going with fine points of law. As a touchstone for answering practical questions it may not turn out to be reliable.

(See Robin Cooke, "An Impossible Distinction" (1991) 107 Law Q. Rev. 46 at 50-51. [Cooke, "An Impossible Distinction"])

[314] It does appear, however, that the plaintiffs did plead damage consisting of the "cost of cleaning carpets and other possessions damaged or dirtied by falling plaster; £50." (*D&F*, *supra* note 306 at 1007). The significance of this pleading was not addressed by the court.

[315] *Winnipeg Condominium*, *supra* note 63 at 201.

[316] *Stieller v. Porirua City Council*, [1986] 1 N.Z.L.R. 84 (C.A.) as viewed by the Privy Council in *Invercargill City Council v. Hamlin*, [1996] A.C. 624, [1996] 2 W.L.R. 367, [1996] 1 N.Z.L.R. 513 at 517 (P.C.). As to recovery, the Privy Council expressly applied New Zealand law, recognizing the divergence between England and the rest of the Commonwealth engendered by the evolution of the English position towards a more restrictive stance in cases such as *D&F* and *Murphy*.

distinction, long expressed in the common law, including in those jurisdictions,[317] between externally-caused physical damage and pure economic loss arising from internal defects, was affirmed.[318]

b. The Manufacturer's Undertaking

Understanding the nature of a "defect" as pure economic loss is not conclusive of the matter of a subsequent purchaser's recovery or non-recovery; it remains to consider whether manufacturers owe a duty to purchasers who have suffered pure economic loss but who fall outside the confines of contractual privity and, moreover, why they do or do not owe such a duty. Recall that the law does not *exclude* recovery for pure economic loss; it merely requires of such plaintiffs that which it requires of plaintiffs seeking recovery for physical damage: a demonstrably injured proprietary interest. This, Brennan J.'s dissenting reasons revealed in *Bryan v. Maloney*,[319] engages a conception of

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[317] See, for example, the dissent of Laskin J. in *Rivtow*, *supra* note 4, where (at 548) he observed that "(i)f physical harm had resulted, whether personal injury or damage to property (other than to the crane itself), Washington's liability to the person affected, under its anterior duty as a designer and a manufacturer of a negligently-produced crane, would not be open to question." His next observation, however, being that liability should still ought to flow from loss incurred to avert a likely harm by withdrawing the crane from service for repairs, was, as will be seen *infra*, influential in the evolution in Canada towards the imposition of liability on manufacturers arising from defects that are "dangerous."

[318] Some commentators espouse further refinement of the notion of an internal defect for the purposes of their respective analyses of products liability. The most enduring treatment was suggested by Marc A. Franklin in "When Worlds Collide: Liability Theories and Disclaimers in Defective-Products Cases" (1966) 18 Stan. L. Rev. 974 at 981-82 [Franklin, "When Worlds Collide"]. Specifically, he distinguishes between "repair loss" (which describes "the harm a defective product has done to itself") with "expectation loss" (which refers to the damages caused to the owner "over and above the actual repair value of the product; for example, loss of use of the product in business or, perhaps, loss of a valuable deal"), and "fitness loss" (which arises where the product does not perform the specific task for which it was purchased). The final category is generally covered by statutory sales law. Moreover, and as Franklin acknowledges, all three categories are forms of pure economic loss and, although most of the caselaw falls within the first category, the treatment which I suggest the law accords them does not vary *inter se*.

[319] (1995), 182 C.L.R. 609, 128 A.L.R. 163 (H.C.A.) [*Bryan v. Maloney* cited to A.L.R.]. The plaintiff was the third owner of a house built seven years earlier by the defendant. Six months after her purchase, she observed cracks appearing in the walls which were determined to be symptomatic of inadequate foundations.

liability which, while entirely distinct from liability arising under the law of contract, similarly draws, at least in part, from the defendant's assumed responsibilities:

> The defects are not physical damage the foreseeability of which gives rise to a prima facie duty of care, but it does not follow that the cost of rectifying such physical defects in order to improve the quality of the building is pure economic loss which may attract an award of damages for negligence.
>
> Where the question is whether a duty of care relating solely to the quality of the building or chattel bought by a purchaser should be imposed by the law of tort or the law of contract, the answer, in my opinion, is that the interests to be protected are appropriately to be governed by the law of contract. As between a builder and the original owner of a building, any claim between them relating to the condition of the building is also properly to be determined by the contract which governs their relationship, not by the law of tort. ... A claim by a remote purchaser against a vendor relating to the condition of the building is also properly to be determined by the law of contract. But physical damage to person or property arising from the construction of a building or the manufacture of a chattel is properly the concern of the law of tort. ...
>
> It would be anomalous to have claims relating to the condition of the building by an original owner against the builder determined by the law of contract if the relief claimed by a remote purchaser against the builder would be determined by the law of tort. *Such a situation would expose the builder to a liability for pure economic loss different from that which he undertook in constructing the building and would confer a corresponding right on the remote purchaser which the purchaser had not sought to acquire from the vendor.*[320]

The critical determinant, then, is the foundational substance of the duty of care – namely, whether the defendant's undertaking to engage in particular conduct "confer(red) a

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[320] *Ibid.* at 190. (Emphasis added). The differential applications of the law of tort and contract in such cases was also the unanimous emphasis of the Privy Council in *Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank Ltd.*, [1985] 2 All E.R. 947, [1986] A.C. 80 at 107 (P.C.), where Lord Scarman said:

> Their Lordships do not believe that there is anything to the advantage of the law's development in searching for a liability in tort where the parties are in a contractual relationship. This is particularly so in a commercial relationship. ... their Lordships believe it to be correct in principle and necessary for the avoidance of confusion in the law to adhere to the contractual analysis: on principle because it is a relationship in which the parties have, subject to a few exceptions, the right to determine their obligations to each other, and for the avoidance of confusion because different consequences do follow according to whether liability arises from contract or tort, e.g. in the limitation of action.

This opportunity which contractual negotiations afford parties to determine their rights and corresponding obligations amplifies the significance of the defendant's "undertaking" – that is, it is reflective of the duty of care grounded in the defendant's assumption of responsibility to the plaintiff who is thereby induced to expect that the defendant will undertake a task reasonably. Inasmuch as the contract reflects the extent of that undertaking, the application of tort law is not only inimical but superfluous.

corresponding right" on the plaintiff to rely on the defendant's ultimate discharge of that undertaking. Were tort liability were to be imposed in circumstances arising from a prior contractual transaction but absent such an undertaking, the defendant would as a consequence be held responsible for that beyond which he or she undertook, under the contract, to be responsible by intentionally or knowingly inducing another to rely on his or her reasonableness. Recall, however, the criticisms of Lords Griffiths and Templeman in *Smith v. Eric S. Bush*[321] of the requirement of an "undertaking" and the consequent importance of distinguishing between the undertaking they were contemplating, being an express assumption of legal liability, and an assumption of responsibility to do something reasonably, knowing that another is reasonably relying on the undertaker to discharge the assumed responsibility.[322] It is the latter type of undertaking that gives rise to a duty of care. Its application to the type of loss arising from defective products or building structures has not, however, been the subject of a great deal of recent attention in the Commonwealth.[323] Perhaps ironically, given the predominance of strict liability in many

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[321] *Eric S. Bush*, *supra* note 98.

[322] Recall the speech of Lord Browne-Wilkinson in *White v. Jones*, *supra* note 103, and specifically cited at note 104.

[323] Most recently, an attempt to articulate an "extended *Hedley Byrne* principle" was made by Chris Gosnell, in "English Courts: The Restoration of a Common Law of Pure Economic Loss" (2000) 50 U.T.L.J. 135. Gosnell, relying on the House of Lords' pronouncement in *Henderson v. Merrett*, [1994] 3 All E.R. 506 (H.L.), however, emphasizes its applicability principally in cases of negligently performed services, and does not consider its operation in cases of defective products and building structures.

In Smillie, "Negligence and Economic Loss", *supra* note 3, an important contribution to an expansive understanding of *Hedley Byrne* and its implications for the tort law duty of care, J.A. Smillie made a brief reference (at 255) to "negligent production or distribution of a defective product" in the course of defending the following principle he discerned as governing recovery in tort law of pure economic loss (at 233):

> ... a defendant who undertakes to perform a business or professional service a principal object of which is to protect or advance the plaintiff's economic interests will be liable to the plaintiff for purely economic loss caused by negligent performance of or failure to perform that service.

My larger criticism of his approach is that he fails to ascribe significance to the plaintiff's reliance on the defendant's undertaking as a necessary element of the duty of care. I also note, however, that, while he carefully develops his thesis with reference to relational economic (maritime charter) losses, negligent misstatement, liability of public authorities and negligent performance of a service, products liability is not

American states,[324] U.S. jurisprudence imparts some instructive insights into this understanding of the basis for determining a manufacturer's liability for pure economic loss.

Historically, U.S. courts evinced hostility towards tort claims for pure economic loss arising from allegedly negligent manufacture. In *Trans World Airlines Inc. v. Curtiss-Wright Corporation*,[325] where serious defects in aircraft engines (which had already caused one crash) were repaired at the expense of the plaintiff, who, in turn, sought indemnity from the manufacturer, Eder J. of the New York Supreme Court cited and affirmed a "general rule" that "the only person liable for damages caused by defects in goods sold (is) the immediate seller by virtue of express or implied warranty to the immediate buyer."[326]

Several related rationales have been offered for this reluctance to invade a domain traditionally governed by warranties made between the parties in privity, even where they

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considered beyond that brief reference cited above. This omission was noted by Bruce Feldthusen, (Feldthusen, *Economic Negligence*, *supra* note 22 at 18-19) who, as I have already observed (at note 290), has also rejected the significance of a manufacturer's undertaking outside the realm of negligent misrepresentation and professional service cases.

See also D.W. Greig, "Misrepresentations and the Sale of Goods" (1971) 87 Law Q. Rev. 179 [Greig, "Misrepresentations"].

[324] In the Commonwealth, strict liability is also formally recognized in Quebec (Art. 1468-69, C.C.Q. (1982)) and in Australia (*Trade Practices Amendment Act 1992* (Cth.)). Beyond those jurisdictions, however, I agree with Stephen M. Waddams' observation, in "New Directions in Products Liability" in Nicholas Mullany and Allen M. Linden, eds. *Torts Tomorrow: A Tribute to John Fleming* (Sydney: LBC Information Services, 1998) at 119, where he states that, in practice, strict liability is, in many Commonwealth jurisdictions, already imposed to a large degree in products liability cases. In reality, the duty of care arising from an undertaking and consequent reliance, combined with statutory implied warranties will, in many circumstances relating to products liability, result in the imposition of liability, howsoever derived. This is not, however, my purpose in espousing a duty of care in such circumstances; indeed, as I will argue *infra*, the Canadian "dangerous defects" distinction is not, where the danger is to another or another's property, an appropriate device upon which to ground tort liability.

[325] 148 N.Y.S.2d 284 (Sup. Ct. 1955), aff'd without opinion, 2 App. Div. 2d 666, 153 N.Y.S.2d 546 (1st Dept. 1966) [*Trans World Airlines*].

[326] *Ibid.* at 287.

are not the disputing litigants; four years after *Trans World Airlines*, the same court explained this reluctance as a reflection of a principle that "economic interests are not entitled to protection against mere negligence."[327] The court distinguished such cases from the seminal judgment of Cardozo J. in *MacPherson v. Buick Motor Co.*[328] which, in the context of a personal injury case, overcame the privity rule in *Winterbottom v. Wright*[329] and held that a subsequent purchaser may recover against a manufacturer for damages caused by a defective product. We have already seen, however, that, contrary to the New York Supreme Court's statement, the law *does* recognize a duty of care in certain cases of pure economic loss.[330] Another rationale that has been advanced is that an invasion of warranty's domain would allow subsequent purchasers to avoid any contractually-imposed limitations on recovery prescribed by their contracts with the intermediate sellers, with whom they *are* in privity[331] and, indeed, this was the particular rationale cited by Eder J. in *Trans World Airlines*.[332]

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[327] *Amodeo v. Autocraft Hudson, Inc.*, 195 N.Y.S.2d 711 at 712 (Sup. Ct. 1959), aff'd, 12 App. Div. 2d 499, 207 N.Y.S.2d 101 (2d Dept. 1960).

[328] 111 N.E. 1050 (N.Y.C.A. 1916) [*MacPherson*].

[329] *Winterbottom v. Wright*, *supra* note 72.

[330] See the general discussion in Chapter 1 and also the discussion under "Recoverable Relational Economic Loss" in Chapter 2.

[331] "'Note': Economic Loss in Products Liability Jurisprudence" (1966) Colum. L. Rev. 917 at 930 ["Columbia 'Note'"].

[332] *Trans World Airline*, *supra* note 325. Specifically, Eder J. said (at 290):

> If the ultimate user were allowed to sue the manufacturer in negligence merely because an article with latent defects turned out to be bad when used in "regular service" without any accident occurring, there would be nothing left of the citadel of privity and not much scope for the law of warranty. There seems to me to be good reason for maintaining that, short of an accident, the citadel should be preserved. Manufacturers would be subject to indiscriminate lawsuits by persons having no contractual relations with them, persons who could thereby escape the limitations, if any, agreed upon in their contract of purchase. Damages for inferior quality, per se, should better be left to suits between vendors and purchasers since they depend on the terms of the bargain between them.

Left unconsidered in *Trans World Airlines*, however, is the position of a plaintiff, not in privity with the manufacturer, who can demonstrate reasonable reliance on an objectively demonstrable undertaking by the manufacturer, such as to bring the manufacturer into "a special relationship"[333] giving rise to a duty of care to the plaintiff. As early as 1957, a commentator no less eminent than Warren Seavey recognized the potential applicability of this principle:

> For centuries the common law has protected personal freedom and the physical condition of persons and things, family relations and reputation, but only within relatively modern times has it protected pecuniary interests divorced from tangible harm. ...
> ...
> ... The liability of manufacturers is ordinarily based upon the negligent misrepresentations to the user or to the one from whom he obtains it that the product is suitable for the use for which it was sold. Hence, consistently, manufacturers should be liable ... only if liability for misrepresentations causing economic harm to third persons is expanded to include negligent misstatements in business transactions, made with reason to believe that such third persons will rely upon them, a result not yet generally achieved. Is it not time to make these rules more nearly consistent with those involving physical harm?[334]

In such circumstances, and where it induces justifiable reliance by the subsequent purchaser, the manufacturer's conduct amounts to an undertaking which, if it induces the plaintiff's reasonable reliance, will engender liability. Its broader significance is grounded in the general principle of tort law, reflective of the origins and common law evolution of the duty of care, and applicable whether the damage is physical or purely economic (of which *Donoghue v. Stevenson* and *Hedley Byrne* are case-specific examples), that liability for the consequences of one's actions arises from the inducement, by way of an assumption of responsibility to refrain from risky conduct, of

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[333] *Williams*, *supra* note 10 at 835.
[334] Warren A. Seavey, "Actions for Economic Harm – A Comment" (1957) N.YU.L. Rev. 1242 at 1242-43 [Seavey, "Actions for Economic Harm"].

another's reliance on the reasonableness of those actions. Moreover, at a practical level, reference to the duty of care so grounded in determining liability avoids the difficulties which persist for the courts as they grapple with the distinctions among an inherent "defect", consequential economic loss, and physical damage to property.

As to the form of such an undertaking, the House of Lords has recently suggested, in *Williams v. Natural Life Health Foods*,[335] that it may amount to "any assumption of responsibility", "conveyed directly or indirectly" by which the undertaker "assumed personal responsibility" towards the act referenced in the undertaking.[336] That assumption of personal responsibility, the House of Lords added, is to be determined by reference to an objective test, meaning "that the primary focus must be on things said or done by the defendant or on his behalf in dealings with the plaintiff.[337]

Williams involved the allegedly negligent provision of advice, and so the objective conduct which the House of Lords considered (and rejected) in determining that the defendant had not undertaken to be responsible for the quality of the advice (of which the plaintiffs were subsequent consumers) is not instructive. In cases of negligently manufactured products and building structures, however, the undertaking might be transmitted through the device of warranty. This entails an understanding of "warranty" which transcends the confines of contract (where, being incorporated into the contract, it is actionable if it not discharged, irrespective of negligence), and incorporates the notion

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[335] *Williams*, *supra* note 10.
[336] *Ibid.* at 834.
[337] *Ibid.* at 835. This is consistent with Warren Seavey's reference to a manufacturer's misrepresentations. (Seavey, "Actions for Economic Harm", *supra* note 334 at 1242-43].

of a representation to subsequent purchasers. While, therefore, the consequent liability to the party in privity with the manufacturer arises under the contract and is consequently enforced under the law of contract, such contractual liability is not exhaustive of the potential ramifications of a manufacturer's representation where the representation is external to the contract[338] and consequently, inasmuch as it intends that representation to induce the subsequent purchaser to rely on its contents, the manufacturer is held to the substance of that inducement.[339]

The extra-contractual legal significance of such a representation is more completely understood with reference to the common law history that led to the "dogma that an innocent misrepresentation of fact which induces a contract does not ... entitle the representee to a remedy in damages against the representor."[340] Warranty was originally an action in tort for deceit, brought by a purchaser who alleged that he or she had made a purchase in reliance on another's representations which later proved to be false.[341] The court required no particular form of language or words to establish a warranty; rather, the

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[338] The Supreme Court of Canada affirmed in *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, 31 D.L.R. (4th) 481 at 521-22 that a tort law duty of care may arise from contractual relationships, although it must be independent from the terms of the contract, and it must not be admitted "if its effect would be to permit the plaintiff to circumvent or escape a contractual exclusion or limitation of liability for the act or omission that would constitute a tort." Thus, in order to amount to an actionable reliance-inducing undertaking, the representation must be external to the contract.

[339] The idea of liability arising from a representation inducing reliance is well-established in U.S. sales law. The *Uniform Sales Act*, § 12, which was drafted in 1906 and soon thereafter replaced by the *Uniform Commercial Code*, defined an express warranty as "any affirmation of fact or any promise by the seller relating to the goods ... if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and the buyer purchases the goods relying thereon." Similarly, § 2-313(1)(a) of the *Uniform Commercial Code* contained this definition: "Any affirmation of fact or promise made by the seller to the buyer which relates to the warranty that the goods shall conform to the affirmation or promise." See Pelster, "Consumer Protection", *supra* note 287 at 1432 and n. 8.

[340] Greig, "Misrepresentations", *supra* note 323.

[341] J.B. Ames, "The History of Assumpsit" (1888) 2 Harv. L. Rev. 1. The plaintiff in such cases, unlike the modern action for deceit, did not have to prove that the representer knew that the statement was untrue: rather, liability in damages was imposed for merely innocent misrepresentation. See Samuel Williston, "Liability for Honest Misrepresentation" (1911) 24 Harv. L. Rev. 415.

court merely inquired as to whether the representor had made a statement of fact regarding the product such that he or she could be taken to have assumed responsibility for the truth of its contents.[342] The purchaser who then purchased on the strength of the representor's statement of facts would then have a remedy where the representation's contents proved false. By the mid-eighteenth century, the practice had emerged of pleading actions alleging a false warranty in *assumpsit* , because of certain procedural advantages to the plaintiff in pleading *assumpsit* rather than case (tort),[343] although the

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[342] Greig, note 323, at 180. See, however, *Chandelor v. Lopus* (1603), Cro. Jac. 4, 79 E.R. 3, where the Court of Exchequer Chamber said "the bare affirmation that it was a bezar-stone, without warranting it to be so, is no cause of action." If formal words of warranty were ever required, however, that requirement was eventually dropped; by 1789, Lord Holt, in *Pasley v. Freeman, supra*, note 70, in reference to an earlier seventeenth century decision (decided one year before *Chandelor v. Lopus*), said: "If the court went on a distinction between the words warranty and affirmation, the case is not law; ... an affirmation at the time of sale is a warranty, provided it appear on evidence to have been so intended." This point emphasizes the importance of an historical perspective to demonstrating the tort aspects of warranty, as the House of Lords, in *Heilbut, Symons & Co. v. Buckleton*, [1913] A.C. 30 (H.L.) [*Heilbut*] held (at 47, *per* Lord Moulton) that, for the plaintiff to succeed, he had to prove "a warranty, *i.e.*, a contract collateral to the main contract to take the shares, whereby the defendants in consideration of the plaintiffs taking the shares (made a representation regarding the nature of the subject company)." That is, the plaintiff had to show an intention to contract in order to demonstrate the existence of a warranty. *Heilbut*'s requirement of a "collateral contract", however, cannot be justified with reference to an historical and principled inquiry into the basis for liability in tort law, as the nature of the early deceit action and as Lord Holt's reasons in *Pasley v. Freeman* make clear.

[343] See, in particular, *Williamson v. Allison* (1802), 2 East 446, 102 E.R. 439 (K.B.) [*Williamson* cited to East]. The plaintiff alleged (at 446-47) that he had negotiated the purchase from the defendant of 24 dozen bottles of claret for immediate export to the East Indies and the defendant, knowing the claret to be "in an unfit and improper state to be so exported", "warrant(ed) the sad claret to be in a fit and proper state to be so exported ... ." The report observed that, at trial, Lawrence J. had remarked, with reference to an earlier case, that (at 448-49):

> ... it did not appear from the note of that case, whether the declaration were in assumpsit or in tort: though he thought it more probable that it was in tort; as the practice of declaring in assumpsit in such cases was not common at that time.

Lord Ellenborough C.J. (at 451) affirmed the basis of tort liability for breach of warranty, and that the shift to assumpsit was essentially a matter of convenience:

> But here if the whole averment respecting the defendant's knowledge of the unfitness of the wine for exportation were struck out, the declaration would still be sufficient to entitle the plaintiff to recovery upon the breach of the warranty proved. For if one man lull another into security as to the goodness of a commodity, by giving him a warranty of it, it is the same thing whether or not the seller knew it at the time to be unfit for sale: the warranty is the thing which deceives the buyer who relies on it, and is thereby put off his guard. Then if the warranty be the material averment, it is sufficient to prove that broken to establish the deceit: and the form of the action cannot vary the proof in that respect. The ancient method of declaring was in tort on the

few commentators on this subject have emphasized that this was merely a procedural shift, and did not reflect a substantive shift in the basis of liability, which was still grounded on the representation, with its concomitant assumption of responsibility, and its consequently-induced purchase.[344] That is, the "warranty" did not have to be contractual, whether part of the original contract, or a separate, collateral contract.

During the nineteenth century, however, as the modern law of contract emerged from *assumpsit* and received the device of warranty, courts inquired "to discover the necessary consideration to support it"[345] and, as a result, the common view inevitably became that, for a purchase to have included a warranty, the purchaser had to demonstrate a contractual intention, whereby the impugned representation could form part of the contract.[346] This ultimately led to the House of Lords' pronouncement in *Heilbut, Symons & Co. v. Buckleton*,[347] which confirmed that a representation did not give rise to an enforceable warranty unless it was made with an intent to contract. As is often the case when a high court pronouncement repudiates general principle, courts in subsequent

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> warranty broken, and that was just going out of general practice when the case of *Steuart v. Wilkins* was discussed, because it was found more convenient to declare in assumpsit for the sake of adding the money counts.

By "adding the money counts", Lord Ellenborough was referring to the simplified pleading that *assumpsit* entailed. By pleading in *assumpsit*, the plaintiff could add the common money counts (grounds for claims of money) in order to recover the purchase price. Consequently, instead of a lengthy rendition in the pleadings of the nature and circumstances of the warranty alleged, the plaintiff simply declared that the defendant had undertaken and promised that, in the case of *Williamson* for example, the claret was fit for export and that the plaintiff, confiding in that undertaking and promise, purchased the claret.

[344] Waddams, *Products Liability*, *supra* note 285 at 5, and Greig, "Misrepresentations", *supra* note 323 at 180.

[345] *Ibid.*, Greig, "Misrepresentations" at 181.

[346] This evolution and its culmination with the House of Lords' pronouncement in *Heilbut* is canvassed at note 342. The requirement of a contractual intention also carried consequences for the type of damages. Successful plaintiffs were allowed expectation damages for loss of an advantageous bargain, as well as consequential damages on the basis that the representor was liable for all damage reasonably foreseen to result from a defect. See *Hadley v. Baxendale* (1854), 9 Exch. 1, 156 E.R. 145 (Exch.).

[347] *Heilbut*, *supra* note 342.

cases, in attempting to circumvent that pronouncement's effects, engaged in strained reasoning that further strayed from the eschewed rule. Consequently, Commonwealth courts typically employed various devices to escape the restrictive influence of *Heilbut*, taking advantage of the "notoriously elusive" nature of intent to find a statement to be a warranty "wherever the result that such a finding (would) lead them to seem(ed) appropriate."[348] As one commentator observed,

> ... a study of the case law in this field does not reveal very many instances of which one could say that clearly injustice had been done (or that it had not been possible to do substantial justice between the parties) because of the inadequacies or rigidity of the law. That this is so is no doubt a tribute to the courts rather than to the law.[349]

Principally, courts have concluded that the representor's words amounted to a warranty that forms part of a "collateral contract", separate from the main contract of sale, but in respect of which the consideration is ostensibly the purchaser's entering into the main contract of sale.[350] Thus an action on a misrepresentation, in shifting from an action in

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[348] Waddams, *Products Liability, supra* note 285 at 134.

[349] David E. Allan, "The Scope of the Contract: Affirmations or Promises Made in the Course of Contract Negotiations" (1967) 41 Aust. L.J. 274 at 275.

[350] Indeed, the predominance of the "collateral contract" approach was candidly acknowledged by Lord Denning, while speaking extra-judicially (in response to Allan (see *ibid.* at 293):

> Whenever a judge thinks that damages ought to be given, he finds that there was a collateral contract rather than an innocent misrepresentation. In practice when I get a misrepresentation prior to a contract which is broken and the man ought to pay damages I treat it as a collateral contract. I have never known any of my colleagues to do otherwise.

Such a conclusion is, however, based on dubious characterizations of intent. Allan (*ibid.* at 275) states:

> In many cases one is left with the impression that on the evidence it would have been as easy for the court to hold that a statement was made *animo contrahendi* as that it was not, to hold that a term was a condition as that it was a warranty, or to invoke the notion of collateral contracts as to reject it.

While the results, as Allan observed, taken individually, may nonetheless be satisfying, the various distinctions being drawn in order to circumvent *Heilbut* pose a problem that is as much practical as conceptual. As Allan further observed (*ibid.* at 275):

> It may frequently be tempting to conclude that a court has first decided a particular case simply upon its merits and then classified the statement involved in accordance with these merits to reach the desirable result. Courts should not however be forced into artificial casuistry in order to do justice;

deceit upon a warranty to *assumpsit*, became subsumed in the modern law of contract and its foundational inquiry into mutual consideration. The House of Lords' pronouncement in *Hedley Byrne* is thus a significant, historically defensible and principled restoration of tort law's application to negligent misrepresentations that induce their recipients to adopt a particular course of conduct, including making a purchase. Given the predominance of U.S. products liability jurisprudence, therefore, and given that the U.S. law has developed from the same origins as the law of Commonwealth jurisdictions, a review of that jurisprudence is "not a mere academic exercise",[351] but rather a demonstrated operation of the same devices of undertaking and reliance critical to *Hedley Byrne*.

The nature of commercial dealings, however, obviously evolved considerably between the emergence of modern contract law and that of *Hedley Byrne* and U.S. strict products liability. Consequently, and as will be canvassed *infra*, the scope of this conception of tort liability extends beyond formal warranties or similarly promissory undertakings and assurances given by the manufacturer, and must account for representations contained in something less than a warranty or similarly promissory undertaking, perhaps in the form of mass advertising or product labelling. Here the outcome of an objective inquiry into whether the representation amounted to an "undertaking" which, combined with reasonable reliance, attracts liability in tort law, will depend on for example whether the representation constituted "puffery" or rather an inducement of reasonable reliance on the

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> and each new decision adds a further precedent to the law until a body of highly technical distinctions has been amassed which renders the task of advising clients a fine exercise in speculation.

Although much of this difficulty was resolved in English law by the adoption of the *Misrepresentation Act 1967* (U.K.), 1967, c. 7, sections 1 and 2 of which provided for an action for misrepresentation inducing a contract, that only applied as between purchasers and other parties to the contract.

[351] Waddams, *Products Liability*, *supra* note 285 at 208.

subsequent purchaser's part. That this sort of representation is made to the public generally, rather than to the subsequent purchaser specifically, further complicates the inquiry, although it does not necessarily preclude recovery; rather, it simply emphasizes the importance of whether the communication would reasonably have amounted to an assumption of responsibility for the truth of its contents. The necessary judicial focus is on the specificity and definitiveness of the communication. The reasonableness of the subsequent purchaser's reliance is, it will be seen, in practice, central to this inquiry: if his or her reliance on the contents of the representation was reasonable, then it would tend to follow that the manufacturer ought reasonably to be taken as having assumed responsibility for those contents.

The challenge of ascribing a legally significant quality to such broadly-targeted and expressed representations was confronted by the New York Court of Appeals in *Randy Knitwear v. American Cyanamid Co.*,[352] one in a series of U.S. cases in the early and mid-1960's that are widely noted for their effect of confining the evolution of strict products liability.[353] There, the defendant, a chemical manufacturer, had furnished a

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[352] 11 N.Y. 2d 5, 181 N.E.2d 399 (C.A. 1962) [*Randy Knitwear*].

[353] In order to consider the U.S. jurisprudence in its historical context, and to appreciate the substance of the restrictions imposed by *Randy Knitwear* and the U.S. cases considered *infra*, it is helpful to appreciate, in general terms, the evolution of strict liability in the U.S. law of products liability. With Cardozo J.'s imposition of liability in negligence in *MacPherson* to overcome the *Winterbottom v. Wright* privity rule, the plaintiff was still required to demonstrate negligence on the part of the defendant. At the same time, however, notions of privity in cases where negligence was not or could not be demonstrated began to "bend", as Marc Franklin describes, by judicial application of devices as various as agency, covenant and third-party beneficiaries. (See Franklin, "When Worlds Collide", *supra* note 318 at 991). The reasoning was generally unclear and inconsistent, but ultimately the courts began to articulate more consistently a view of privity as being unnecessary in the case of an "implied warranty", such as *Henningson v. Bloomfield*, 32 N.J. 358, 161 A.2d 69 (Sup. Ct. 1960) [*Henningson* cited to A.2d] where the court, invalidating a defendant's disclaimer as "unfair", allowed a plaintiff to recover on the basis of an implied warranty, rejecting the requirement of privity. Then, in 1963, in *Greenman v. Yuba Power Products*, 27 Cal. Rptr. 697, 377 P.2d 897 (Sup. Ct. 1963) [*Greenman*], where the plaintiff had been injured by reason of a defective home carpentry outfit manufactured by the defendant and sold to the plaintiff's wife, Traynor J.

fabric manufacturer with "Cyana", a resin intended to prevent fabric shrinkage. The plaintiff, a clothing manufacturer, had acquired from an intermediary fabric manufacturer Cyana-treated material, which it made into garments and sold to customers, after which time "it was claimed that ordinary washing caused them to shrink and to lose their shape." Although it alleged breach of an express warranty, the plaintiff's evidence was that, in acquiring the fabric, it had relied upon two forms of representations made by the defendant: advertising (both in trade journals and in direct mail pieces to clothing manufacturers such as the plaintiff)[354] and labels or garment tags furnished by the defendant, bearing the defendant's name and product name, and stating: "This Fabric Treated for Shrinkage Control(.) Will Not Shrink or Stretch Out of Fit(.)"[355]

As to the advertisements, Fuld J., for (on this point) a unanimous court, observed:

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explained that these "implied warranties" were to be understood in terms of strict liability where, consequently, demonstrable negligence was not required. (This led to the contrasting decisions of *Santor v. Karagheusian, Inc.*, *infra* note 365 and *Seeley v. White Motor Company*, *infra* note 366). The emergence of strict liability was acknowledged by the American Law Institute in the *Restatement (Second) of the Law of Torts* § 402A (1965), ultimately adopted by most states, which provided:

> Special Liability of Seller of Product for Physical Harm to User or Consumer.
> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
> a. the seller is engaged in the business of selling such a product, and
> b. it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
> (2) The rule stated in Subsection (1) applies although
> a. the seller has exercised all possible care in the preparation and sale of his product, and
> b. the user or consumer has not bought the product from or entered into any contractual relation with the seller.

This did not resolve matters as between the manufacturer and the purchaser, however, as § 402A conferred a strict obligation only on "sellers." In this respect, it was identical to all three alternative models set out in the *Uniform Commercial Code*, § 2-318, which extended the contractual obligations of a seller (but not a manufacturer) to express or implied warranties and sets out the criteria for a seller to validly disclaim liability for defects.

[354] Unfortunately, the court's reasons do not reveal the substance of the advertising, and consequently we cannot know on the facts if the issue of "puffery", which was not addressed, ought to have been.

[355] *Randy Knitwear*, *supra* note 352 at 400. The words "Shrinkage Control" were entirely in upper case letters in the actual advertisement."

> ... Manufacturers make extensive use of newspapers, periodicals and other media to call attention, in glowing terms, to the qualities and virtues of their products, and this advertising is directed at the ultimate consumer or at some manufacturer or supplier who is not in privity with them. ... Under these circumstances, it is highly unrealistic to limit a purchaser's protection to warranties made directly to him by his immediate seller. The protection he really needs is against the manufacturer whose published representations caused him to make the purchase.
>
> ... The manufacturer places his product upon the market and, by advertising and labeling (*sic*) it, represents its quality to the public in such a way as to induce reliance upon his representations. He unquestioningly intends and expects that the products will be purchased and used in reliance upon his express assurance of its quality and, in fact, it is so purchased and used. Having invited and solicited the use, the manufacturer should not be permitted to avoid responsibility, when the expected use leads to injury and loss, by claiming that he made no contract directly with the user.[356]

Similar considerations applied specifically to the labels:

> Equally sanguine representations on packages and labels frequently accompany the article throughout its journey to the ultimate consumer and, as intended, are relied upon by remote purchasers.
> ...
> Although we believe that it has already been made clear, it is to be particularly remarked that in the present case the plaintiff's reliance is not on newspaper advertisements alone. It places heavy emphasis on the fact that the defendant not only made representations (as to the nonshrinkable character of "Cyana Finish" fabrics) in newspapers and periodicals, but also repeated them on its own labels and tags which accompanied the fabrics purchased by the plaintiff from (the intermediary).[357]

The representations, then, while made "to the public" in form, are in substance directed individually at every purchaser further down the supply chain – whether a non-privity manufacturer or supplier, or the ultimate consumer. Like any undertaking forming part of the causal sequence leading to liability, they are objective demonstrations of the manufacturer's intention to induce the receiver of the representations to believe that he or she may rely upon the manufacturer to accept responsibility for its contents.

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[356] *Ibid.* at 402-03.
[357] *Ibid.* at 402-03.

Although the advertising and labelling in *Randy Knitwear* were each considered separately, there is, especially in Fuld J.'s reference to "advertising and labeling (*sic*)" as a representation of "quality to the public in such a way as to induce reliance", a sense that they were taken cumulatively as engendering the necessary elements of a duty of care. Thus the adequacy of a representation, taking the form for example of advertising *alone* or labelling *alone*, as a duty-engendering undertaking, was left unclear. Three years after *Randy Knitwear*, however, the Ohio Supreme Court, in *Inglis v. American Motors Corp.*,[358] considered a suit brought by the purchaser of a Rambler automobile against, *inter alia*, the manufacturer for breach of warranty and negligence. The pleadings made various specific allegations of structural and mechanical defects in the automobile, and further that the plaintiff's purchase had been induced by representations contained in advertising concerning the Rambler's quality manufacture.[359]

In affirming the County Court of Appeals' judgment for the plaintiff on this issue, Herbert J. relied on the following excerpt from an earlier Ohio authority[360] which had considered the legal significance of representations contain in manufacturers' advertisements:

> ... The consuming public ordinarily relies exclusively on the representations of the manufacturer in his advertisements. What sensible or sound reason

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[358] 209 N.E.2d 583 (Ohio Sup. Ct. 1965) [*Inglis*].

[359] Specifically, the plaintiff alleged that the purchase was induced by:

> ... representations of the defendants made to the plaintiff by advertising in mass communications media that Rambler automobiles were trouble-free, economical in operation and build and manufactured with high quality workmanship. (The) (p)laintiff alleged further that ... the Rambler automobile purchased by the plaintiff was not trouble-free, not free from defects in material and workmanship, not economical in operation, and was not manufactured with a high degree of quality in workmanship and craftsmanship.

[360] Specifically, the decision of Zimmerman J. in *Rogers v. Toni Home Permanent Co.*, 147 N.E.2d 612 (Ohio Sup. Ct. 1958).

> then exists as to why, when the goods purchased by the ultimate consumer on the strength of the advertisements aimed squarely at him do not possess their described qualities and goodness and cause him harm, he should not be permitted to move against the manufacturer to recoup his loss. In our minds no good or valid reason exists for denying him that right. Surely under modern merchandising practices the manufacturer owes a very real obligation towards those who consume or use his products. The warranties made by the manufacturer in his advertisements and by the labels on his products are inducements to the ultimate consumers, and the manufacturers ought to be held to strict accountability to any consumer who buys the product in reliance on such representations and later suffers injury because the product proves to be defective or deleterious.[361]

Even allowing for the language reflective of the U.S. inclination towards strict products liability, however, the analysis in *Inglis* is not as satisfying as that in *Randy Knitwear*, as it is exclusively focussed on the customer's reliance, and no consideration is given to the objectively determined scope of responsibility assumed or undertaken by the defendant. While this affirms my earlier observation that reliance, if it is reasonable, will tend to support a conclusion that the manufacturer assumed responsibility for the representation that induced it, *Inglis*'s grounding of liability exclusively in the plaintiff's reliance as a basis for imposing liability truncates the duty analysis, which necessarily entails an inquiry into the defendant's wrongdoing.

The converse omission is apparent in the reasoning of the California Superior Court in *Free v. Sluss*,[362] where the manufacturer's representation consisted only of labelling, unaccompanied by any mass public advertising. There, the court, noting that the label expressed a "guarantee of quality",[363] found that this representation transcended the manufacturers' privity-bound dealers and extended to the ultimate consumer. "It establishe(d)", Burch J. found, "the manufacturer's knowledge and intention that the

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[361] *Inglis*, *supra* note 358 at 616.
[362] 107 P.2d 854 (Cal. Sup. Ct. 1948).
[363] *Ibid.* at 856. Specifically, the "guarantee" amounted to an offer to refund purchase money if the soap did not meet with the purchaser's "entire approval."

goods should move through the usual channels of trade, and was a representation addressed to those who would deal in its product."[364] The representation, therefore, amounted to the manufacturer's undertaking to the ultimate consumer of responsibility for the truth of its contents, and the court imposed liability based on that reasoning. The significance of the undertaking, however, lay in its impact on the customer's purchasing choice; the substance of the representation, in order to constitute an undertaking that forms part of the liability sequence, must have induced the customer, in reliance on its contents, to purchase it where otherwise he or she would not have done so. It must, then, have amounted to an interference with his or her autonomy to choose from the available opportunities or options, whether they include competing brands, products or refraining from making any purchase. While the facts, as recited in *Free v. Sluss*, suggest that the plaintiff likely did purchase in reliance on the manufacturer's representation, that was not addressed in the reasons. Consequently, while *Free v. Sluss* and *Inglis* together and cumulatively reveal a full application of the duty of care analysis, the reasoning in *Randy Knitwear*, where the duty of care was grounded in both the defendant's undertaking and the plaintiff's reliance, is complete, linking the plaintiff's loss with the defendant's wrongdoing.

The fundamental nature of these dual elements of liability in tort law is demonstrated, or at least better understood, by each of the well-known decisions of the Supreme Court of New Jersey in *Santor v. Karagheusian, Inc.*[365] and of the Supreme Court of California in

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[364] *Ibid.* at 856.
[365] 44 N.J. 52, 207 A.2d 305 (Sup. Ct. 1965) [*Santor* cited to A.2d].

Seely v. White Motor Company,[366] both important 1965 pronouncements that represented contrasting approaches in the U.S. to strict products liability – the former articulating a broader "implied warranty" rule (independent of any representation made by the manufacturer), and the latter requiring the plaintiff's demonstrated reliance on the manufacturer's express representation.

Santor, which preceded *Seely* by four months, arose from the plaintiff's retail purchase of a "Gulistan" carpet which had been manufactured by the defendant and which, almost immediately after installation, developed a line down its centre. Eventually, other lines appeared, further detracting from the carpet's aesthetic qualities. While not necessarily amounting to an inducement to the plaintiff's reliance, the manufacturer had advertised the product as "Grade #1", and the plaintiff was aware of the advertising at the time of purchase. For reasons which are not apparent in his decision (for the court), however, Francis J. did not consider whether the representation of "Grade #1" quality in the advertisement had amounted to an undertaking or assumption of responsibility for its contents by the manufacturer and, if so, whether the plaintiff had in fact relied on it. Had he done so, *Santor*'s contrast with *Seely*, as will be seen,[367] would have been non-existent. Instead, relying on the U.S. jurisprudence that established strict products liability,[368] he derived an "implied warranty" of reasonable fitness from the fact that the manufacturer puts the product "in the channels of trade for sale to the public", thus overcoming "the strictures of the long-standing privity of contract requirement."[369] Strict

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[366] 45 Cal. Rptr. 17, 403 P.2d 145 (Sup. Ct. 1965) [*Seely* cited to P.2d].
[367] See *infra* note 372.
[368] In particular, *Henningson*, *supra* note 353 and *Greenman*, *supra* note 353.
[369] *Santor*, *supra* note 365 at 309, 311.

liability, Francis J. concluded, is thus reflective of "public policy"[370] requiring imposition on manufacturers of a duty of care, irrespective of whether the manufacturer was negligent or whether it had induced the plaintiff's reliance.

The California Supreme Court, in *Seely*, rejected the extension of liability in *Santor* to circumstances involving no express representation made by the manufacturer to the ultimate purchaser. The plaintiff in *Seeley* had purchased a truck from an intermediate dealer by way of a printed purchase order issued by the manufacturer which contained an express representation upon which, Traynor C.J. found, the plaintiff relied in purchasing the truck.[371] Directly addressing the imposition of liability in *Santor* based on an implied warranty, Traynor C.J. said:

> We are of the opinion, however, that it was inappropriate to impose liability on that basis in the *Santor* case, for it would result in imposing liability without regard to what representations of quality the manufacturer made. It was only because the defendant in that case marketed the rug as Grade #1 that the court was justified in holding that the rug was defective. Had the manufacturer not so described the rug, but sold it "as is", or sold it disclaiming any guarantee of quality, there would have been no basis for recovery in that

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[370] *Ibid.* at 311.

[371] The representation contained the following:

> The White Motor Company hereby warrants each new motor vehicle sold by it to be free from defects in material and workmanship under normal use and service, its obligation under the warranty being limited to making good at its factory any part or parts thereof.

Interestingly, however, the evidence was that the plaintiff, at the time of purchase, had assumed (wrongly) that the representation had been made *not* by the manufacturer, but by the dealer. (*Seely*, *supra* note 366 at 148). This suggests that the plaintiff's reliance was on the dealer to act reasonably, not the manufacturer – a point which Peters J. emphasized in dissent (at 152). Traynor C.J. resolved this by reference to the California *Commercial Code*, which required merely that the purchaser, in making the purchase, rely on the representation itself in making the purchase, and not on the source of the representation. While on the facts of this case it may not have mattered whether the plaintiff was relying on the dealer or the manufacturer, it does seem that the reasonableness of reliance is in part determined by its subject – that is, in some circumstances it might be reasonable to rely on a manufacturer but unreasonable to rely on a dealer. The facts of *Santor* might serve as a good example in this regard, given the infamously transitory nature of carpet retailers. That is, a purchaser might well choose *not* to rely on a representation of fitness issued by a dealer for fear that the dealer will not be long available to honour the representation. (Ultimately, Peters J. agreed with the majority in the result, but grounded his reasoning on the absence, in his view, of "policy bases" requiring a distinction between physical damage and economic loss, thus extending strict products liability to the subsequent purchaser's economic loss.)

> case. Only if someone had been injured because the rug was unsafe for use would there have been any basis for imposing strict liability in tort.
>
> The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the "luck" of one plaintiff in having an accident causing physical injury. The distinction rests, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products. He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of (*sic*) conditions that create unreasonable risks of harm. He cannot be held for the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumer's demands. ...[372]

The prominence of strict products liability in Traynor C.J.'s reasons in *Seely* has, viewed through the eyes of Commonwealth jurists, the potential to muddle his analysis somewhat, for two reasons. First, since his finding that the manufacturer had made an express representation to the plaintiff determined the case in the plaintiff's favour, his reference to strict products liability was, strictly speaking, superfluous.[373] He was, nonetheless, particularly concerned to rationalize the *Uniform Commercial Code* which

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[372] *Seely*, *supra* note 366 at 151. Traynor C.J.'s reference to the law's distinction between physical damage and economic loss was also key in distinguishing his own judgment in *Greenman*, *supra* note 353, which enshrined strict products liability in California law, from *Seely*, and affirms the importance of characterization of the loss as arising from either physical damage or pure economic damage. At 151, he held:

> Plaintiff contends that, even though the law of warranty governs the economic relations between the parties, the doctrine of strict liability in tort should be extended to govern physical injury to the plaintiff's property, as well as personal injury. We agree with this contention. Physical injury to property is so akin to personal injury that there is no reason for distinguishing them. ... . In this case, however, the trial court found that there was no proof that the defect caused the physical damage of the truck. ...

The "defect", therefore, did not amount to "physical" damage within the meaning of a legally protected interest arising from external damage to one's person or property. While the analysis here, and throughout Traynor C.J.'s reasons in *Seely*, is implicated by the dominance in U.S. jurisprudence generally of the language of strict liability, the point remains that characterization of damages is fundamental to their recoverability.

[373] In dissent, Peters J. argued, for that reason, that "(e)verthing said by the majority on that subject is obviously dicta." (*Seely*, *supra* note 366 at 153).

allowed sellers in certain circumstances to disclaim liability,[374] and strict liability, which would tend to the opposite conclusion, by delineating between their respective scopes of application. Hence *Seely* was decided in a larger context of determining the limits of strict products liability, which limits Traynor C.J. clearly sought to draw at pure economic loss, by restricting recovery to the basis of an express warranty under the *Uniform Commercial Code*. In so doing so, he emphasized the fundamental elements, by then familiar to Commonwealth jurisdictions by reason of *Hedley Byrne*, of the duty of care. *Santor*, he said, could be justified only on the basis that the manufacturer had expressly held out the carpet as being "Grade #1."[375] Specifically, then, and aside from the overarching U.S. context of strict products liability, he observed that the foundation of the duty of care rested not on the mere fact that the manufacturer had placed an item on the market, but on the consumer's reliance on the fact and scope of the manufacturer's undertaking, manifested by its agreement in the form of a representation that its product is designed to satisfy the consumer's requirements. The undertaking giving rise to liability was again demonstrated as *not*, as critics have since charged, an express assumption of *legal* responsibility, but rather, as *Seely* affirmed, an express acknowledgement on the manufacturer's part that the product will perform in a particular manner.

The second potentially confusing aspect of the prominence of strict products liability in *Seely* and, indeed, also in *Santor* is the concept of an "implied warranty", upon which Francis J. based recovery in *Santor* and which Traynor C.J. rejected in *Seely*. This

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[374] See note 353.

[375] This would, however, appear to verge on the "puffery" which I suggested earlier in this chapter would have to be distinguished from an inducement of reasonable reliance.

concept is a term of art, distinct from the implication of an undertaking or assumption of responsibility derived from, for example, a manufacturer's express representation as to quality. An implied warranty is one which, in a strict products liability regime, is imposed by law,[376] derived from the placement of a product on the market, and in the absence of an actual representation to the subsequent purchaser of, as Francis J. said, "reasonable suitability of the article manufactured for the use for which it was reasonably intended to be sold."[377] The duty of care which derives from more orthodox conceptions that are theoretically consistent with the historical origins and evolution of the duty of care requires, as Traynor C.J. did in *Seely*, an express representation that specifically induces reliance.

Strict products liability aside, another complicating but ultimately informing aspect of *Seely* is Traynor C.J.'s reference to "*warranty* recovery for economic loss." As has already been demonstrated through an historical analysis of breach of warranty, warranty is commonly, but mistakenly, viewed as being a necessarily and exclusively contractual device, as Blackmun J. viewed it in *East River Steamship Corp. v. Transamerica Delaval Inc.*, "through which a contracting party can seek to recoup the benefit of the bargain."[378]

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[376] Walter H.E. Jaeger, "Product Liability: The Constructive Warranty" (1964), 39 *Notre Dame Lawyer* 501 at 506.

[377] *Santor*, *supra* note 365 at 311. See also "Columbia 'Note'", *supra* note 331 at 937.

[378] *East River*, *supra* note 286 at 868. English law has been similarly rigourous in maintaining conceptual distinctions respecting warranty. In *Finnegan v. Allen*, [1943] K.B. 425, [1943] 1 All E.R. 493 (C.A.) [*Finnegan v. Allen* cited to K.B.], on the strength of the submissions of A.T. Denning, K.C., Lord Greene M.R. said (at 430):

> Warranty is one of the most ill-used expressions in the legal dictionary, but its essence is contractual in nature and must be pleaded in terms sufficient to assert that contractual relationship.

More recently, in *D&F*, *supra* note 306 at 1004, "policy considerations" were said to tend against an extra-contractual application of warranty; there, Lord Bridge expressed the view that "the imposition of warranties ... on one person in favour of another, when there is no contractual relationship between them, is contrary to any sound policy requirement."

This exclusivist view was also evident in the larger context in which *Seely* was decided; after what was seen as a "sudden burst of rationalizing product cases as belonging to tort law rather than to the warranty side",[379] *Seely* represented "a halt, if not a retreat."[380] Yet, Traynor C.J., in implementing this retrenchment, grounded tort liability, like Fuld J. in *Randy Knitwear*, on a representation that amounted to a warranty. The critical point, however, is that the device of warranty was not being used to describe a term of the contract between parties in privity, but as a representation by the manufacturer to the relying non-privity subsequent purchaser, from which an undertaking to be responsible for the truth of the representation's contents was inferred. Thus the historical nature of breach of warranty as a tort, canvassed above, is critical to an appreciation of the significance of these duty components; that is, they are consistent with the historical understanding of circumstances giving rise to a duty not to interfere with another's proprietary interests, famously expressed in *Coggs v. Bernard*,[381] where Gould J. explained the duty of care imposed on a bailee:

> The objection that has been made is, because there is not any consideration laid. But I think it is good either way, and that any man, that undertakes to carry goods, is liable to an action, be he a common carrier, or whatever he is, if through his neglect they are lost, or come to any damage. ... The reason of the action is, the particular trust reposed in the defendant, to which he has concurred by his assumption, and in the executing which he has miscarried by his neglect. ... if a man takes upon him expressly to do such a fact safely and securely, if the thing comes to any damage by his miscarriage, an action will lie against him.[382]

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[379] Franklin, "When Worlds Collide", *supra* note 318 at 979.
[380] *Ibid.* at 979. Indeed, *Seely* was an early harbinger of a retreat, or at least a retrenchment in the U.S. following an "insurance crisis" and as general concerns emerged regarding the system of tort liability. See J.A. Henderson and T. Eisenberg, "The Quiet Revolution in Products Liability: An Empirical Study of Legal Change" (1990) 37 U.C.L.A. L. Rev. 479. As a further reflection of this retreat, the American Law Institute's *Restatement (Third) of the Law of Torts* (1998) maintained strict liability but distinguished between manufacturing defects and design defects and providing that, in the latter instance, the plaintiff must demonstrate that the manufacturer had chosen that defective design over a reasonable alternative design.
[381] *Coggs v. Bernard*, *supra* note 67.
[382] *Ibid.* at 909.

Powell J. agreed that "the gist of these actions is the undertaking", which "obliges (the defendant) so to do the thing, that the bailor come to no damage by his neglect."[383] "(T)his action", he concluded, "is founded upon the warranty. ... And a man may warrant a thing without any consideration."[384] "Warranty", then, historically and as employed by Traynor C.J. in *Seely*, is properly understood not only as a contractual device, but as the substance of a representation made to induce reliance,[385] thereby causing the ultimate consumer to relinquish some of his or her own personal autonomy in making its consumer choices to the manufacturer's benefit, and giving rise to liability for negligent manufacture of defective products or building structures.

Where, therefore, the plaintiff can demonstrate that, but for his or her reasonable reliance on the defendant's inducement, he or she, acting on another consumer option, could have had something reflecting the value paid to the defendant, the plaintiff can recover the difference between that value and the residual value (if any) of the subject item. For example, if the plaintiff had paid $100, and the residual value is $10, the plaintiff's recoverable damages would be $90. This carries two important implications: first, the plaintiff's recovery is not determined by the price of the functional alternative product. That is, he or she recovers $90, irrespective of whether the alternative also costs $100, or

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[383] *Ibid.* at 910.

[384] *Ibid.* at 911. Holt C.J., at 912, also affirmed that liability arose from the defendant's "undertaking" to move goods and store them safely and, at 919, concludes that consideration is unnecessary by reason of the plaintiff's reliance, expressed as "the owner's trusting him with the goods".

[385] Here I am agreeing with William Pelster, although his overall thesis calls for recovery for subsequent purchasers by way of a modification and expansion of the notion of privity – a modification and expansion which, I suggest, are unnecessary in view of the principles underlying the tort law duty of care. (Pelster, "Consumer Protection", *supra* note 287 at 1442). I am also agreeing generally with Sir Robin Cooke, (Cooke, "An Impossible Distinction", *supra* note 313 at 59), although he takes the point further, arguing that "the substance of the obligation is more important than the way in which it is classified." My point is that "warranty" imports not only a contractual obligation, but also describes the nature of a manufacturer's representation to those with whom it is not in privity.

more, or less. The plaintiff's measure of recovery is governed not by the cost of a functional alternative, but by the cost to him or her of having relinquished some of his or her own personal autonomy in making its consumer choices to the manufacturer's benefit.[386] The second implication of the quantum of the plaintiff's recovery is that recovery in tort may exceed the recovery that he or she might have had under a contractual warranty, where the value of the subject product as a properly functioning product is less than what the plaintiff paid for it, and where the contractual warranty provides for a functional replacement (as opposed to a refund of the purchase price).

The practical application of the indirect proprietary interests that are engendered by a defendant's undertaking and a plaintiff's reasonable reliance can be understood by considering concrete and particular examples. While, for example, the facts of *Santor*, where the court relied on an implied representation derived from the mere offering for sale of the carpet, are not recounted in the case report in detail sufficient to make a complete comparison, assume for the sake of the analysis that there were competing carpet dealers of which Santor was aware at the time of purchase, and which could have offered him the product he *thought* he was purchasing, namely the combination of function and aesthetics he sought in purchasing from Karagheusian. Santor would then have had to demonstrate that he was induced, by reason of the defendant's undertaking, or representation amounting to an assumption of responsibility, to purchase the carpet

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[386] This is consistent with the principles governing recovery for negligent misrepresentation in the law of torts, which requires that "the plaintiff ... be put in the position it would have been in had the misrepresentation not been made." (*BG Checo International Ltd. v. British Columbia Hydro and Power Authority* (1993), 75 B.C.L.R. (2d) 145, 99 D.L.R. (4th) 577, [1993] 1 S.C.R. 12 at 37. This principle has most recently been applied by the British Columbia Court of Appeal in *Prince George (City) v. Rahn Bros. Logging Ltd.*, 2003 BCCA 31.)

from Karagheusian and, more to the point, to relinquish his opportunity to purchase a different and functional carpet.

Here, and as I have already observed,[387] Santor would have also been required distinguish Santor's representation of the carpet as "Grade #1" from legally insignificant puffery, unintended to be an assumption of responsibility for the carpet's quality. If, for example, Santor had demonstrated that "Grade #1" represented an industrial classification, used when a carpet meets certain objective criteria (failing which it is classified as "Grade #2" or "Grade #3"), then he ought to have succeeded on the basis that the representation implied a sufficiently particular quality, such that it induced Santor to favour it over other available competing products. Similarly, if the bald statement "Grade #1" had been accompanied in the advertisement with a more particular statement to the effect that the carpet would maintain its aesthetic appearance over a certain period of time, or would not develop lines, Santor also ought to have succeeded. The more particular the representation, then, the more likely the inference of the necessary undertaking and the reasonableness of the reliance.

If, conversely, the statement "Grade #1" had appeared by itself in the advertisement unaccompanied by any other information regarding the quality of the rug, or if instead it had not appeared in an advertisement but rather on a banner hanging over the storefront, Karagheusian would have been able to argue that Santor could not have reasonably taken from such a general, abstract statement that Karagheusian had undertaken responsibility for the rug's quality, and that such an ambiguous statement of puffery ought to have

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[387] See note 375.

invited, at the very least, further specific inquiries from Santor as to quality. Context will be important in such cases; were such a representation to issue from a singularly respected, high-end jewellery manufacturer and retailer as opposed to one of many carpet dealers in a market, it might be more easily construed as an objective manifestation of an intention to induce a customer to rely on the product's quality.

Seely's facts also serve as a concrete exemplar. There, the representation was more particular, warranting the vehicle to be "free from defects in material and workmanship under normal use and service." Most consumers in the market for a new vehicle "shop around" and generally narrow down their options to a few competing models, and consequently the plaintiff will generally be able to demonstrate that he or she could have, but for the defendant's inducement, purchased a competing product that would have met reasonable expectations. If successful, then, White's compensation would represent the cost of having relinquished his freedom to purchase a competing functional vehicle by instead acting on White Motors' inducement. Thus the focus of the judicial inquiry would be on the particularity and context of the representation, and whether it induced, in the circumstances, reasonable reliance on its contents and therefore on the product's quality. Here, the representation, while a general statement, was less ambiguous and more specific than, for example, Karagheusian's "Grade #1" representation in *Santor*. Its form also resembles the language of a contractual warranty, which may lead a court to infer both an intention on the part of White Motors to be responsible for the vehicle's quality, and justification for Seely's reliance, overcoming any concerns that might be posed by, for example context – namely, whether White Motors was a respected

dealership associated with a major vehicles manufacturer, or whether it was one of the much-maligned generic dealers in used vehicles.

Aside perhaps from the secondary market for automobiles, potentially the most significant impact of this approach would be felt in the secondary housing market, where subsequent purchasers are not in privity with the builders. As with the vehicle purchaser, in most cases home purchasers will have examined other homes and can demonstrate that, but for having been induced by the builder's representation, they would have acquired a satisfactory home that met their requirements. Here, it is quite possible that the plaintiff *can* demonstrate an express undertaking given by the plaintiff upon which the defendant relied. In this regard, it is not uncommon, particularly in the case of high-end homes (or, in urban areas in southern Ontario or British Columbia where property values have been consistently high for the past fifteen years), that subsequent purchasers will contact the builder to discuss specific and general aspects of its construction, and that they will rely on the builder's representations in reaching a decision to purchase the particular home.

Again, the particularity of the content of the representation is important to the purchaser's ability to demonstrate that he or she relied on any representation by the builder in deciding to purchase the home. Thus a statement that the home is "well-built" or "should have no problems" would be less likely to be found to have engendered reasonable reliance than specific representations made in response to specific inquiries about, for example, the adequacy of foundations given subsoil characteristics, the adequacy of

ventilation in ceiling space or under external cladding, or the reliability of sub-trades employed for roofing. The builder would not, however, be without defences, even in the face of a specific representation; even in the case of lower-end homes, for example, a common practice has emerged in the past decade whereby, rather than relying on the builder to ensure that the home was properly constructed, potential homebuyers will employ "home inspectors" to inspect the home for visible structural and non-structural defects, and for Building Code compliance. The builder would have a strong argument that, far from relying on the builder's representation, the plaintiff's conduct reveals that he or she chose not to rely on the builder, but rather on a third party.

As the proper basis for imposing such liability, however, this would, in Canada, displace a relatively recently-adopted test which imposes liability for repair of defective products or building structures where the defect is distinguished by its "dangerousness", arising from the risk it poses of physical damage to persons or property. Accordingly, this distinction's consistency or inconsistency with tort law's foundational duty components of undertaking and reliance ought to be considered.

c. The "Dangerous Defect"

Since the House of Lords pronounced in *Hedley Byrne*, various propositions have been made and cited with the object of reforming the law's treatment of pure economic loss in a manner that removes all distinctions between such loss and the loss that arises from physical damage.[388] Thus, and as I have already noted, Lord Denning rejected in *Dutton* strict distinctions between pure economic loss arising from a defect, and physical

[388] Smillie, "Negligence and Economic Loss", *supra* note 3 at 232.

damage. Were the defect, he observed, to be allowed to run its (possible) course and cause physical damage to person or property, the defendant would be liable to the plaintiff; why then, should the plaintiff not be able to recover if, before the defect had run its course and caused physical damage to persons or property, it was discovered and repaired before physical damage to person or property occurred?[389] Lord Wilberforce, "deriving much assistance" from the dissenting judgment of Laskin J. in *Rivtow*,[390] developed this idea in *Anns*, where the defect posed a risk "such that there is present or imminent danger to the health or safety of persons occupying it."[391] While Laskin J. expressly refrained in *Rivtow* from deciding whether recovery extends to claims for pure economic loss where there was "no threat of physical harm"[392] – that is, in circumstances where the defect was not dangerous – the House of Lords affirmed such recoverabililty in 1982,[393] although it quickly retreated from that position[394] and, in *Murphy*,[395] rejected recovery based on a dangerous defects distinction. English courts have since applied an exclusionary rule, whether or not the loss was incurred to avert a risk of danger. The United States Supreme Court has also rejected this distinction,[396] while the most recent

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[389] *Dutton*, *supra* note 297. He consequently held (at 474) that a manufacturer of "an article" would be liable for the cost of repair if the defect was discovered in time to prevent injury.

[390] *Rivtow*, *supra* note 94. Laskin J. had suggested that the plaintiff ought to have recovered repair costs as they were incurred to avoid the risk of "a threat of physical harm" (at 549). The majority judgment held that economic loss arising from a product defect was recoverable in contract, and that the plaintiff could not recover the cost of repairing a dangerous defect, although it recover the consequential profit loss (where the defect required cessation of business activity). La Forest J.'s pronouncement in *Winnipeg Condominium*, *supra* note 63, represented the culmination of a gradual shift at the Supreme Court of Canada, which La Forest J. recounted (at 211), towards Laskin J.'s dissent in *Rivtow*.

[391] *Anns*, *supra* note 15 at 505.

[392] *Rivtow*, *supra* note 94 at 552.

[393] *Junior Books Ltd. v. Veitchi Co. Ltd.*, [1983] 1 A.C. 520, [1982] 3 W.L.R. 477, [1982] 3 All E.R. 201 (H.L.). There, the majority of Law Lords, relying on *Anns*, allowed the plaintiffs to recover the cost of repairing a defective floor, which did not pose any danger to person or property.

[394] *The Aliakmon*, *supra* note 138. See also the Court of Appeal's pronouncement in *Aswan*, *supra* note 303, in particular the speech of Lloyd L.J. (at 151-53).

[395] *Murphy*, *supra* note 111. See also *D&F*, *supra* note 306.

[396] *East River*, *supra* note 286 at 870, rejecting "the intermediate and minority land-based positions". Interestingly, and in contrast to most of the Commonwealth cases, this case involved an allegedly defective

Australian position and the more consistently-expressed New Zealand position is directly opposite, allowing recovery, whether or not the defect is dangerous.[397]

The Canadian position has, since La Forest J.'s pronouncement for the Supreme Court of Canada in *Winnipeg Condominium*,[398] rested on the "dangerous defect" distinction, thus occupying the middle ground between the exclusionary English position and the inclusionary Australian and New Zealand cases. There, the plaintiff condominium corporation, the (subsequent) purchaser of an apartment building, sued the general builder and subcontractor that had installed exterior stone cladding, some of which had collapsed, necessitating repairs. La Forest J., observing that the structural defect was "not merely shoddy" but "dangerous",[399] said:

> In my view, this is important because the degree of danger to persons and other property created by the negligent construction of a building is a cornerstone of the policy analysis that must take place in determining whether the cost of repair of the building is recoverable in tort. As I will attempt to show, a distinction can be drawn on a policy level between "dangerous" defects in buildings and merely "shoddy" construction in buildings and that, at least with respect to dangerous defects, compelling policy reasons exist for the imposition upon contractors of tortious liability for the cost of repair of these defects.[400]

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product, as opposed to a structure. Something akin to the "dangerous defects" distinction was also argued (and rejected) in *Trans World Airlines*, *supra* note 325.

[397] *Bryan v. Maloney*, *supra* note 319; *Bowen*, *supra* note 292; *Stieller v. Porirua City Council*, *supra* note 316; *Invercargill City Council v. Hamlin*, *supra* note 316; *Riddell v. Porteous* (1998), [1999] 1 N.Z.L.R. 1 (C.A.). All these cases, like many of the English cases such as *Dutton*, *Batty* and *Anns*, involve residential housing, a fact which at least one commentator has found potentially significant as possibly reflective of an (unarticulated) public policy consideration privileging the physical integrity of such dwellings. (Feldthusen, *Economic Negligence*, *supra* note 22 at 179).

[398] *Winnipeg Condominium*, *supra* note 63.

[399] *Ibid.* at 199.

[400] *Ibid.* at 199. As to La Forest J.'s reference to "buildings", note that his reliance on Laskin's dissent in *Rivtow*, which involved a crane, suggests that he was not intended to restrict this distinction to buildings, to the exclusion of products.

As to those "policy reasons" supporting recovery for the cost of repair in cases of dangerous defects, La Forest leaned heavily on the reasoning of Laskin J.'s dissent in *Rivtow* which Lord Wilberforce had celebrated in *Anns*:

> If a contractor can be held liable in tort where he or she constructs a building negligently and, as a result of that negligence, the building causes damage to persons or property, it follows that the contractor should also be held liable in cases where the dangerous defect is discovered and the owner of the building wishes to mitigate the danger by fixing the defect and putting the building back into a non-dangerous state. In both cases, the duty in tort serves to protect the bodily integrity and property interests of the inhabitants of the building.[401]

In addition, he argued that the exclusionary rule as expressed in *D&F* and *Murphy* penalizes the responsible property owner who promptly repairs a defect before it causes injury, inasmuch as he or she must bear that cost. This scenario he then contrasted with the plaintiff who, either negligently or intentionally, lingers to the point at which the defect causes an accident. The essential difficulty with such a rule, La Forest J. held, is that it "provides no incentive for plaintiffs to mitigate potential losses and tends to encourage economically inefficient behaviour."[402]

There is, *prima facie*, some intuitive attraction to La Forest J.'s policy-based approach in *Winnipeg Condominium*. Moreover, by citing the tort law imperative of protecting the building inhabitants' interests in their bodily and proprietary integrity, he portrayed the dangerous defect exception to non-recovery as reflective of the law's fundamental concern with physical damage; this also amplifies his point about mitigation insofar as he perceived that identical interests arise in cases of damage to property or person as in cases where plaintiffs incur loss in repairing or mitigating dangerous defects. There are,

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[401] *Ibid.* at 212-13.
[402] *Ibid.* at 213.

however, practical and conceptual difficulties with allowing recovery for cost of repairs based on the dangerous defects distinction, arising from the concept generally, and also more specifically from La Forest J.'s policy considerations. This is not to suggest that recovery for the costs of removal (as opposed to repair) of a danger is unavailable in the law of torts. Like the recoverable relational economic loss which I described in Chapter 2, where expense is incurred to mitigate or avert the threat of imminent physical damage to a proprietary interest, the plaintiff can be viewed simply as having excluded the defendant from interfering with the plaintiff's rights in his or her own property, and thus as entitled to compensation for such expense.[403]

Notwithstanding the validity of the dangerous defect distinction for the limited purpose of compensating for the costs of mitigating or averting imminent physical danger, courts have encountered a practical difficulty in defining "dangerousness" or, more particularly, in prescribing the allowable parameter of remoteness beyond which potential danger is so improbable as to be unrecoverable.[404] Clearly, some threshold is necessary; otherwise,

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[403] This is also then case where, strictly speaking, the imminent danger is not to the plaintiff's own property or person, but to another's. The idea is that, in creating risk of danger, a defendant owes a duty of care not only to the people at risk of the danger, but to rescuers who incur loss in averting the danger. As Cardozo J. said in *Wagner v. International Railway Co.*, 133 N.E. 437, 232 N.Y. 176 at 180-81 (C.A. 1921), "(d)anger invites rescue. The cry of distress is the summons to relief ... the act, whether impulsive or deliberate, is the child of the occasion." Thus in *Alcock v. Chief Constable of South Yorkshire Police*, [1992] 1 A.C. 310, [1991] 3 W.L.R. 1057, 4 All E.R. 907 at 923 (H.L.), Lord Oliver said:

> It is well established that the defendant owes a duty of care not only to those who are directly threatened or injured by his careless acts but also to those who, as a result, are induced to go to their rescue and suffer injury in so doing.

[404] This in turn leads to a related practical difficulty, which is that courts are reluctant to exercise their discretion to dismiss cases of allegedly defective products or building structures summarily, with the result that, subject to settlement or abandonment, the matter is bound to result in expensive and lengthy litigation. See, for example, the reasons for judgment of Hutchison J. of the British Columbia Supreme Court in *Campbell v. Flexwatt* (1996), 25 B.C.L.R. (3d) 329 (S.C.), rev'd (on other grounds) (1997), 44 B.C.L.R. (3d) 343 (C.A.), leave to appeal refused (1998), 228 N.R. 197 (S.C.C.) where, in an action brought by purchasers of radiant heating panels, the defendant Canadian Standards Association was unsuccessful in its arguments against class certification, which emphasized that the plaintiffs had not relied on its certification of the panels. Rejecting these arguments, Hutchison J. appeared to deny any legal significance in the

almost any repair could be characterized as having been carried out for reasons of safety. La Forest J. in *Winnipeg Condominium* grounded the duty of care on "the *reasonable likelihood* that a defect in a building will cause injury to its inhabitants", which risk he further qualified with the description "real and substantial."[405] Other judicial expression has differed, both in language and in degree of imminence of risk, variously describing the subject risk as "imminent",[406] "reasonably certain",[407] "not merely possible, but probable",[408] "doomed",[409] "grave and disastrous",[410] "almost certain",[411] or "threatened."[412] Laskin J.'s dissent in *Rivtow* embraces a panoply of various thresholds, ranging from the strict ("fraught with danger") to the arguably less onerous ("threatened", "foreseeable").[413]

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conception of the duty of care articulated in *Hedley Byrne*. In doing so, however, he was relying on recent Canadian cases that were either irrelevant to products liability (*such as Norsk*) and on *Winnipeg Condominium*:

> I am satisfied that the arguments raised by CSA, that it can not be held responsible for pure economic loss, nor liable to members of the class unless they prove reliance on CSA, are no more than that, arguments, not so compelling that certification should be denied. At this stage what must be determined are triable issues. It would be folly for the court to get into a careful analysis of the case law and its applicability to the issues at this preliminary point in the case at bar. I need cite no more than the following cases put forward in reply by Mr. Macaulay to the submissions of CSA: On economic loss: *Winnipeg Condominium* ..., *Canadian National Railway v. Norsk Pacific Steamship Co.* ... . These cases make it clear that the plaintiffs (*sic*) arguments are viable and triable issues.

[405] *Winnipeg Condominium*, *supra* note 63 at 212.
[406] *Trans World Airlines*, *supra* note 325 at 290. Note, however, that because the danger was averted, there was no recovery.
[407] *MacPherson*, *supra* note 328 at 1053. This was a personal injury case.
[408] *Ibid.* at 1053.
[409] *Batty*, *supra* note 303 at 562. Note the submissions of defence counsel, which suggested that a similar threshold, requiring that the danger be "inescapable."
[410] *Ibid.*, at 562.
[411] *Ross v. Dunstall* (1921), 63 D.L.R. 62 (S.C.C.), also a personal injury case.
[412] *Bowen*, *supra* note 292 at 414 and 423. While the New Zealand Court of Appeal did not require a dangerous defect, it did cite it.
[413] *Rivtow*, *supra* note 94 at 552.

In order to avoid the objection that the dangerous defects distinction allows purchasers to undo a bad bargain by substituting a defective product for a qualitatively whole product,[414] however, the risk has to be of a degree, not in magnitude but in likelihood or imminence, that merits protection. Otherwise, defects that might merely be said to *conceivably* cause danger would inevitably be emphasized by plaintiffs seeking to enhance their side of a bargain they perceive to have been disadvantageous. The risk, then – which is not the risk of the defect occurring, but the risk of the physical damage to person or property occurring – must, in order to be a meaningful distinction, be characterized by a degree of inevitability, thus leading to recovery that is justified by reason of the plaintiff having incurred expense to protect his or her proprietary interest from imminent threat of physical damage.

Applied to the facts of *Winnipeg Condominium* or *Rivtow*, the answer to this practical cautionary note may be that, because the defect had already manifested itself in such a way that could well have caused personal injury (in *Winnipeg Condominium*) and had caused a death (in *Rivtow*), the risk was such that recurrence was probably inevitable and thus the allowance of recovery for the costs of removing the danger was justified. Similarly, in *Batty*, the evidence was that the house was certain, within ten years, to be "gravely damaged".[415] Harder to defend, however, is the more recent application of the dangerous defect distinction by the Ontario Court of Appeal in *Hughes v. Sunbeam*

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[414] Laskin J.'s remedy, in *Rivtow*, would not have been merely to render the crane *safe*, but rather to render the crane *better* (that is, safe and (still) useable) than that for which the plaintiff had contracted at the time of purchase.

[415] *Batty*, *supra* note 303.

Corporation Canada Ltd.[416] There, the defendant manufacturer applied to strike the plaintiff's proposed class action claim, in which he alleged that he had purchased an ionization smoke alarm manufactured by the defendants. He further alleged that the alarm was defective and unreliable, and sought damages for the cost of the alarm, its removal and for the installation of a replacement. For the court, and in affirming the trial judge's dismissal of the manufacturer's application, Laskin J.A. said:

> The underlying rationale for permitting recovery for pure economic loss in a case like *Winnipeg Condominium* is safety, the prevention of threatened harm. By compensating the owner of a dangerously defective product for the cost of repair, the law can encourage the owner to make the product safe before it causes injury to persons or property. By contrast compensation to repair a defective but not dangerous product will improve the product's quality but not its safety.
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> This case falls on the border. A smoke detector that does not detect fires in time for occupants to escape injury is not itself dangerous, but relying on it is. The occupants are lulled into a false sense of security. The threatened harm to persons or property is no less than that from a dangerous defect. In other words, the safety considerations are similar. Safety justified compensating the owner of the apartment building in *Winnipeg Condominium* to eliminate the dangerous defective cladding. Safety may also justify compensating the owner of a defective smoke alarm to eliminate dangerous reliance on it.
>
> The claim thus shows that in the negligent supply of defective goods cases, the safety rationale for compensation does not always support a clear distinction between dangerous and non-dangerous defects. ...
>
> For these reasons, I am not persuaded that Hughes' negligence claim against First Alert discloses no reasonable cause of action. As a supplier of allegedly defective safety devices on which reliance is dangerous, First Alert may well owe a duty of care to a purchaser that is not defeated by the relevant policy considerations. ...[417]

Laskin J.A.'s reasons reflect that the court has resolved the practical difficulty of threshold by rejecting, or at least ignoring, any threshold strictures of inevitability or imminence in favour of conceivability or foreseeability. That is, he grounds the duty of care that a manufacturer "may well owe" in its manufacture of a defective smoke alarm,

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[416] (11 September 2002), Docket # C35521 (Ont. C.A.).
[417] *Ibid.* paragraphs 26-29.

on which reliance is dangerous, by reason of "threatened harm." That harm, however, is not inevitable or otherwise imminent. A building structure containing a defective smoke alarm is not like the house in *Batty*, which was, in the language of Megaw L.J., "doomed"; rather, even if left in place, a defective smoke alarm poses a risk that is generally quite remote.[418]

This further reveals a fundamental conceptual difficulty in allowing recovery for the costs of repair based on the dangerous defect distinction. In *Hughes*, while reliance on the defective product might well have been dangerous, such danger evaporated when the plaintiff discovered the defect. While "safety", then, did in fact "justif(y) compensating the owner of a defective smoke alarm to eliminate dangerous reliance on it", that cost did not extend to replacement, which would amount to a betterment, salvaging for the plaintiff what was otherwise simply a bad bargain. An owner would not reasonably rely on the smoke alarm once the defect was discovered. Similarly, in *Winnipeg Condominium*, once the cladding was recognized as defective, the danger was eliminated because steps could be taken to remove the danger.[419]

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[418] While the risk of damage in the event of a fire in a building structure is obviously grave, my point is that the risk of a fire in a building structure is itself not grave, and certainly not characterized by the inevitability present in *Batty* or, for that matter, by the degree of probability of recurrence present in *Winnipeg Condominium*.

[419] This point was emphasized by Lord Bridge in *D&F*, *supra* note 306 at 1006, where he observed:

> If the hidden defect in the chattel is the cause of personal injury or of damage to property other than the chattel itself, the manufacturer is liable. But if the hidden defect is discovered before any such damage is caused, there is no longer any room for the application of the *Donoghue v. Stevenson* principle. The chattel is now defective in quality, but is no longer dangerous. It may be valueless or it may be capable of economic repair. In either case the economic loss is recoverable in contract, by a buyer or hirer of the chattel entitled to the benefit of a relevant warranty of quality, but is not recoverable in tort by a remote buyer or hirer of the chattel.

See also Lord Keith's speech in *Murphy*, *supra* note 111 at 918.

La Forest J., in *Winnipeg Condominium*, however, anticipated and rejected this criticism as reflecting an "abstract logic",[420] and concluded that the owner ought nonetheless to be compensated for the cost of "fixing the defect and putting the building back into a non-dangerous state."[421] This statement, however, reinforces my point. Aside from La Forest J.'s use of the term "back", which suggests, contrary to the nature of a manufacturing defect, that the building was at one point in a non-defective or "non-dangerous state",[422] there is a difference between "putting the building ... into a non-dangerous state", and "fixing the defect." As Stamp L.J. said in *Dutton*:

> I have a duty not carelessly to put out a dangerous thing which may cause damage to one who may purchase it, but the duty does not extend to putting out carelessly a defective or useless or valueless thing.[423]

If, then, the plaintiff's claim arises from having entered into a bad bargain, then it should be asserted not against the original manufacturer, but against the person who received the proceeds of sale. The manufacturer's responsibility for the subsequent purchaser's disappointed expectations is therefore restricted to those circumstances where he or she has, by misrepresenting the product, undertaken or otherwise assumed responsibility for its quality where the misrepresentation has induced the plaintiff into the bargain, foregoing viable purchasing alternatives. That aside, the remedy ought to be restricted to the expense incurred in removing the imminent danger to persons or property. Thus in *Winnipeg Condominium* the rest of the cladding could have been removed or buttressed. In *Rivtow*, the crane could have been taken out of service. In *Hughes*, the danger, which

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[420] *Winnipeg Condominium*, *supra* note 63 at 214.
[421] *Ibid.* at 213.
[422] This is an extension of the observation I make earlier in this chapter about the defective quality of the product or structure *ab initio*.
[423] *Dutton*, *supra* note 297 at 490.

we are told was in the plaintiff's reliance on the alarm, was removed when he learned of the defect. All these plaintiffs ought to have been able to recover such costs under the law of torts, leaving them to recoup further costs – the costs incidental to their bad bargains – under the law of contract, although within the terms of their purchase agreements with the seller.

This fundamental objection to allowing recovery of the cost of repairing a defect that is no longer dangerous by reason of its ascertainment can be understood in a related and even more fundamental way. The function of the tort law, whether expressed in the tort of negligence or in any other tort, is to compensate for *damage*. "(T)he principle of recovery in an action for tort", Cory J. held in majority reasons in *Cunningham v. Wheeler*,[424] is "to compensate the *injured* party as completely as possible for the *loss suffered* as a result of the negligent action or inaction of the defendant."[425] In her (partial) dissent, McLachlin J., as she then was, affirmed this "fundamental principle":

> ... the plaintiff in an action for negligence is entitled to a sum of damages which will return the plaintiff to the position the plaintiff would have been in had the *accident* not occurred, in so far as money is capable of doing this. The goal was expressed in the early cases by the maxim *restitutio in integrum*. The plaintiff is entitled to full compensation and is not to be denied recovery of *losses which he has sustained*. ... The ideal of compensation which is at the same time full and fair is met by awarding damages for all the plaintiff's *actual losses*, and no more. *The watchword is restoration; what is required to restore the plaintiff to his or her pre-accident position.*[426]

Engagement of tort law requires, then, an "accident", a "loss", an "injury", causing the plaintiff to plead restoration to a pre-accident, pre-loss or pre-injury state which, by necessary implication, requires more than a defect existing from the time of manufacture.

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[424] [1994] 1 S.C.R. 359, 113 D.L.R. (4th) 1 [*Cunningham v. Wheeler* cited to D.L.R.].
[425] *Ibid.* at 7. (Emphasis added).
[426] *Ibid.* at 24-25. (Emphasis added).

Here again, the distinction between an internal defect and external damage is seen as central to the law's distinct treatment of pure economic loss. Hence, for example, Lord Bridge's statement in *D&F* that "liability can only arise if the defect remains hidden until the defective structure causes personal injury or damage to property other than to the structure itself."[427] Eder J. in *Trans World Airlines* put it more bluntly:

> Until there is an accident, there can be no loss arising from the breach of this duty ... . "Though negligence may endanger the person or property of another, no actionable wrong is committed if the danger is averted." *Schmidt v. Merchants Despatch Transp. Co.*, 270 N.Y. 287, 300, 200 N.E. 824, 827, 104 A.L.R. 450.[428]

Just as in other otherwise compelling circumstances, therefore, such as that of the oft-lamented impunity for failure to effect an easy rescue, this "fundamental principle" of the law of torts simply does not operate to allow recovery for anticipatory repairs, that is, where there is no damage.[429] That is, the fact of a bad bargain, with the result that the

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[427] *D&F*, *supra* note 306 at 1006. See also at 1011, where Lord Bridge said:

> What gives rise to the action is then not "damage" in any accepted sense of the word but the perception of possible but avoidable damage in the future. The logic of according the owner a remedy at that stage is illustrated by the dissenting judgment of Laskin C.J. (*sic*) in *Rivtow Marine Ltd. v. Washington Iron Works* ... and it is this: if the plaintiff had been injured the negligent builder would undoubtedly have been liable on *Donoghue v. Stevenson* principles. He has not been injured, but he has been put on notice to an extent sufficient to deprive himself of any remedy if he is now injured and he therefore suffers, and suffers only, the immediate economic loss entailed in preventing or avoiding the injury and the concomitant liability for it of the negligent builder which his own perception has brought to his attention. It is fair therefore that he should recover this loss, which is as much due to the fault of the builder as would have been the injury if it had occurred. Thus it has to be accepted either that the damage giving rise to the cause of action is pure economic loss not consequential on injury to person or property, a concept not so far accepted into English law outside the *Hedley Byrne* type of liability ..., or that there is a new species of the tort of negligence in which the occurrence of actual damage is no longer the gist of the action but is replaced by the perception of the risk of damage.

[428] *Trans World Airlines*, *supra* note 325 at 290. See also *Northern Power*, *supra* note 309 at 328.

[429] This is also a difficulty with certain professional service cases, notably judicial pronouncements allowing recovery in "wills cases" such as *White v. Jones*, *supra* note 103. There, after quarrelling with his two daughters, the testator executed a will which did not include them as beneficiaries. They subsequently

plaintiff has acquired something that is less valuable than he or she had expected, does not amount to damage. Until, therefore, the plaintiff has sustained an interference with his or her rights, such as where either steps have been taken to preserve property from imminent danger or where physical damage occurs to another person to his or her property[430] or, alternatively, until the plaintiff can demonstrate that he or she reasonably

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reconciled, however, and the testator then instructed his solicitor to prepare a new will to include gifts of £9,000 to each of them. Nearly two months later, with nothing having been done to carry out these instructions, the testator died. Lord Goff acknowledged (at 698-99) several "conceptual difficulties", which included the "well established" rule that a solicitor's sole duty is to his or her client, and the principle that tort law does not compensate "a mere loss of an expectation", but rather "an existing right or interest of the plaintiff." In other words, and as these difficulties have often been paraphrased, the person owed a duty suffers no damage, and the person suffering the damage is owed no duty. Lord Goff also acknowledged (at 704) that liability would not lie under "the principle in *Hedley Byrne*", as there was neither an undertaking by the solicitor nor reliance by the intended beneficiaries on the exercise by the solicitor of due care and skill. He concluded (at 707), however, that

> there is a lacuna in the law, in the sense that practical justice requires that the disappointed beneficiary should have a remedy against the testator's solicitor in circumstances in which neither the testator nor his estate has in law suffered a loss.

Thus, and despite having already acknowledged that there was neither an undertaking nor reliance, Lord Goff (at 710) concluded that the *Hedley Byrne* principle ought to be

> extend(ed) to the intended beneficiary ... by holding that the assumption of responsibility by the solicitor towards his client should be held in law to extend to the intended beneficiary who (as the solicitor can reasonably foresee) may, as a result of the solicitor's negligence, be deprived of his intended legacy in circumstances in which neither the testator nor his estate will have a remedy against the solicitor.

In his speech, Lord Browne-Wilkinson also acknowledged (at 714) the absence of reliance in this case specifically and in such cases generally, and that it remains "an essential ingredient in a case based upon negligent misstatement or advice", such might not be the case where a "special relationship" can be otherwise established. Emphasizing (at 718) the "unique features" of cases involving negligent preparation and execution of a will, including the obvious difficulty that the negligence will "lie hidden" until the testator's death, at which point "the error will become incapable of remedy", Lord Browne-Wilkinson concurred in the result.

The problem with this approach, and quite aside from the "extension" of the defendant's undertaking (which undertaking Lord Goff had initially and thoroughly explained was made to the testator and not to the prospective beneficiaries), is that, without an element of reliance, the plaintiff cannot demonstrate that he or she has suffered damage. All she has is a lost contingent expectation, in respect of which she cannot reasonably have altered her position or otherwise placed restrictions on her personal autonomy. Here again, tort law is being conceptually stretched to the point that its fundamental elements are being ignored or rejected in order to find a duty where, on principle, there is none. There was no "lacuna" in the law; rather, application of the law led to a result which, for the majority in *White v. Jones*, was evidently unpalatable, presumably because it would result in unpunished negligence.

[430] In this sense, anticipatory damages can be distinguished from, for example, cost of future care or lost future earnings in cases of damage to the person. In the latter circumstance, while the loss is prospective, it is consequent upon physical damage which has already occurred, and compensation properly corresponds to the amount which may reasonable be expected to be expended in putting the injured party in the position

relied on an express undertaking or assumption of responsibility by the manufacturer with respect to the quality of the product or structure,[431] the imposition of liability in negligence amounts to recognition of a cause of action that overstretches the conceptual boundaries of tort law such that its fundamental purpose, namely to provide a remedy for damage, is either ignored or impliedly discarded (since it has not been done expressly). To so accommodate a plaintiff for repair outlays within the framework of the law of torts would require a perversion of tort law principles such that one can hardly call it an application of the law of torts.

Some jurists have suggested, however, that this objection does not necessarily overcome or otherwise defeat what they perceive as an intuitive sense of the justice of the defendant's recovery where the repair expenses were incurred not to avoid a bad bargain but to preserve the bargain, the value of which was threatened by the manufacturer's negligence; there remains, despite an acknowledged manifestly inappropriate application of tort law principles to these circumstances to allow recovery, an "undeniable appeal of common sense" in the reasoning that, since a manufacturer can be liable for the negligent construction of a building or product which causes damage to persons or property, they also ought to be liable where a dangerous defect is discovered and remedied before such

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in which he or she would have been but for the injury. See *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, 83 D.L.R. (3d) 452 at 462.

[431] I have already referred to the role of home inspectors. This is a manifestation of the principle *caveat emptor*, which La Forest J. criticizes in *Winnipeg Condominium*, *supra* note 63 at 220-21 as being "not responsive to the realities of the modern housing market" and as illustrative of "the unreality of the assumption that the purchaser is better placed to detect and bear the risk of hidden defects." His remarks, however, reflect only a partial expression of the assumption underlying *caveat emptor*. *Caveat emptor* also requires that if the purchaser is dissatisfied or uncertain about the product, he or she can (1) negotiate an indemnity or warranty at the time of entering into the purchase agreement; (2) obtain insurance; (3) make his or her own investigation (hence the role of home inspectors) or (4) refrain from purchasing the product.

damage occurs.[432] In *Winnipeg Condominium*, for example, La Forest J. observed that the defendant "should not be insulated from liability simply because the current owners of the building acted quickly to alleviate the danger that Bird itself may well have helped to create."[433] That is, the manufacturer can be seen as having been unjustly enriched by the subsequent purchaser who, having discovered the defect, remedies it at his or her own expense. As Brennan J. said in dissent in *Bryan v. Maloney*,

> (i)f expense is reasonably incurred in removing the risk, it is right that the party incurring it should be indemnified by the party who, if the risk had materialised and physical damage had occurred, would have been primarily liable to the third party suffering that damage.[434]

While concerns of unjust enrichment are not alien to juristic expression in either the law of tort or the law of contract, they do not engage, in either field, appropriate conceptual tools to accommodate a claim for anticipatory damages incurred to mitigate or avert imminent danger to a third party, and not to one's own proprietary interest. Mayo Moran has argued, however, that in cases such as *Winnipeg Condominium* they engage the law of restitution as a means of resolving the tension between the essential requirements of

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[432] See, for example, Mayo Moran, "Rethinking *Winnipeg Condominium*: Restitution, Economic Loss and Anticipatory Repairs" (1997) 74 U.T.L.J. 115 at 121-22. See also Woodhouse J.'s reasons in *Bowen*, *supra* note 298 at 417, where he says: "It would seem only common sense to take steps to avoid a serious loss by repairing a defect before it will cause physical damage and rather extraordinary if the greater loss when the building fall (*sic*) down could be recovered from the careless builder but the cost of timely repairs could not." Similarly, Mason C.J. in *Bryan v. Maloney*, *supra* note 319 at 173, said:

> It is difficult to see why, as a matter of principle, policy or common sense, a negligent builder should be liable for ordinary physical injury caused to any person or to other property by reason of the collapse of a building by reason of the inadequacy of the foundations but be not liable to the owner of the building for the cost of remedial work necessary to remedy that inadequacy and to avert such damage. Indeed, there is obvious force in the view expressed by Lord Denning in *Dutton v. Bognor Regis Urban District Council* that, as a rational basis for differentiating between circumstances of liability and circumstances of no liability, such a distinction is an "impossible" one.

[433] *Winnipeg Condominium*, *supra* note 63 at 214.

[434] *Bryan v. Maloney*, *supra* note 319 at 189.

tort law and common sense intuition,[435] and in particular the restitutionary principle of indemnifying a plaintiff for having necessarily discharged the liability of another (specifically the manufacturer),[436] or otherwise having intervened out of necessity or moral compulsion.[437] Thus she posits that a plaintiff may be compensated where he or she discharges a liability to a third party for which the defendant was principally responsible, or where he or she confers a benefit on the defendant by preventing misfortune created by the defendant's act. In approaching liability with reference to

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[435] It is not uncommon for commentators on restitution and on tort, on occasion, to attempt to displace cases that they find difficult to reconcile into the other's field. See, for example, the respective commentaries of George Palmer, in *The Law of Restitution* (Boston: Little, Brown, 1978) at para. 2.10 and Ernest Weinrib, *The Idea of Private Law* (Cambridge, MA: Harvard University Press, 1995) at 196 on the case of *Vincent v. Lake Erie Transportation Co.*, 124 N.W. 221 (Minn. Sup. Ct. 1910).

Resort to a restitutionary remedy, however, is not a "cure-all" in cases of pure economic loss. Lord Goff's evident concern in *White v. Jones*, *supra* note 103, was that adherence to the tort law duty of care elements of undertaking and reliance would have allowed the solicitor to escape the consequences of his wrongdoing. The underlying assumption appears to have been that the solicitor was unjustly enriched by his having performed a professional and recompensed service negligently. Unlike, however, the facts of *Winnipeg Condominium*, it is debatable whether concerns of unjust enrichment arise in *White v. Jones* because, although the solicitor was enriched by doing a poor job in return for fees reflective of having done a good job, the testator (who enriched the solicitor) was not correspondingly impoverished and, in fact, his estate benefited to the extent of £18,000, representing the value of the two failed gifts. As Peter Birks has emphasized, the words "unjust enrichment" are an abbreviation of "the generic conception of ... unjust enrichment *at the expense of another*." (Peter Birks, *An Introduction to the Law of Restitution* (Oxford: Clarendon Press, 1985) at 16. Similarly, Lionel Smith has described "(t)he cause of action in unjust enrichment (as being) about a reversible transfer of wealth." (Lionel D. Smith, "The Province of the Law of Restitution" (1992) 71 Can. Bar Rev. 672 at 697). This is consistent with judicial statements in England and Canada which require, as a necessary element of unjust enrichment, that "the enrichment (be) at the expense of the plaintiff." (See, for example, *B.P. Exploration Co. (Libya) v. Hunt (No. 2)*, [1970] 1 W.L.R. 783 at 839 (Q.B.), aff'd, [1981] 1 W.L.R. 232 (C.A.), aff'd, [1982] 1 All E.R. 925 (H.L.)). Thus there must be a loss on the plaintiff's part that corresponds to the defendant's enrichment.

There is, however, a "schism" dividing jurists who write on the law of restitution, relating to the restitutionary remedy's dependence on unjust enrichment. (See Peter Birks, "Unjust Enrichment and Wrongful Enrichment" (2001) Tex. L. Rev. 1767). Assuming, however, that a restitutionary remedy were ultimately dependent on whether the plaintiff could demonstrate a loss, the facts of *White v.* Jones would no more lead to a remedy under the law of restitution than under the law of torts. The matter of a negligent solicitor's liability to disappointed beneficiaries, then, is a matter that ought to be addressed, if it is to be addressed at all, by legislative amendment.

[436] This is the right to recoupment, available to a plaintiff who, under compulsion of law, has made a payment discharging the primary liability of another. As to the requirement of "compulsion of law", while the applicable categories are not exclusive, courts have recognized a distinct category of costs incurred for the "abatement of nuisances" which typically involve health authorities having compelled occupiers to render premises safe for occupation. (See Lord Goff and Gareth Jones, *The Law of Restitution*, 4th ed. (London: Sweet & Maxwell, 1993) at 343-50. [Goff and Jones, *The Law of Restitution*]).

[437] The law of restitution recognises, generally, a restitutionary claim based upon a plaintiff's "necessitous intervention." (Goff and Jones, *The Law of Restitution*, *supra* note 436 at 369).

fundamental principles, therefore, and in particular with an appreciation of the necessity for damage in tort law but the opportunity afforded by restitution, "dangerousness" is seen as not only irrelevant to the causal inquiry leading to tort law liability, which in cases of defective products or building structures is properly grounded in the manufacturer's undertaking and the purchaser's reliance, but conversely as leading to a restitutionary remedy.

The difficulty with this approach, however, is that, for two reasons, *Winnipeg Condominium* cannot be so easily displaced from the law of torts into the law of restitution. First, in most dangerous defect cases, as in *Winnipeg Condominium*, one cannot know whether the subsequent purchaser has suffered a loss, within the meaning of unjust enrichment, until the amount which he or she paid is revealed, as well as what the value of the good purchased (because the price paid might well have conformed to the value). Moreover, cases such as *Winnipeg Condominium* inescapably engage issues of wrongdoing arising from a defendant's fault and, while notions of wrongdoing and unjust enrichment have often been treated by courts cumulatively and in combination with each other, they are distinct concepts and, given the broader concern arising from claims brought by plaintiffs seeking to undo bad bargains, concerns of unjust enrichment would not allow a court to go beyond that which tort law gives the plaintiff, being compensation for the reasonable cost of averting an imminent risk of danger.

I have attempted in this chapter to apply a broader understanding of a proprietary interest to a frequent subject of litigation, being cases of defective products and building

structures. In doing so, I have sought to demonstrate how the indirect proprietary conceptions of undertaking and reliance extend beyond their conventional confines of negligent misrepresentation or negligent performance of a service, thus explaining and justifying recovery in this field, and have also exploring the practical and conceptual limits of the dangerous defects distinction, lately adopted and applied in Canadian jurisprudence. Thus I have addressed three specific problems that arise in the law of "products liability", as the field is generally (and only partially) expressed: first, and most generally, the problem of the customer's reliance on a manufacturer's extra-contractual representation; secondly, the problem of expenses incurred to protect a proprietary interest from imminent danger; and thirdly, the problem of expenses incurred to repair a dangerously defective defect (which is inimical to tort law, and likely also unrecoverable in the law of unjust enrichment, or restitution).

V. CONCLUSION

In the introduction to my first chapter, I averred that since *Donoghue v. Stevenson*, but particularly in the past 30 to 35 years, courts have struggled to accommodate pure economic loss within the framework of the tort law duty of care by applying diverse considerations which, generally speaking, one can amalgamate as "public policy" considerations. I then tried to show that the results have been practically and conceptually unsatisfying, and have left both jurists and litigants without coherent guidance that addresses the subject in a manner that simultaneously accounts for its vast breadth and for the nuanced distinctions among its various forms. I further attempted to demonstrate that such incoherence is particularly apparent in the cases which rely upon yardstick of proximity as a duty determinant, which most Commonwealth jurisdictions (but notably not Canada) have in recent years rejected.

Pure economic loss, then, compels jurists to confront the essence of private law and, in particular (but not exclusively), the law of torts and the common law inquiry that leads to the imposition of liability. Hence the centrality to that inquiry and to my analysis of a principled and mutually-reinforcing dual nature of a plaintiff's entitlement and a defendant's corresponding obligation, equally enforceable where the interference constitutes a direct injury or an indirect interference grounded in the plaintiff's detrimental reliance on the defendant's undertaking to be responsible for his or her actions.

My objective, then, has not been merely to expose the failings of policy or proximity-based duty determinants, but to expose their fundamentality; that is, I have attempted to demonstrate not only that such determinants are unworkable, but also that they are so because of their inconsistency with the fundamental norms of the law of torts and its engagement by the injury to a right derived from a proprietary interest. The promise of applying a dual conception of that interest is threefold. First, it affirms both that essential engagement of an injured right. Further, it manifests a conceptual and doctrinal unity of tort law's compensatory function where the injured right is in a corporeal or otherwise tangible proprietary interest (as in *Donoghue v. Stevenson*) or in a notion of autonomy (as in *Hedley Byrne*). Finally, it reconciles a rights-based approach to the law of torts with a wider range of liability for pure economic loss, derived in turn from a broader understanding of the indirect proprietary interest in one's own autonomy, and of the injury such an interest sustains by reason of an invitation to rely, and actual detrimental reliance.

In espousing a rights-oriented approach, my treatment of the law of torts runs counter to the predominance of economic imperatives in much current torts scholarship. This is not to suggest that the law of torts, as a juristic device, is not or cannot be an incidental reflection of efficiency or other instrumentalist imperatives. Indeed, my analysis of the duty of care specifically contemplates the need for justification of a duty of care, and I have argued in this thesis that it is the absence of any justificatory inquiry whatsoever that gravely implicates Lord Wilberforce's proximity-based duty in *Anns*. Insofar as economic or other imperatives are consistent with the function of tort law, which is to

compensate for an injury to the plaintiff's rights, they may be served by tort law's operation. They do not, however, represent principled or necessary elements of the tort law inquiry leading to liability which must consequently inform the justificatory inquiry. Indeed, they are inconsistent with what Jules Coleman calls the "structure" of tort law.[438] That is, they are inessential or incidental to the two central elements of tort law as a legal, or even social, device: first, the structural or institutional form, oriented to an individualized inquiry (as opposed to a generalized inquiry into prospective risk, internalization, deterrence and loss-spreading), which entitles a person who has suffered a loss to claim against and recover from another who owed a duty of care to them; secondly, the other person having caused the loss. Thus there is, as Stephen Perry has said, a "pragmatic dissonance" between tort law's institutional framework and economic theory.[439] This further amplifies the significance of my approach in relation to *Anns* and *Cooper v. Hobart*, which import policy considerations, often taken by courts to be economic policy considerations, into the duty analysis.

On this general point, I differ from Professor Bruce Feldthusen, whose work on pure economic loss is widely cited and applied in Canada and other Commonwealth jurisdictions (particularly Australia), inasmuch as he has applied an economic analysis to the question of pure economic loss. I have, however, diverged even more fundamentally from Professor Feldthusen on his division of pure economic loss cases into five categories. While, and as I noted in the "Introduction", his categories represent useful organizational and analytical reference points to consider difference cases of pure

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[438] Jules L. Coleman, *Risks and Wrongs* (Cambridge: Cambridge University Press, 1992) at 374.
[439] Stephen R. Perry, "Tort Law", in Dennis Patterson, ed., *A Companion to Philosophy of Law and Legal Theory* (Cambridge, MA: Blackwell Publishers Inc., 1996) at 67.

economic loss, they do not reflect a norm that confines the law to unique and category-specific parameters. The fundamental justification for the distinct treatment which the law accords pure economic loss is universal, not categorical, and extends beyond the strict parameters of those five categories to apply to all forms of pure economic loss. The implication of that universality is such that, having demonstrated that pure economic loss is recoverable in the law of torts only in cases where the defendant has interfered with either a direct or an indirect proprietary interest of the plaintiff, I was able to attempt to enrich our understanding of the law's distinct treatment of pure economic loss in three respects: First, I sought to harmonize and justify those dual interests into a mutually coherent and unified conception of the duty of care, applied to claims for damages arising from pure economic loss. Then, I demonstrated how classes of recoverable "exceptions" of relational economic loss were derived from direct proprietary conceptions. Thirdly, I showed how the indirect proprietary conceptions of undertaking and reliance extend beyond the conventional confines of negligent misrepresentation and negligent provision of a service, to explain and justify recovery in the field of products liability and negligent construction.

The orientation I have employed and the particular analyses which flowed from it suggest further areas of potentially fruitful exploration. For example, at a more specific level, the indirect proprietary interest, applied to the realm of defective products and building structures, while offering a principled approach, may be variously applied across jurisdictions, depending upon local trade custom. Thus the notion of an invitation to rely may be more nuanced or context-dependent and may thus deserve more context-specific

attention in future treatments. More generally, and as I also noted in the "Introduction", insofar as the law of torts affords distinct treatment to pure economic loss, it does so while requiring nothing more than it does of claimants who allege physical damage to person or property: that they prove injury to a proprietary interest. By considering pure economic loss from the perspective of fundamental tort law principles, then, it is also possible to refresh and enrich our appreciation of the significance of those principles as they apply to cases of physical damage to person or property. That is, by attempting to unite conceptually the notions of rights and duties in the law of torts with those of a defendant's undertaking and a plaintiff's reasonable detrimental reliance, the province of the law of torts would be realized as a broader, principled compensatory device.

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