LIABILITY IN NEGLIGENCE FOR PURE ECONOMIC LOSS: THE LATEST CHAPTER (*PERRE V APAND PTY LTD*)[1]

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INTRODUCTION

Ever since *Hedley Byrne & Co Ltd v Heller & Partners Ltd*[2] rejected an absolute rule precluding liability in negligence for "pure" economic loss, the courts in the common law world have struggled to articulate the boundaries of any such liability, and the means of determining in which circumstances a duty of care to avoid causing plaintiffs such losses arise. As Professor Fleming has said, recovery of pure economic losses "has been and remains the most controversial area of torts".[3] Pure economic losses are those losses which are not causally connected to, or flow from, some personal injury or property damage suffered by a plaintiff, that is, they are not economic losses *consequential* upon such injury to person or property.[4] Consequential economic losses, such as loss of earnings, generally are recoverable by a plaintiff subject only to the proviso that they must be a reasonably foreseeable kind of harm and therefore not too remote.[5]

Certainly, in some cases of pure economic loss, the factors which need to be established in order for a duty of care to arise have been formulated in ways which engender a reasonable certainty as to the limits of liability. The law of negligent misrepresentation or misstatement is an example where recent case law has spelt out the relevant criteria for establishing a duty of care. A combination of a plaintiff's reliance on a statement, the reasonableness of such reliance and some assumption of responsibility by the defendant, seem to be the critical factors the courts balance in order to determine whether a

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1 (1999) 164 ALR 606.

2 [1964] AC 465.

3 JG Fleming, *Law of Torts* (LBC, 9th ed, 1998), 194.

4 See eg, The Honourable Sir Anthony Mason "The Recovery and Calculation of Economic Loss" in NJ Mullaney (ed) *Torts in the Nineties* (LBC, 1997), 8-9.

5 The test of reasonable foreseeability in the context of injury to person or property is not particularly onerous, and loss of earnings or business profits and the like are readily recoverable where they are consequential.

duty of care exists.[6] The concern of this article is with one type of pure economic loss where the limits of liability have not been clearly drawn by case law, and where there is considerable uncertainty as to how to determine when a duty of care exists, justifying a defendant's liability for such negligently inflicted losses. The cases to be considered concern pure economic losses flowing from a negligent act or omission (rather than a negligent misstatement[7]) which damages property owned by a third party (or perhaps even causes personal injury to the third party)[8] as a result of which the plaintiff suffers some economic loss. The label "relational" economic loss is sometimes used to describe the loss in such cases, stemming from the fact that the loss usually arises as a result of some relationship between the plaintiff and the third party. For example, in *Caltex Oil (Aust) Pty Ltd v The Dredge "Willemstad"*[9] the defendant's dredge damaged an oil pipeline owned by a third party (AOR). The pipeline was used to transport petroleum across Botany Bay from the refinery owned by AOR to the plaintiff's terminal. After the pipeline was damaged, the plaintiff had to make alternative arrangements to transport the petroleum to its site, and was successful in its claim for recovery of those extra costs incurred. The label "relational" economic loss, however, does not accurately describe all such cases, for a loss may arise even where no relationship between the plaintiff and third party exists and yet recovery may still be allowed, as in *Perre v Apand Pty Ltd*,[10] discussed below. Nonetheless, the label "relational" economic loss will be used, for convenience, to describe all pure economic losses sustained by a plaintiff and arising from harm to a third party's property (or person).

Caltex Oil[11] was the first decision in which Australian courts allowed a claim for relational economic loss; the decision has however been criticised for its failure to provide any clear basis for determining when a duty of care will arise.[12] Such criticisms have led the House of Lords in England to reaffirm a general exclusionary rule, excluding liability for *relational* economic loss at

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6 RP Balkin & JLR Davis, *Law of Torts* (2nd ed, Butterworths 1996), 413-426; see eg, *Esanda Finance Corp Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241, particularly the judgments of Brennan CJ, & Gaudron & Toohey JJ. Compare *Perre v Apand Pty Ltd* (1999) 164 ALR 606, 638-9 per McHugh J, who considers "vulnerability" of a plaintiff to be the "relevant" criterion for determining the existence of a duty of care and that reliance and assumption of responsibility are merely "evidentiary indicators" of such vulnerability.

7 It must be conceded, however, that at times it may be difficult to draw a distinction between words and acts. See Balkin & Davis, ibid, at 413.

8 See eg, *Foodland Association Ltd v Mosscrop* [1985] WAR 215. In that case, a husband's claim for pure economic losses arising from personal injury suffered by his wife (and business partner) was rejected by the Supreme Court of Western Australia.

9 (1976) 136 CLR 529.

10 (1999) 164 ALR 606. See at 630 per McHugh J.

11 (1976) 136 CLR 529.

12 See eg, *Candlewood Navigation Corp Ltd v Mitsui OSK Lines Ltd: The Mineral Transporter* [1986] AC 1, 22-5.

least, in *Murphy v Brentwood District Council*[13] (though in other areas of pure economic loss, the House of Lords has not been so restrictive in its approach and recovery has been allowed in a number of recent decisions).[14] As has been pointed out, however, since *Hedley Byrne v Heller* itself delivered a "mortal blow" to the exclusionary rule,[15] there is no returning to the admitted predicability in the law and certainty which such a rule, if nothing else, could claim as a virtue.[16] In the recent decision of *Perre v Apand Pty Ltd*[17] the High Court of Australia reaffirmed the correctness of *Caltex Oil* and the principle that in certain circumstances, liability may be imposed for pure economic losses of a plaintiff arising from a defendant's negligent acts which cause damage to a third party's property. As Gummow J said in *Perre v Apand*[18]

> The decision of this court in *Caltex Oil*[19] is authority at least for the proposition that, in cases such as the present, one does not begin with an absolute rule that damages in negligence are irrecoverable in respect of economic loss which is not consequential upon injury to person or property.

Since *Caltex Oil,* however, there has been little clarification in Australian case law, at least, as to the scope of potential liability for relational economic loss. As Kirby J stated in *Perre v Apand*, "[t]he law of negligence in cases of claims for pure economic loss is completely unsatisfactory."[20] The purpose of this article is to consider the High Court's decision in that case, in order to determine whether a more satisfactory legal position has been attained. It will be argued that the High Court has failed to take the opportunity to provide clear guidance to the courts and legal profession on the question of what has replaced the rule excluding liability for pure economic loss caused by negligent acts or omissions.

The Exclusionary Rule and The Reasons for It

A number of factors have been identified as underlying the original rule excluding liability in negligence for pure economic loss, which factors still underpin the continuing restrictive approach of the courts in finding a duty of care. The fact that the reasons against imposing liability are often highlighted by the courts supports the view of some commentators and judges that there

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13 [1991] 1 AC 398.

14 See eg, *White v Jones* [1995] 2 AC 207; *Spring v Guardian Assurance Plc* [1995] 2 AC 296.

15 See Mason, n 4 *supra*, at 2.

16 *Perre v Apand Pty Ltd* (1999) 164 ALR 606, 628 per McHugh J, and see references cited.

17 (1999) 164 ALR 606.

18 (1999) 164 ALR 606, 651. See also at 628, per McHugh.

19 (1976) 136 CLR 529; 11 ALR 227.

20 (1999) 164 ALR 606, 685.

ought to be a "de facto" presumption against liability for pure economic loss, unless cogent reasons for liability can be shown to exist.[21]

Two main concerns have repeatedly found expression in the courts and in the academic literature. First, the concern has been expressed that allowing recovery for pure economic loss raises the prospect of the imposition of liability "in an indeterminate amount for an indeterminate time to an indeterminate class",[22] in the oft-cited words of Cardozo CJ. The need to avoid such "indeterminacy" is still a central feature of the reasoning in all recent decisions concerning relational economic loss. In *Perre v Apand*, for example, Gleeson CJ stresses the need to place limits on liability within the bounds of "common sense and practicality."[23] Secondly, the courts and commentators have stressed the significant differences between economic losses and other types of harm, namely that such losses usually arise as a result of a person's pursuit of his or her economic goals. As such, not only do they "not constitute social losses (as harms to persons or property do) but merely transfers of wealth",[24] there is additionally a need to protect an individual's autonomy to be able to legitimately pursue his or her social and commercial goals. Individuals are entitled to pursue or protect their own interests and do not need to justify such conduct merely because it causes economic loss to others.[25] As McHugh J stated in *Hill v Van Erp*:

> 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 latter person.[26]

The contrast with negligently inflicted personal injuries or property damage is sharp. As Lord Oliver has said,

> [t]he infliction of physical injury to the person or property of another universally requires to be justified. The causing of economic loss does not. If it is to be categorised as wrongful it is necessary to find some

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21 See B Feldthusen, "Liability for Pure Economic Loss: Yes, But Why?" (1999) 28 *Western Australian Law Review* 84, 117, who cites McHugh J in *Hill v Van Erp* (1997) 188 CLR 159.

22 *Ultrameres Corp v Touche* 174 NE 441, 444 (1931).

23 (1999) 164 ALR 606, 610, citing *Caparo Industries plc v Dickman* [1990] 2 AC 605, 633 per Lord Oliver of Aylmerton.

24 See Feldthusen, n 21 *supra*, at 86. As Feldthusen states: "One commercial party's loss is often another's gain."

25 See *Perre v Apand Pty Ltd* (1999) 164 ALR 606, 610 per Gleeson CJ; at 616 per Gaudron J; at 635-6 per McHugh J; at 653-4 per Gummow J; at 683-5 per Kirby J; at 701-2 per Hayne J. Of course there are limitations on this principle, particularly where conduct involves intentional wrongdoing such as duress or deceit (per McHugh J, at 636).

26 (1997) 188 CLR 159, 211; 142 ALR 687, 726 (footnotes omitted). McHugh J cites *Home Office v Dorset Yacht Co* [1970] AC 1004, 1027 per Lord Reid, in support.

factor beyond the mere occurrence of the loss and the fact that its occurrence could be foreseen.[27]

Other factors are also noted as creating significant differences between economic loss and harm to persons or property. For example, it is pointed out that victims of economic losses may have allocated such losses via contract and that such contractual allocations usually ought to be protected.[28] Similarly, victims of economic losses may more effectively protect themselves against such losses by means of insurance.[29] Another concern which has been expressed is the "lack of precision in the concept of financial loss",[30] although it must be noted that such difficulties may arise in the context of consequential economic loss as well.

Despite these cogent reasons for limiting liability for negligently caused pure economic loss, it is also widely accepted that adherence to an absolute rule excluding liability works injustice. As *Caltex Oil*[31] demonstrates, in some circumstances a defendant must accept responsibility for pure economic losses caused by his or her negligence. What has troubled the common law since that decision is how best to articulate what those circumstances are, in other words how best to formulate the rule or principle or methodology which allows one to determine or predict whether a duty of care exists in a given case.

Possible Approaches to Duty of Care

Sir Anthony Mason, writing in 1997, has identified at least three different approaches to the duty of care issue in Australia and other common law jurisdictions.[32] He identifies methodologies based on:

(1) the search for unifying principles, such as proximity;

(2) the incremental approach; and

(3) an approach emphasising the different categories of economic loss, in recognition of Professor Feldthusens' view that "economic loss may be sustained in various ways with different consequences."[33]

The third of these approaches now has been endorsed by the Supreme Court of Canada. In *Bow Valley Husky (Bermuda) Ltd v St John Shipbuilding Ltd*,[34]

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27 *Murphy v Brentwood DC* [1991] 1 AC 398, 487.

28 Feldthusen, n 21 *supra*, at 86-7; *Perre v Apand Pty Ltd* (1999) 164 ALR 606, 610 per Gleeson CJ.

29 *Canadian National Railway Co v Norsk Pacific Steamship Co Ltd* (1992) 91 DLR (4th) 289, 350 per La Forest J.

30 *Perre v Apand Pty Ltd* (1999) 164 ALR 606, 610 per Gleeson CJ.

31 (1976) 136 CLR 529.

32 Mason, n 4 *supra*, at 4-6.

33 *Ibid*, at 5. See generally, Feldthusen, n 21 *supra*.

34 [1997] 3 SCR 1210; 153 DLR (4th) 385 (subsequent references are to the DLR report).

the Court unanimously held that the two-part methodology should be followed,[35] namely by inquiring whether a duty of care exists on the basis of the foreseeability of harm to a plaintiff and a sufficient relationship of proximity between the plaintiff and the defendant and, secondly, if it exists, whether such a duty is negated or limited by policy considerations.[36] Further, within this two-step approach, the Court accepted that a category-based approach is appropriate, so that each category requires separate analysis. The five categories adopted by the Court are those of Professor Feldthusen, namely: (1) negligent misrepresentation; (2) relational economic loss; (3) negligent supply of shoddy goods or structures; (4) independent liability of a statutory public authority; and (5) negligent performance of a service.[37]

In *Bow Valley Husky* a defendant manufacturer was in part responsible for a fire which damaged an oil rig. The owners of the rig successfully sued for their losses (their claim being reduced by their contributory negligence) but a further claim was brought by two other plaintiffs who had contractual relationships with the rig owners and who suffered losses as a result of the rig being out of service. The Supreme Court unanimously rejected the claim for their relational losses. The discussion of the economic loss issue took up less than 11 pages of the reported decision in the DLR, and on that point, all six justices were in agreement, with the judgment being delivered by McLachlin J. McLachlin J considered the issue of liability for relational economic loss and stated that the following important propositions had been accepted by the Supreme Court:

> (1) relational economic loss is recoverable only in special circumstances where the appropriate conditions are met; (2) these circumstances can be defined by reference to categories, which will make the law generally predictable; (3) the categories are not closed. La Forest J. identified the categories of recovery of relational loss defined to date as: (1) cases where the claimant has a possessory or proprietary interest in the damaged property; (2) general average cases; and (3) cases where the relationship between the claimant and property owner constitutes a joint venture.[38]

Sir Anthony Mason has described this Canadian approach (writing before the *Bow Valley Husky* decision) as a reaffirmation of the two-step methodology as "applied through the medium of five categories".[39] Whatever the merits of

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35 The Supreme Court utilised the approach first suggested by Lord Wilberforce in *Anns v Merton Borough Council* [1978] AC 728. That approach no longer commands the support of the House of Lords and nor has it been followed in Australia. See generally Balkin & Davis, n 6 *supra*, at 201-208. The decision in *Anns* itself was overruled by the House of Lords in *Murphy v Brentwood District Council* [1991] AC 398.

36 (1997) 153 DLR (4th) 385, 408 per McLachlin J.

37 See eg, Feldthusen, n 21 *supra*, at 85-6.

38 (1997) 153 DLR (4th) 385, 406.

39 Mason, n 4 *supra*, at 14. He cites the unanimous decision in *Winnipeg Condominium Corporation No 36 v Bird Construction Co* [1995] 1 SCR 85; 121 DLR (4th) 193, as supporting this conclusion.

such an approach (and the Supreme Court has been criticised for failing to give any "meaningful attention to what ought to be the fundamental question in economic loss cases: the justification for the recognition of a duty of care in the first place"),[40] the unanimity reached by the Supreme Court does at least have the advantage of providing clear guidelines as to how the problem of economic loss should be approached. The advantage of such a uniform approach will become evident after a consideration of the High Court's decision in *Perre v Apand*,[41] where the divisions within the judgments provide a stark contrast to the position in Canada.

Perre v Apand Pty Ltd: Facts

The facts of *Perre v Apand*[42] are complicated by the number of different appellants and their complex inter-relationships, but apart from this, the facts are fairly straightforward, perhaps surprisingly so given the overall length of the reported decision.[43] The appellants consisted of the Perres (6 related couples), and two companies (Warruga Farm Pty Ltd and Perre's Vineyards Pty Ltd) and a joint venture (the Rangara joint venture) controlled by members of the Perre family, and all involved in the growing and processing of potatoes in South Australia. (For convenience, all these parties will be described collectively as the Perres).

The respondent, Apand Pty Ltd, had supplied potato seed to the Sparnons, who grew potatoes in close physical proximity to the appellants. The seeds supplied by Apand were diseased and as a result, the Sparnon's potato crop was infected with bacterial wilt. The apellants' land and potato crops were never infected with the disease. However, around 80% of the appellants' potatoes were exported to Western Australia. Regulations made under *The Plant Diseases Act 1914* (WA) restricted the importation of potatoes into Western Australia if such potatoes were grown within 20 kilometres of property affected by bacterial wilt, or else processed or packed with "equipment on premises with or in which potatoes, grown within 20 kilometres of a known outbreak of the disease Bacterial Wilt ... have been handled."[44] The export ban was to remain in place for five years after the outbreak. Consequently, despite the appellants' potato crops not being infected, the appellants suffered losses which were "wholy economic",[45] in the form of lost exports and sales of potatoes, as well as decreases in the value of land owned or sold by some of the appellants.

At trial and on appeal to the Full Federal Court it was held that Apand owed the Sparnons a duty of care, which had been breached when Apand

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40 Feldthusen, n 21 *supra*, at 85.

41 (1999) 164 ALR 606.

42 (1999) 164 ALR 606.

43 The report in the ALR is 118 pages long.

44 The relevant regulations are set out in full in (1999) 164 ALR at 621.

45 (1999) 164 ALR 606, 696 per Hayne J.

negligently supplied the diseased seed to the Sparnons.[46] The Perres' claims were dismissed at both instances, however, on the basis that "the necessary relationship of proximity did not exist between Apand and any of the Perre interests with respect to the kind of damage suffered by them."[47] Consequently, the Perres appealed to the High Court. The finding at trial and on appeal to the Full Federal Court, that Apand had been negligent in its supply of seed to the Sparnons, was readily accepted by the High Court,[48] so that the issue before the Court turned solely on whether a duty of care was owed to the appellants in relation to the pure economic losses they had suffered.

In the Hight Court, five justices (Gleeson CJ, Gaudron, Gummow, Kirby and Callinan JJ) allowed the appeal in respect of all the appellants, holding that a duty of care to avoid pure economic loss was owed by the respondent. McHugh and Hayne JJ allowed the appeal in relation to some, but not all, of the Perres' interests. McHugh J considered that only owners of, and growers of potatoes on, land within the 20 kilometre radius of the affected property were owed a duty. The duty of care did not extend to processors of potatoes, namely Warruga Farms Pty Ltd in its capacity as a processor (it also grew potatoes) or owners of the processing facilities (Perre's Vineyards Pty Ltd).[49] Hayne J limited the duty of care to growers and processors of potatoes intended directly for export to Western Australia, namely Warruga Farms Pty Ltd. Consequently all seven justices held that Apand owed a duty of care to Warruga Farms, in its capacity as grower; excepting Perre's Vineyard, six of them held that Apand owed a duty of care to all other Perre interests; and five of them held that Apand owed a duty of care to Perre's Vineyards Pty Ltd. Despite this near unanimity in the Court's decision, seven separate judgments were delivered. Although Gleeson CJ agreed with the reasons of Gummow J,[50] he also added some observations.

The differences between the reasoning of the members of the Court seemingly are wide-ranging and at odds in relation to a number of significant issues. It will be argued below, however, that there are a number of common threads running throughout each of the judgments.

The Reasoning of the Court

Chief Justice Gleeson

As already noted, Gleeson CJ agreed with the reasons given by Gummow J, but made a number of observations.

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46 See eg, (1999) 164 ALR 606, 668, 708.

47 (1999) 164 ALR 606, 669 per Kirby J.

48 See eg, (1999) 164 ALR 606, 665-6 per Gummow J (Gaudron J agreeing on this point); at 622 per McHugh J.

49 (1999) 164 ALR 606, 643-4.

50 (1999) 164 ALR 606, 611.

It was noted by Gleeson CJ that if "there once was a bright line rule which absolutely prevented recognition of a duty of care" where a defendent's negligence caused pure economic loss, that line had given way as a result of the acceptance by the courts of liability for negligent misstatements; and there was no convincing reason why such liability "should be treated as the solitary exception to an otherwise absolute exclusionary rule."[51] Nonetheless, in Gleeson CJ's view, the considerations underlying the exclusionary rule (discussed above) still remain cogent. In the case before him, however, they did not preclude liability and he accepted the reasons of Gummow J that the respondents owed a duty of care to the appellants. In particular, Gleeson CJ emphasised the knowledge of Apand of the need for care in supplying seed because of the potential damage to potato growers;[52] the vulnerability of such growers and processors to Apand's negligence; the physical propinquity of the appellants' land to that of Sparnons; and the control that Apand had over the activity on the Sparnon's land, as relevant considerations supporting a duty of care.[53]

Justice Gaudron

It was accepted by Gaudron J that no governing principle applicable to all cases of economic loss had as yet been (and perhaps never would be) enunciated.[54] In line with the High Court's recent retreat from the utilisation of the concept of proximity as a determinative test of duty of care in *Hill v Van Erp*,[55] she considered that:

> It may well be that, at this stage, the notion of proximity can serve no purpose beyond signifying that it is necessary to identify a factor or factors of special significance in addition to the foreseeability of harm before the law will impose liability for the negligent infliction of economic loss.[56]

Justice Gaudron considered that in time, different categories will become discernible for which the special circumstances giving rise to a duty of care can be articulated. Negligent misstatement is one such category. Gaudron J considered that in recent times another such category had become established, namely cases involving the protection of legal rights. Where a defendant is in a position to control another's exercise or enjoyment of legal rights, that position could give rise to a duty to avoid negligently destroying or impairing such rights.[57] Since Apand's negligence would adversely impact

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51 (1999) 164 ALR 606, 610.

52 This was established by an internal memo, reproduced (1999) 164 ALR 606, 662 in the judgment of Gummow J.

53 (1999) 164 ALR 606, 612.

54 (1999) 164 ALR 606, 613.

55 (1997) 108 CLR 159.

56 (1999) 164 ALR 606, 629.

57 (1999) 164 ALR 606, 616-17. Gaudron J cites the solicitors' negligent performance of service cases, *Hawkins v Clayton* (1988) 164 CLR 539 and *Hill v Van Erp* (1997) 188

upon the legal rights of potato growers exporting to the Western Australian market and since such persons were powerless to protect themselves, Gaudron J considered that Apand's situation was closely analogous to those in positions of control over other's exercise or enjoyment of legal rights.[58] Hence, Apand owed all the appellants a duty of care.

Justice McHugh

After criticising and rejecting a number of other possible approaches as "suitable determinants of duty"[59] of care (in negligence cases generally, as well as in cases of pure economic loss) McHugh J stressed the need for predictability in the application of legal rules to future cases. Consequently, "the principles and rules which govern claims in negligence must be as clear and as easy of application as is possible."[60] In McHugh J's view, the further development of the law of negligence was best served by the incremental approach. He described this approach in the following terms:

> In my view, given the needs of practitioners and trial judges, the most helpful approach to the duty problem is first to ascertain whether the case comes within an established category. If the answer is in the negative, the next question is, was the harm which the plaintiff suffered a reasonably foreseeable result of the defendant's acts or omissions? A negative answer will result in a finding of no duty. But a positive answer invites further inquiry and an examination of analogous cases where the courts have held that a duty does or does not exist. The law should be developed incrementally by reference to the reasons why the material facts in analogous cases did or did not found a duty and by reference to the few principles of general application that can be found in the duty cases.[61]

Consistently with his incremental approach, McHugh J approved of the use of categories of liability of pure economic loss, as adopted by the Supreme Court of Canada,[62] but since the case before the Court did not fall within any of the established categories, he noted that these categories are not closed.[63] Although ultimately the issue in all cases of negligence always depends on whether the defendant *"should have had* the interest or interests of the plaintiff in contemplation" before deciding whether to pursue, or not to pursue, a particular course of conduct, in deciding the issue of duty, reference had to be made to the "few general principles that appear to govern all cases of pure economic loss".[64] McHugh J considered that:

CLR 159, as supporting the existence of this "second discrete category of liability for pure economic loss."

58 (1999) 164 ALR 606, 618.

59 (1999) 164 ALR 606, 629.

60 (1999) 164 ALR 606, 629.

61 (1999) 164 ALR 606, 630.

62 See above.

63 (1999) 164 ALR 606, 631.

64 (1999) 164 ALR 606, 631, emphasis in original.

> The principles concerned with reasonable foreseeability of loss, indeterminacy of liability, autonomy of the individual, vulnerability to risk and the defendant's knowledge of the risk and its magnitude are, I think relevant in determining whether a duty exists in all cases of liability for pure economic loss.[65]

Those principles were then applied by McHugh J to the facts at hand. The principle against the indeterminacy of potential plaintiffs was ultimately the most critical factor in deciding to which of the appellants Apand owed a duty of care. McHugh J considered that only the growers of potatoes and the landowners on which the potatoes were grown were a sufficiently determinable class ("indeterminacy" depending, however not on the number and size of potential claims but on whether the defendant "knew or ought to have known of the number of claimants and the nature of their likely claim.")[66] Growers of potatoes were ascertainable as a class by the 20 kilometre geographical limit set by the Western Australian regulations. Since, however, processors of potatoes could be prevented from exporting to Western Australia even if operating outside the 20 kilometre radius around an affected land (if the premises or equipment being used had come into contact with potatoes from the quarantined area), McHugh J considered that this class of potential claimants was not a sufficiently ascertainable class.[67]

Justice Gummow

Given the failure of the courts to identify any general or "simple formula" for determining a duty of care in cases of pure economic loss, Gummow J (Gleeson CJ agreeing) considered the question one of "whether the salient features of the matter give rise to a duty of care owed by Apand."[68] In identifying these salient features, attention must be paid to the connections between the parties to determine whether their relationship is sufficiently close. It is by closely examining the facts of a particular case that the duty issue can be resolved; this, however, does not involve an adherence to an incremental approach. Gummow J observed:

> The case law will advance from one precedent to the next. Yet the making of a new precedent will not be determined merely by seeking the comfort of an earlier decision of which the case at bar may be seen as an incremental development, with an analogy to an established category. Such a proposition, in terms used by McCarthy J in the Irish Supreme Court, "suffers from a temporal defect - that rights should be determined by the accident of birth".

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65 (1999) 164 ALR 606, 632.

66 (1999) 164 ALR 606, 633. See also at 661 per Gummow J.

67 (1999) 164 ALR 606, 643-4.

68 (1999) 164 ALR 606, 659.

> The emergence of a coherent body of precedents will be impeded, not assisted, by the imposition of a fixed system of categories in which damages in negligence for economic loss may be recovered.[69]

Justice Gummow then proceeded to identify what he considered to be the salient features of the case, taking into account various "control mechanisms" limiting liability.[70] He stressed that Apand had knowledge of the existence of potato growers and processors within a 20 kilometre radius of the Sparnon's property, and of the consequent dangers of an outbreak of bacterial wilt. Further, since Apand already owed a duty of care to the Sparnons, it was not pursuing any legitimate business interests inconsistent with a finding of a duty of care. Finally, Apand controlled the risk of spreading diseased seed and the appellants were vulnerable to that control and could not protect themselves from the potential danger.[71] For these reasons, Gummow J believed there was a "close and direct"[72] relationship between Apand and all of the appellants so that Apand owed all the appellants a duty of care for breach of which purely economic loss could be recovered.

Justice Kirby

In *Pyrenees Shire Council v Day,*[73] Kirby J had applied a three-stage approach to determining the question of whether a duty of care arises in a given case (the *"Caparo"* test).[74] Essentially this approach requires (1) a determination of the reasonable foreseeability of the persons who might suffer harm as a result of the defendant's negligence, (2) a relationship of "proximity" of "neighbourhood" between the plaintiff and defendant, and (3) if the first two stages are satisfied, a determination of whether it is "fair, just and reasonable that the law should impose a duty", in the answering of which question policy considerations clearly need to be taken into account.[75]

In *Perre v Apand,* Kirby J reiterated and defended this approach against strong criticisms of it by a number of his fellow justices in that case.[76] Kirby J (perhaps somewhat reluctantly)[77] accepted that the three stages of inquiry did not constitute a "test" or "rule" as such, but that they did provide an "approach or methodology" and, what is more, an approach

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69 (1999) 164 ALR 606, 659 (footnotes omitted). The quote is from *Ward v McMaster* [1988] IR 337, 347.

70 Gummow J does not clearly explain how these control mechanisms operate in conjunction with the need to identify the salient features of the case nor, specifically, what these control mechanisms are.

71 (1999) 164 ALR 606, 660-5.

72 (1999) 164 ALR 606, 664.

73 (1998) 192 CLR 330.

74 The approach was proposed in *Caparo Industries Plc v Dickman* [1990] 2 AC 605, 617-18 per Lord Bridge

75 The three stages are set out in full in (1999) 164 ALR 606, 676.

76 (1999) 164 ALR 606, 610-11 per Gleeson CJ; at 624-6 per McHugh J; at 698 per Hayne J.

77 (1999) 164 ALR 606, 676, where he states that he was "prepared to agree".

> which obliges the decision-maker to face squarely the policy considerations which cannot be hidden behind a lawyer's conceit that liability in negligence for pure economic loss is an area of policy-free norms searching for a catalogue of "exceptions" to a very shaky general rule.[78]

In identifying relevant policy considerations, Kirby J highlighted the two main bases supporting the original exclusionary rule, namely the need to avoid indeterminate liability and interference with ordinary business conduct.[79]

Justice Kirby suggested[80] that the "proper" three-stage approach was consistent with the approach of the Canadian Supreme Court, as evidenced in the recent decision of *Bow Valley Husky (Bermuda) Ltd v Saint John Shipbuilding Ltd*,[81] a decision which will be returned to below.

In applying the three-stage approach to the facts in *Perre v Apand*, Kirby J indicated that the first stage, that of foreseeability, was readily established. Proximity (the second stage) was established by the appellants' physical proximity to the Sparnon's property, and the knowledge of Apand of the existence of potato growers and processors within that vicinity and their foreseeable (indeed, known) vulnerability to Apand's negligent conduct.[82] Finally, in considering policy matters, Kirby J rejected any suggestions of indeterminacy of liability or infringement upon the economic freedom of Apand.[83] Consequently, Apand owed all the appellants a duty of care.

Justice Hayne

Justice Hayne stressed the need for some further control mechanisms in the area of pure economic loss, since foreseeability of injury, though essential, is not enough to establish a duty of care.[84] Hayne J rejected "proximity" as such a control mechanism and suggested that the law in this area should develop incrementally:

> And so it must for as long as no unifying principle emerges. But that is far from saying that the law should develop without explicit recognition of the factors that are considered important in deciding whether there is a duty to take care to avoid pure economic loss. The identification of those factors is essential to any ordered development of the law in this area. In particular, if the matter were to be described in terms of whether to impose a duty would be "fair, just and reasonable" it is essential to

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78 (1999) 164 ALR 606, 676.

79 (1999) 164 ALR 606, 672, 688-9.

80 (1999) 164 ALR 606, 677-8.

81 (1997) 153 DLR (4th) 385.

82 (1999) 164 ALR 606, 687-9.

83 (1999) 164 ALR 606, 688-9.

84 (1999) 164 ALR 606, 696.

> identify what are the factors that lead to the application of these epithets.[85]

In Hayne J's view, the search for control mechanisms is driven by at least two considerations already noted above ("indeterminacy" and "autonomy") and these two considerations are critical in determining liability in a given case. Applying these two considerations, Hayne J concluded that, first, only growers and processors of potatoes for sale directly to Western Australia were a determinate class. Associated parties, such as landowners (not themselves growing potatoes) or growers selling to exporting processors, rather than exporting directly to Western Australia, were not within this determinate class.[86] Secondly, in deciding whether liability would infringe a defendant's economic autonomy, Hayne J proposed a negative test which considered whether such conduct, if *deliberately* carried out, would be illegal or tortious. In Hayne J's view "if deliberate conduct is neither unlawful nor tortious, why should the same kind of conduct (engaged in carelessly rather than deliberately) be tortious?"[87]

Justice Hayne does not indicate, however, whether an affirmative answer to this test (that is, if deliberate conduct is illegal or tortious) automatically supports the conclusion that *careless conduct* of the same type does infringe the autonomy of a defendant.

Justice Callinan

In determining whether a duty of care exists where only economic loss has been incurred, Callinan J considered that the "principle emerging" from *Caltex Oil*[88] could be applied. That principle requires consideration of whether the defendant "had knowledge or the means of knowledge that a particular plaintiff would be likely to suffer economic loss as a consequence of the defendant's negligence," and that this requires a careful consideration of all the relevant facts and a frank acknowledgment of the need to weigh up policy considerations.[89]

Callinan J surveyed the Australian authorities concerning the recovery of pure economic loss and concluded:

> The cases subsequent to *Caltex* in this country show that all judges are united in their opinions that, for policy reasons, there is a need for a control mechanism to limit the availability of relief for pure economic loss so that commerce, providers of services, courts and society generally will not have to bear the burden and uncertainty of incalculable claims

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85 (1999) 164 ALR 606, 698.

86 (1999) 164 ALR 606, 699-701.

87 (1999) 164 ALR 606, 701. At first blush, this view does appear logically persuasive, but may not be as self-evident as it seems. See discussion in Tony Weir, *Economic Torts* (Oxford University Press, 1997) 14-16.

88 (1976) 136 CLR 529.

89 (1999) 164 ALR 606, 710.

> by a mass of people whose identity or very existence may be unknown to the defendant. It is not surprising, having regard to the different factual situations in which pure economic loss has been suffered and will no doubt be suffered in the future, and the frank judicial acknowledgments that have been made of the relevance of public policy and social issues, that the principles governing or controlling the mechanisms to limit liability have not always been stated identically.[90]

Justice Callinan proceeded to identify the relevant principles and control mechanisms relevant to the case at hand, and held that Apand owed a duty of care to all of the appellants since it had effective control of the supply of diseased seed; the Western Australian regulations created a determinate class of potential plaintiffs, of whom Apand was aware; the appellants were vulnerable to Apand's obviously risky conduct;[91] and the geographical and commercial "propinquity" of the appellants to the Sparnon's property.[92]

Finally, since no legitimate commercial activity would be impeded as a result of holding Apand liable to the appellants, Callinan J concluded that all the appellants were owed a duty of care.

Analysis of the Judgments: A Court Divided?

Perre v Apand has done little to resolve the uncertainties surrounding the duty of care issue in the law of negligence, either generally or specifically in the context of pure economic loss. Not only are there seven separate judgments (many of them lengthy), a number of those judgments contain express and sometimes strong criticism of the reasoning and approaches of fellow justices. Given the almost unanimous *conclusions* of the members of the High Court as to whether Apand owed a duty of care to the various appellants, these divisions in reasoning, perhaps, are surprising.

The sharpest criticisms of "competing" approaches can be seen in the judgments of Kirby J, defending his three-stage approach, and McHugh and Hayne JJ, adopting an incremental approach and formulating specific rules or principles which determine the duty of care issue within (at least according to McHugh J) identified categories of liability. Kirby J, for example, considers the approach of McHugh J to be an attempt to formulate specific *rules* of universal application.[93] Kirby J considers such an approach to be flawed:

> The rules which [McHugh J] has expressed are not universal. They are no more than criteria, applicable in the facts of *this* case, for giving content

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90 (1999) 164 ALR 606, 716.

91 Callinan J seems to suggest that the *degree* of negligence also may be a relevant consideration; see at 719. See also at 641 per McHugh.

92 (1999) 164 ALR 606, 717-19.

93 Although McHugh J uses the term "principles" (at 632, for example), on the same page he notes that the law's policies against indeterminacy of liability and interference in autonomy, can be "translated into forms which can be applied as *rules* of law" (emphasis added).

> to the universal requirement of undertaking the policy analysis required by the third stage of the *Caparo* approach.[94]

Kirby J rejects the view that his approach involves the use of mere "labels",[95] and suggests that the same can be said of the criteria adopted by others.[96] In disagreement, McHugh J considers the concepts of "proximity" and the inquiry as to whether it is "fair, just or reasonable" to impose a duty, to have insufficient content and to be incapable of providing adequate criteria for predicting the issue of "duty of care" in a given factual circumstance.[97] Hayne J makes a similar point.[98]

Other disagreements are also evident in the Court's decision. For example, Gummow J (and thus Gleeson CJ), alongside Kirby J, expressly rejects the incremental approach as impeding the emergence of a "coherent body of precedents".[99] Gummow J, however, does not adopt a universal three-stage approach and instead emphasises the need to identify the "salient features" of each case in order, perhaps in continuation of the search for coherent principles relevant to different types of cases. Significantly, however, both Gummow and Kirby JJ stressed the need to develop the law cautiously and in light of existing authorities.[100] Another split is evident in McHugh J's express rejection and criticisms of Gaudron J's "infringement of precise legal rights" approach. McHugh J notes the difficulties in defining the meaning of rights.[101] Further examples could be given.

Given these divisions within the Court, it is perhaps ironic that a number of justices stressed the need to clarify the legal position in relation to duty of care (both generally, and within pure economic loss cases) in order to provide greater certainty in the law and to allow for predictable outcomes in future cases raising varying factual scenarios. Kirby J, for example, stated:

> This appeal affords this Court an opportunity to clarify the law. Plainly it is an area of law which calls out for such treatment. Only a measure of reconceptualisation will provide an enduring foundation for the application of legal principles to this and future cases in the place of the present disorder and confusion.[102]

It is an opportunity which the Court has, it seems, thrown to the wind. Instead, each of the members of the Court emphasised their own preferred approaches, exhibiting differences in philosophy and methodology in solving

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94 (1999) 164 ALR 606, 677 (emphasis added).

95 This view was expressed by Hayne J (1999) 164 ALR 606, 698.

96 (1999) 164 ALR 606, 684.

97 (1999) 164 ALR 606, 625-6.

98 (1999) 164 ALR 606, 697-8.

99 (1999) 164 ALR 606, 659.

100 (1999) 164 ALR 606, 659 and 667 respectively.

101 (1999) 164 ALR 606, 627 See also Feldthusen, n 21 *supra*, at 118-19.

102 (1999) 164 ALR 606, 668. See also at 628-30 per McHugh J.

"duty of care" issues in negligence, so that only one approach (that of Gummow J) has the support of more than one justice of the Court.

Certainly, it might be possible to describe some of the judgments in *Perre v Apand* in terms of one of the three approaches or methodologies identified by Sir Anthony Mason, outlined above. Kirby J, for example, supports a universally applicable duty of care approach based on *Caparo*, within which approach the concept of proximity continues to have an essential role as a unifying principle. Nonetheless, to attempt to place each of the individual judgments within such methodological "categories" is difficult. McHugh J, for example, adopts a combination of the second and third approaches as identified by Sir Anthony Mason.

It is suggested that it is ultimately the divisions within the Court over the broad methodological questions which have disguised the broad similarities of reasoning underlying *all* of the judgments in *Perre v Apand*. Only by elucidating these similarities, it is suggested, can the law of negligence (at least in the context of pure economic loss) progress to achieve the very ends of greater certainty and predictability of outcomes which many members of the High Court have expressed to be desirable. After a consideration of the different approaches in various common law jurisdictions (and writing before *Perre v Apand*), Sir Anthony Mason has concluded that "[w]hen one looks below the level of theoretical discussion in the judgments to the actual decisions and the basic elements of the decisions, a greater pattern of uniformity ... emerges."[103] I suggest that the same conclusion can be drawn in relation to the various judgments in *Perre v Apand*.

The Common Features of the Judgments in *Perre v Apand*

A consideration of all the judgments in *Perre v Apand* suggests that the seemingly considerable differences of opinion expressed therein may be more apparent than real. A number of unanimously (or nearly so) held views are evident in the judgments:

(1) All the justices of the High Court accept that the test of foreseeability on its own is insufficient to establish a duty of care.

(2) All the justices either expressly or impliedly consider *Caltex Oil*[104] to be correctly decided and to provide a starting point for determination of the duty of care issue in relation to pure economic loss arising from negligent acts or omissions causing damage to a third party's property.

(3) A number of justices commented on the unsatisfactory state of the law and the need for the Court to give guidance in resolving the difficulties. It is doubtful that those justices who did not expressly comment on this would disagree with such a view.

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103 Mason, n 4 *supra*, at 25.

104 (1976) 136 CLR 529.

(4) All of the members if the High Court accept that cases of pure economic loss raise special problems and that, consequently, there is a need to consider certain "control mechanisms", or special factors establishing a close relationship, before a duty of care may be said to arise.[105] Although Kirby J considers that his three-stage approach is applicable to all cases of negligence, he also accepts that in the context of pure economic loss, certain identifiable policy considerations limiting recovery are particularly important.[106]

(5) All members of the High Court accept that at least two factors limiting liability are critical in determining a duty of care in cases of pure economic loss namely the need to avoid (i) indeterminacy of liability and (ii) unreasonable infringements on the autonomy of the defendant. To be sure, within the different judgments, these factors are described as performing different roles or as being relevant at different stages of the inquiry. For example, Kirby J considers these factors are relevant considerations to be weighed up merely at the policy stage of inquiry;[107] whereas McHugh and Hayne JJ seem to elevate them to the status of rules or principles, so that if there is indeterminacy of liability or an unwarranted infringement of autonomy, then liability will be precluded.

(6) Most of the members of the Court expressly acknowledge the role of policy in determining the duty issue or at least do not exclude such policy considerations.[108] Although McHugh J considers the third stage of the *Caparo* inquiry to involve the use of indeterminate terms such as "fair" and "just", he nonetheless accepts that such notions may be "invoked as criteria of last resort".[109] Presumably, since the "fair, just and reasonable" inquiry is widely used to include considerations of policy, McHugh J would also accept such considerations as a "last resort"

(7) All of the members of the Court identified other principles or matters relevant in restricting a duty of care and thus limiting liability, although these "have not always been stated identically."[110] Undeniably, however, at least some of the following are of utility in determining a duty of care for relational economic loss: the vulnerability of the plaintiffs; control by the defendants of the risks or sources of danger; some form of physical or commercial proximity (or propinquity, as some members of the Court now prefer); and knowledge by the defendants of special facts, especially

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105 (1999) 164 ALR 606, eg, at 609 per Gleeson CJ; at 613-15 per Gaudron J; at 629-33 per McHugh J; at 660 per Gummow J; at 699 per Hayne J; at 716 per Callinan J.

106 (1999) 164 ALR 606, 677, 688-90.

107 (1999) 164 ALR at 688-90.

108 (1999) 164 ALR 606, 615-16 per Gaudron J; per Kirby J throughout his judgment; at 716 per Callinan; query Hayne J, who at 699 notes that "additional considerations" may need to be taken into account.

109 (1999) 164 ALR 606, 626. See also at 630, where McHugh J states that the reasons for imposing a duty should "reflect policies that the courts have recognised as relevant."

110 (1999) 164 ALR 606, 716 per Callinan J.

> ones identifying the plaintiffs individually or as members of an ascertainable group at risk from the defendants' negligent conduct.
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> As Callinan J pointed out, however, once such relevant factors are identified, they do not provide a mechanical guide to determining individual cases, as different weight may be placed on competing factors by different judges and "quite reasonably" so.[111]
>
> Given the considerable similarities between the relevant factors identified by the various members of the Court, is it all that significant under which rubric or label such factors are considered, or at what stage of the duty inquiry they become relevant? In other words, does it matter whether they are seen as "rules" or "principles" limiting liability, or as "control mechanisms", or as relevant factors within specific categories of cases, or as relevant policy considerations? Clearly, such differences in methodology and approach would be significant if they gave rise to different *outcomes* in the cases. But as was already noted, the decision of the Court as to liability and as to which appellants were owed a duty of care was almost unanimous. All justices devoted much of their analysis to the question of the indeterminacy of some of the classes of appellants, with only the conclusions of McHugh and Hayne JJ differing as a result of their application of this consideration to the facts.

Given the common conclusions as to liability reached by most of the members of the Court, it is suggested, with respect, that the Court has failed to grasp the opportunity to put aside differences in methodology and identify the common themes of liability in cases of pure economic loss caused by negligent acts or omissions. The Court failed to provide some certainty and guidance in the application of the law to complex cases, and if the highest appellate court does not provide such guidance, where should it come from? There is much to be said for the view that there ought to be an emphasis within the judiciary on handing down concurring or joint judgments, at least in those cases in which all are agreed in the outcome of the case.[112] It is interesting to note that in *Perre v Apand*, Callinan J ignored the exchanges of criticism engaged in by some of his fellow justices and sought to encompass a range of different concepts utilised by different justices in reaching his own conclusions. He stated:

> I turn now to a consideration of the factors which in combination I think relevant in this case and which establish a sufficient degree of proximity [compare Kirby J], foreseeability, a special relationship [compare the "close relationship" of Gummow J], determinacy of a relatively small class [compare particularly McHugh and Hayne JJ], a large measure of control on the part of the respondent [compare particularly Gaudron J],

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111 (1999) 164 ALR 606, 716-17, citing J Stapleton, "Duty of Care Factors: a selection from the Judicial Menu" in Cane & Stapleton (eds) *The Law of Obligations* (1998), 88.

112 See Justice Doyle, "Judgment Writing: Are There Needs For Change" (1999) 73 *Australian Law Journal* 737, generally, and 738-9.

and special circumstances justifying the compensation of the appellants for their losses.

Canadian Developments

It is proposed to conclude this article by returning to the developments in the Supreme Court of Canada in relational economic loss cases, to provide a contrast with the differences evident in the opinions of the judges of High Court in *Perre v Apand*. The developments in Canadian cases provide an illustration of how apparently significant differences in approach can be rationalised in order to provide uniform guidance for resolving problems. The unanimous decision of the Supreme Court in *Bow Valley Husky (Bermuda) Ltd v Saint John Shipbuilding Ltd*[113] has already been noted above, but it is significant that that unanimity was achieved only five years after another relational economic loss case, *Canadian National Railway Co v Norsk Pacific Steamship Co*[114] (*"Norsk"*), demonstrated seemingly considerable differences in approach within the Court. In *Norsk*, the Supreme Court had to consider the liability of a defendant who had negligently damaged a government-owned railway bridge which was principally used by the plaintiff, who had a contractual relationship with the owner. The Supreme Court held, by a four to three majority, that the defendant owed the plaintiff a duty of care in relation to its economic loss, essentially the costs of re-routing its trains. Of the majority, McLachlin J (with L'Heureux-Dube and Cory JJ concurring) applied the two-step test of liability set out above.[115] Although nominally, this involves one less step of analysis than propounded by Kirby J in *Perre v Apand*,[116] in substance it is not dissimilar to Kirby J's approach since the first step requires a consideration of two factors, namely the foreseeability of a plaintiff and further, a sufficiently proximate relationship between the defendant and plaintiff. Once these two factors are satisfied and a duty of care is prima facie established, the second step enquires whether such a duty is negated by policy considerations. By way of contrast, La Forest J (Sopinka and Iacobucci JJ concurring), commenced his analysis from the basis of a general exclusionary rule and then articulated exceptions to that rule where recovery would be permitted.[117] (The fourth member of the majority, Stevenson J, applied the test of Mason J in *Caltex Oil*[118] as to whether the plaintiff as a specific individual was reasonably foreseeable as someone who would suffer financial loss as a result of the defendant's negligence.)[119] The three

113 (1997) 153 DLR (4th) 385.

114 [1992] 1 SCR 1021; 91 DLR (4th) 289.

115 See text to notes 35-36 above

116 (1999) 164 ALR 606.

117 This simplified summary is taken from the judgment of McLachlin J (La Forest J concurring; Iacobucci, Gonthier, Cory & Major JJ, concurring with this part of the judgment) in *Bow Valley Husky (Bermuda) Ltd v Saint John Shipbuilding Ltd* (1997) 153 DLR (4th) 385, 405.

118 (1976) 136 CLR 529.

119 (1992) 91 DLR (4th) 289, 388-9.

dissenting justices and three justices of the majority, however, agreed that if the plaintiff was in a "joint venture" with the owner of the bridge, liability would be found. The differences in result in the case turned on the differences as to the meaning of "joint venture" for the purposes of this rule.

In 1997, in *Bow Valley Husky,*[120] the Supreme Court reconsidered the issue of liability for the negligent infliction of relational economic loss, after a number of intervening economic loss cases had signalled a confirmation of the Court's commitment to the two-step test of duty of care.[121] In her judgment, McLachlin J held that earlier differences in the methodologies evident in *Norsk* should not disguise the essential similarities in the reasoning of the Court. McLachlin J said that "[t]he differences in methodology is not, on close analysis, as great as may be supposed."[122] She then proceeded to outline the common propositions accepted by the Court, as already set out above.[123]

CONCLUSION

Bow Valley Husky demonstrates, contrary to the considerable differences evident in the judgments of McHugh and Kirby JJ, in particular, that it is possible to adopt a generally applicable methodology governing all negligence cases and utilising general concepts such as foreseeability and proximity (as Kirby J does, but contra McHugh J), whilst at the same time recognising (as McHugh J does, but contra Kirby J) that there may be different categories of case in which pure economic losses may be sustained and for which different factors and considerations may be particularly relevant.[124]

Though the Canadian Supreme Court's approach is unanimous, this does not mean that it has not been subjected to criticism. Professor Feldthusen has suggested that "Canada has a well developed set of rules to govern the recovery of pure economic loss and a virtual absence of any rationale to support them."[125] He considers that there has been a lack of proper analysis of duty and instead, the use of "relatively empty words"[126] and the "question-begging concepts of foreseeability and proximity."[127] Such terms are only

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120 (1997) 153 DLR (4th) 385.

121 The cases were *Winnipeg Condominium Corporation no 36 v Bird Construction Co* [1995] 1 SCR 85; 121 DLR (4th) 193 (economic loss arising from defective building); *D'Amato v Badger* [1996] 2 SCR 1071; 137 DLR (4th) 129 (relational economic loss); and *Hercules Management Ltd v Ernst & Young* [1997] 2 SCR 165; 146 DLR 577 (economic loss arising from reliance on financial audits).

122 (1997) 153 DLR (4th) 385, 405

123 See text to note 38.

124 See also *Hawkins v Clayton* (1988) 164CLR 539, where Deane J, the foremost advocate in the High Court of a unifying concept of proximity, considers that there may be different categories of economic loss. See also Mason, n 4 *supra*, at 18.

125 Feldthusen, n 21 *supra*, at 85.

126 *Ibid*, at 97.

127 *Ibid*, at 105

useful, in Professor Feldthusen's opinion, if they "direct legal actors' attention to a common range of rational and relevant considerations."[128] By way of contrast, he considers (writing before *Perre v Apand*) that the Australian High Court generally has engaged in a much "deeper and richer analysis of duty" of care and has placed more emphasis on identifying the reasons for imposing a duty of care, if at all.[129]

If this view is correct, it is all the more unfortunate that the High Court has failed to recognise the considerable similarities of the "deeper and richer" analysis engaged in by the various justices and the similarities of the specific relevant considerations being applied by all the justices, to reach essentially the same conclusions. The High Court has failed to grasp the opportunity, *Bow Valley Husky*-like, to give some guidance as to a possible way forward. Having six or seven seemingly different approaches to problems of pure economic loss is of little assistance in providing certainty and predictability in the law. The differences in methodology, as important as they might seem, did not lead to significantly different outcomes in *Perre v Apand* and involved the application to the facts of, and emphasis upon, essentially the same critical and determinative factors.

128 *Ibid*, at 119.

129 *Ibid*, at 97.