BY DAMIAN SCATTIN
AND MELANIE HINDMAN, BRISBANE

Pure economic LOSS

"it is disappointing to see that in an area that so desperately required a definitive statement of the law, none has been provided."

The circumstances in which a plaintiff may recover damages for pure economic loss has been described as "the most controversial area of our law of tort".[1] These cases have been relatively few and far between and the courts have not assisted legal practitioners to conquer this fledging area of tort by their failure to expound principles from which practitioners can advise clients with certainty as to their rights to recover damages of this type.

The High Court has recently had cause to examine the principles of pure economic loss in the matter of *Perre v Apand Pty Ltd*, judgment handed down on 12 August 1999. The full bench has handed down seven separate judgments, and whilst some common threads can be drawn, it is disappointing to see that in an area that so desperately required a definitive statement of the law, none has been provided. Regardless, the case is a step forward in that consensus has been reached on some principles of law relating to these claims, although no single ratio is evident.

The Facts

Apand Pty Ltd (the respondent) was a major operator in the potato crisping market in Australia and was heavily involved in research into new varieties of potato.

Apand arranged for the importation of tissue culture of the Saturna variety of potato, as a potential variety of potato for a winter crop. The production of the seed was initially undertaken at the Victorian Seed Potato Certification Scheme which multiplied seed potatoes in conditions designed to keep them disease-free.

The seed was then grown in the Koo Wee Rup Swamp area. This area had long been used for potato growing but was low-lying and susceptible to diseases. A representative of Apand invited five of Apand's contract growers in South Australia to grow an experimental crop of Saturna potatoes from the seed grown in the Koo Wee Rup Swamp area. The Sparnons were one of the contract growers who agreed to participate.

Five of the six experimental crops of Saturna potatoes, planted at Apand's initiative were found to be affected by bacterial wilt. The outbreak of the disease was found to have arisen from the production in the Koo Wee Rup Swamp area. An outbreak of bacterial wilt occurred on the Sparnons' property.

The appellants were a number of

potato growers and processors located in close proximity to the Sparnon's property. Potatoes were grown by the appellants on land two and three kilometres from the Sparnon's property. A washing and packing facility was located three kilometres from the Sparnon's property.

A large proportion of the appellants' potato crop was ordinarily exported to Western Australia. In 1992, some 79.2% of the appellant's potatoes were exported to Western Australia. The Western Australian market was very profitable for the appellants. Where potatoes in the local market would sell for $300 per tonne, the Western Australia market would pay $670 per tonne.

The bacterial wilt from the Sparnon's property did not infect the potatoes grown by the appellants.

The appellants' cause of action arose out of a piece of Western Australian legislation prohibiting the import of any potatoes that are harvested, washed or packed within 20 kilometres of a known outbreak of bacterial wilt in the last five years. The outbreak of bacterial wilt on the Sparnon's property effectively stopped the appellants' lucrative exporting of potatoes to Western Australia for five years. The appellants' claim was for pure economic loss not connected to any damage to their property.

The respondent's knowledge

It was found by all the judges of the High Court that Apand knew of the potential impact of bacterial wilt and specifically the Western Australian legislation. The Court referred to an internal memorandum sent within Apand that referred to the impact of the Western Australian legislation on farmers affected.

The decision of the Full Federal Court

The Full Federal Court was unanimous in their decision to reject the Perre's claim. A fear of Apand being exposed to indeterminate liability was the primary reason.

The appeal to the High Court

The High Court found in favour of the appellants and reversed the decision of the Full Federal Court remitting the issue of damages to a single judge.

FACTORS CONSIDERED

Exclusionary rule

It was generally agreed that the exclusionary rule is a bright line determining liability in pure economic loss cases. It simply denies recovery of damages. McHugh J pointed out that this can cause injustices and since the decision of *Hedley Byrne*, exceptions to the exclusionary rule have been recognised. The exclusionary rule is certain and the law requires predicability but the rule should not be adopted for that reason only. Stare decisis is a good principle but it should not trump the need for a desirable change in the law.

Most of the judges examined the previous cases on pure economic loss, particularly the 1976 High Court decision of *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* which has been criticised in a number of other jurisdictions.[2] The High Court upheld the decision stating that it had been decided correctly. Gleeson CJ stated that *Caltex* does not expound that there is a general rule that one person owes to another a duty to take care not to cause reasonably foreseeable financial harm. However, despite the lack of a single ratio decidendi, the case made clear that Australia no longer adheres to the strict exclusionary rule.

Evolution of this area of law

McHugh, Kirby, Hayne and Callinan JJ stated that the law in this area is developing and must develop incrementally. There was general agreement that there is no unifying principle at this time and through the cautious development of the law, a principle will emerge.

McHugh J took the approach that it must be ascertained whether the case at hand falls within an established category. If not, was the harm the plaintiff suffered a reasonably foreseeable result of the defendant's acts? If the answer to that question is yes, one must look to other cases to see whether a duty exists.

Gummow J was prepared to accept that the imposition of a fixed set of categories for which damages for economic loss can be received would impede the evolution of the tort. The categories, he said, are not closed.

Kirby J, pointed out that claims for economic loss are increasing and the law is not settled. An incremental development will properly set the boundaries. However, Kirby J went somewhat further and said that this case provided an opportunity to clarify the law and this required reconceptualisation to provide enduring foundations for the application of legal principles. In this sense, Kirby J advocated the transparent application of policy to determine liability.

Callinan J agreed that the law is developing in a piecemeal fashion but further stated that the principles of *Caltex* must be applied; this was not a discretionary matter. It is not yet possible to identify a bright line of demarcation of pure economic loss cases where damages are recoverable and those where they are not.

Ascertainable class

The fear of creating indeterminate liability appears to be a primary force in determining whether an action for pure economic loss will succeed. As Kirby J said (at 60), "a line must be drawn to limit indeterminate liability".

In this matter, the entire High Court held that the appellants who grew the potatoes that were no longer available for export to the lucrative Western Australian market were of an ascertainable class.

McHugh J, for example, said that the appellants were members of a class whose members, numerous or not, were ascertainable by Apand. Further, indeterminacy depends on what the defendant knew or ought to have known of the number of claimants and the nature of their likely claims not the size and number of those claims.

The liability that Apand may face may be large but was not indeterminate. McHugh J was even prepared to accept that the class can be determinate where the members of the class are not individually known to the defendant but could have been ascertained by the defendant. Liability will only be indeterminate where liability can not be readily calculated.

Gaudron J pointed out that indeterminate liability is a policy consideration, not a rule of law. Kirby J agreed dealing ▶

with the issue of indeterminacy in the policy step of the three step approach adopted by him.

It would not necessarily be fatal to the recognition of a duty of care that the duty is owed to a class whose members can not be identified with complete accuracy. Further, it was stressed that the size of the group is an irrelevant consideration.

It was stated that similarly to *Caltex*, Apand knew of the class of persons who would be affected. The Western Australian legislation provided an objective criteria by which the class of claimants could be identified.

Proximity

A majority of the Court decided that proximity is no longer a unifying criterion for duty of care. Gaudron J was perhaps the harshest critic saying that proximity serves no purpose beyond signifying that it is necessary to identify a factor of special significance in addition to foreseeability of harm before the law will impose liability.

McHugh, Hayne and Callinan JJ agreed that proximity must be used in combination with other factors. Kirby J, used proximity as step two of his three step approach to determine whether liability arose but stated that proximity alone was not a determinative factor.

While the Court made clear that proximity is no longer a determinate of liability for pure economic loss, the Court has not provided a unified approach on what should be the means of controlling liability.

Foresight

The Court unanimously decided that Apand's foresight of harm was a relevant consideration to determine if a duty of care existed. It was agreed that the internal memorandum was fatal to Apand's argument that the risk to the appellants was not foreseen. Not only had Apand ought to have foreseen the risk but it actually did foresee the risk as was evident from the memorandum.

McHugh J further stated that where property was damaged, knowledge or reasonable foresight of harm itself was sufficient to impose duty of care but this is not the case with economic loss. More than mere forseeability was required.

Callinan J thought it important that Apand had an especially heightened awareness of the dangers of bacterial wilt evidenced from the internal memorandum.

Vulnerable persons

Five members of the Court (Gleeson CJ, Gaudron, McHugh, Gummow and Callinan JJ) considered the vulnerability of the appellants a factor to be considered. Of particular importance was the fact that the appellants were powerless to protect their own interests and could not appreciate the risk they were exposed to.

Further, Apand had knowledge of this class of vulnerable persons. This was said to bring Apand and the appellants into such a close and direct relation as to give rise to a duty of care.

Policy – what is fair, just and reasonable

Although Kirby J embraced the principle of policy being an important factor in deciding these types of claims, he did not receive substantial support from the rest of the bench. McHugh J for instance stated that it is not good enough to say that a Court must decide if a duty exists in accordance with the principles of fairness, justice and equity for that approach provides no assistance to lower Courts or practitioners who require more certainty in the law. Policy, McHugh stated, should be used as a last resort.

Hayne J agreed to the extent that he did not believe the principles of fairness, justice and reasonableness assisted. Callinan J took a slightly different approach and said that you must look to whether imposing a duty is reasonable or proportionate. The question to ask is whether the damages likely to be available are unreasonable or disproportionate in all the circumstances.

Second Tier Claimants

Only McHugh and Hayne JJ drew distinctions in terms of possible recovery between the potato growers and others. McHugh J said allowing recovery to persons other than the potato growers stretched the concept of determinancy.

McHugh was not prepared to accept that the processors of the potatoes were of a determinate class. For instance, the class could extend to persons outside the 20 kilometre radius. Hence recovery would be excluded.

Hayne J referred to that fact that only the growers were directly affected. There was no sound basis to distinguish the other appellants (namely the potato processors) from anyone else who suffered a financial loss (for example the transport companies retained by the appellants to carry potatoes to Western Australia).

Although this was the minority view, some of the majority hinted that although they were prepared to accept that the processors fell within the ascertainable class, those classes of claimants with more tenuous connections to the original negligent act may have more difficulties proving their damage.

The different approaches – a summary

Gaudron J, stated that in essence there must be some special factor before a court will impose a duty of care in the protection of commercial interests. She stated that the rights infringed on in this case were rights to sell potatoes in the Western Australian market.

She imposed the duty upon Apand saying that where a person knows or ought to know that their acts may cause loss of legal rights possessed and the person is not able to protect their own interests, the law should impose a duty of care to take steps to avoid a foreseeable risk of economic loss resulting from loss of those rights.

Kirby J said that the proper approach to determine if a duty of care is owed is the three step approach adopted in *Caparo* which has support in other jurisdictions. The three steps involve an examination of forseeability, proximity and policy. One of these on its own is not sufficient to limit the scope of liability.

In respect of the damage being foreseeable by Apand, Kirby J stated that there was a real risk of the damage occurring that was not far-fetched. On the proximity issue, Kirby J drew attention to the close physical proximity. Indeterminate liability was a policy consideration that had to be consid-

ered. Kirby said there was no risk of indeterminacy as the vulnerability of persons was measured by exact geographical references (that is 20 kilometres from a bacterial wilt outbreak). A further policy consideration was whether holding that a duty exists interfered with Apand's economic freedom; that is its autonomy and competitive operation of the market place. Kirby J held that neither limited liability in this circumstance.

McHugh J agreed with Kirby J on the point that imposing a duty did not interfere with Apand's commercial freedom because Apand were already under duty to take reasonable care of the Sparnons.

McHugh J disagreed specifically with both Gaudron and Kirby JJ's approaches. He preferred to examine firstly if the circumstances fell within the ambit of any of the previously decided cases. It was determined that it did not and was a novel case. Accordingly, he then examined how vulnerable the appellants were to incur loss in the face of Apand's conduct. It was also necessary to look to the actual knowledge of Apand concerning the risk and the magnitude and to questions of indeterminate liability.

Gleeson CJ and Gummow, Hayne and Callinan JJ had the most similar approaches. All agreed that there was no simple formula to determine if duty of care arose. Each looked to a number of factors in combination to determine if a duty was present.

Callinan J, presented the most all encompassing view stating that the following factors should be considered - sufficient degree of proximity, foreseeability, a special relationship, determinancy of a relatively small class, a large measure of control on the part of the respondent and special circumstances justifying the compensation of the appellants for their losses. Callinan J further looked at the fact that what had occurred was not merely the result of merely legitimate, competitive or commercial activity.

An opportunity missed?

Although an opportunity was provided, the Court failed to provide a unifying coherent theme to assist practitioners and lower Courts in their struggle with this complicated area of law. Although several factors to examine in determining whether a duty of care, breach of which allows recovery for pure economic loss, exists, have been elucidated, no clear guidelines have been set by the Court to increase predicability. It appears that the courts are likely to engage in a balancing of factors to determine if the relevant duty exists. The numerous approaches of the members of the High Court, indicate that this area of law is far from settled.

1 Lord Steyn, Forward to Bernstein, *Economic Loss*, 2nd ed. (1998) at xiii.

2 Most notably by the Judicial Committee of the Privy Council in *Candlewood Navigation Corporation Ltd v Mitsui OSK Lines Ltd* [1986] AC 1