Economic Loss

Emil J. Hayek*

INTRODUCTION

The aim of this article is to survey the development of the liability for pure economic loss through cases. There have been significant developments in the law of negligence over the last two decades which have consequentially affected the liability for pure economic loss. As this liability is almost entirely a creature of judge-made law, this examination shall concentrate on selected leading cases and salient principles and *dicta* emerging from them. Three common law jurisdictions — namely, England, Australia and Canada — are the subjects of this article. These jurisdictions have common origin and similar development and their interdependence in the area reviewed is well manifested by numerous references to citations from the cases within these jurisdictions.

Pure economic loss is a financial loss suffered by the plaintiff as a result of negligence of the defendant and which is not consequent upon injury to the plaintiff's own person or property. It is distinguished from consequential economic loss, which is always claimed by the same party who has suffered physical damage.[1] Estey J stated that '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.'[2]

Pure economic loss is generally not recoverable. Professor Fleming explains the ingrained opposition of the common law courts to finding liability for pure economic loss as follows:

> [T]he burden of compensating anyone besides the primary casualty is feared to be unduly oppressive because most accidents are bound to entail repercussions, great or small, upon all with whom he had family, business or other valuable relations.[3]

---

* J.U.Dr. (Prague), of the Bar of Ontario; Emeritus Professor of Law, University of Ottawa; Visiting Professor, Faculty of Law, James Cook University of North Queensland, Townsville, Queensland.

1 cf. B. Feldhusen, 'Pure Economic Loss Consequent upon Physical Damage to a Third Party' (1977) 16 *University of Western Ontario Law Review* 1, 4.

2 *Attorney-General for the Province of Ontario v Fatehi* [1984] 2 SCR 536, 542; 56 NR 62.

3 J.G. Fleming, *The Law of Torts* (8th ed., Sydney: Law Book Co. Ltd, 1992), 179.

The area of debate is not whether a plaintiff should be able to recover in a negligence action for pure economic loss. There seems to be no reason for denying such recovery in principle. The operating factor appears to be policy. The common law is afraid of opening the floodgates. This closed door policy is apparent in the often quoted words of Cardozo CJ in the 1931 American case of *Ultramares Corp. v Touche*:

> Recovery of economic loss in the absence of physical damage or personal injury would expose defendants to liability in an indeterminate amount for an indeterminate time to an indeterminate class.[4]

Cardozo CJ's statement reflects the traditional common law's position towards pure economic loss, the so-called exclusionary rule.

ENGLAND

In 1875, in *Cattle v The Stockton Waterworks Co.*,[5] the exclusionary rule was established in England which denied liability in negligence for pure economic loss. The plaintiff had entered into an agreement with a landowner to dig a tunnel under a roadway for a fixed fee. Due to the defendant company's negligence, water seeped into the excavation dug by the plaintiff which resulted in his work being delayed, causing him greater expense and less profit. The court denied him recovery because he did not own the property and consequently had no right of action for pecuniary loss. The court seemed to be concerned about not opening up the possibility of future defendants having a burden imposed on them that would be out of proportion to their wrongdoing. This is reflected in the judgment of Blackburn J:

> It may be said that it is just that all such persons should have compensation for such a loss, and that, if the law does not give them redress, it is imperfect. Perhaps it may be so. But, as was pointed out by Coleridge, J., in *Lumley v. Gye* 2 E. & B. at p. 252; 22 L.J. (Q.B.) at p. 479, Courts of justice should not 'allow themselves, in the pursuit of perfectly complete remedies for all wrongful acts, to transgress the bounds, which our law, in a wise consciousness as I conceive of its limited powers, has imposed on itself, of redressing only the proximate and direct consequences of wrongful acts.'[6]

This sentiment is clearly echoed in the far more often quoted statement by Cardozo CJ above.

Since *Cattle v The Stockton Waterworks Co.*, the exclusionary rule was generally followed and prevented the recovery for pecuniary loss in the

---

[4] (1931) 255 NY 171, 179.
[5] (1875) LR 10 QB 453.
[6] *Id.* 457.

absence of physical injury or damage. Professor J.A. Smillie commented that prior to 1963 (that is, the *Hedley Byrne* case), a rule denying liability in negligence for pure economic loss had been applied consistently for about 90 years.[7] And Gibbs J stated in *Caltex:*

> However, before the decision in *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd.* it appeared to have been established that a plaintiff who sustained economic loss which resulted from loss or damage negligently caused to the property of a third person was not entitled to recover damages. The simplest explanation of these decisions appears to be that it was thought that the wrongdoer owed the plaintiff no duty to take care to avoid causing him loss which was purely economic, although in some cases the reason given was that the damage was too remote, for in this as well as in other branches of the law of negligence questions of duty of care and remoteness of damage are difficult to disentangle.[8]

There were, of course, a few exceptions. A notable one is *Greystoke Castle,*[9] relied upon by Lords Devlin, Hodson and Pearce in *Hedley Byrne*[10] and Stephen J in *Caltex.*[11] Lord Hodson referred to Lord Roche's example of a damage to a carrier's lorry caused by the negligence of the driver of another lorry. In such a case the owner of the goods, although they are not damaged, may recover from the negligent driver the expenses — for example, costs of unloading, reloading and on-carriage by the new lorry.[12] Lord Devlin said that *Greystoke Castle* 'makes it impossible to argue that there is any general rule showing that such loss [financial loss without physical injury to the plaintiff's property] is of its nature irrecoverable'.[13]

Lord Pearce relied on *Greystoke Castle* for a proposition that 'economic loss alone, without some physical or material damage to support it, can afford a cause of action. ...'[14] Stephen J in *Caltex* refers to *Greystoke Castle* as an example of a right of recovery for pure economic loss.[15]

The modern concept of the law of negligence originated in *Donoghue v Stevenson*[16] where Lord Atkin, in his classic passage, laid down the general principle of the law of negligence, the so-called neighbourhood test, namely, 'You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour', and 'neighbour' is described as one so closely and directly affected by the act as to have been contemplated as so affected by the actor. It did not

---

7 J.A. Smillie, 'Negligence and Economic Loss' (1982) 32 *University of Toronto Law Journal* 231.

8 *Caltex Oil (Aust.) Pty Ltd v The Dredge 'Willemstad'* (1976–77) 136 CLR 529, 544–5.

9 *Morrison Steamship Co. Ltd v Greystoke Castle (Cargo Owners)* [1947] AC 265.

10 *Hedley Byrne & Co. Ltd v Heller & Partners Ltd* [1964] AC 465 (HL).

11 (1976–77) 136 CLR 529.

12 *Hedley Byrne & Co. Ltd v Heller & Partners Ltd* [1964] AC 465.

13 *Id.* 518.

14 *Id.* 536.

15 (1976–77) 136 CLR 529, 570–2.

16 [1932] AC 562 (HL).

have any immediate effect on liability for economic loss, as it was considered that Lord Atkin's 'neighbourhood principle', with its constituents of foreseeability and proximity, applied only where damage resulted from physical injury or property damage.

The real breakthrough came in 1963 in the *Hedley Byrne* case,[17] which extended the liability for negligence to encompass liability for negligent misstatement and pure economic loss. As Lord Denning wrote, 'Whereas *Donoghue v Stevenson* dealt with negligent acts, *Hedley Byrne* dealt with negligent statements.'[18] It would be inappropriate not to mention Lord Denning's dissent in *Candler v Crane, Christmas & Co.*,[19] where he made a valiant attempt to introduce liability for negligent misstatement 12 years before *Hedley Byrne*. Lord Denning's analysis has been described as masterly by Lord Bridge of Harwich in *Caparo Industries PLC v Dickman*.[20]

Hedley Byrne is the foundation of the concept of liability for economic loss. It had been relied upon in *Caltex*,[21] and the speeches of the Law Lords are referred to in many subsequent cases. Of particular significance are Lord Reid's statements of the different consequences of negligent words and negligent acts, the standards of a reasonable man,[22] and assumption of responsibility and reliance,[23] Lord Morris of Borth-Y-Gest's emphasis on reliance[24] and Lord Devlin's reference to relationship 'equivalent to contract'.[25]

In the third case of the trilogy, the *Borstal Boys*[26] case, the concept of negligence was invoked to make the Home Office (Public Authority) liable in respect of its statutory duties. Distinction was drawn in that case between policy (discretionary) and operational decisions. Public authorities are not to be held liable if someone is injured or damaged in consequence of policy decisions (e.g. to keep an open Borstal, or to give the boys a greater deal of freedom), but they are liable for negligence at the operational level (e.g. the three supervising officers went to bed instead of supervising the Borstal boys). This distinction was further elaborated and applied in *Anns*[27] and in two Canadian cases, *City of Kamloops v Nielsen*[28] and *Just v British Columbia*.[29] Lord Reid also expanded the concept of negligence by suggesting that Lord Atkin's formulation should be regarded as a statement of principle:

---

[17] [1964] AC 465.
[18] Lord Denning, *The Discipline of Law* (London: Butterworths, 1979), 245.
[19] [1951] 2 KB 164.
[20] [1990] 2 WLR 358, 369.
[21] (1976–77) 136 CLR 529, 549–52 per Gibbs J.
[22] *Hedley Byrne & Co. Ltd v Heller & Partners Ltd* [1964] AC 465, 482.
[23] *Id.* 486–7.
[24] *Id.* 502–3.
[25] *Id.* 529.
[26] *Home Office v Dorset Yacht Co. Ltd* [1970] AC 1004 (HL).
[27] *Anns v Merton London Borough Council* [1978] AC 728 (HL).
[28] [1982] 2 SCR 2.
[29] (1989) 64 DLR (4th) 689 (SCC).

> *Donoghue v Stevenson* [1932] A.C. 562 may be regarded as a milestone, and the well-known passage in Lord Atkin's speech should I think be regarded as a statement of principle. It is not to be treated as if it were a statutory definition. It will require qualification in new circumstances. But 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. For example, causing economic loss is a different matter; for one thing, it is often caused by deliberate action.[30]

The next milestone in the expansion of tortious liability was *Anns v Merton London Borough Council*.[31] In that case, the principle of *Donoghue v Stevenson* was applied to cover *nonfeasance* and a municipal council was held liable for the negligence of its servant, who negligently inspected and passed improperly laid foundations. These defective foundations posed no risk to persons or other property, and damages were awarded for economic loss suffered by the owner of the building as a result of the necessity to repair structural defects, although Lord Wilberforce considered that there was damage to property.[32] In that case, Lord Wilberforce laid down a new formulation of duty of care, namely a two-stage approach. First, one must ask whether a sufficient degree of proximity or neighbourhood arises between the parties so that the defendant should realise that any carelessness on his part will harm the plaintiff — if so, *prima facie* a duty of care will arise. Next, one has to consider whether there are any policy considerations which should operate so as to restrict or eliminate the duty of care.

Lord Wilberforce's new broad expression of a single general principle of negligence was a culmination of the development of negligence law which started in *Donoghue v Stevenson*[33] and was reaffirmed in the *Dorset Yacht* case.[34]

The new formulation reached its zenith five years later in *Junior Books Ltd v Veitchi Co. Ltd*.[35] Here, the owner of the building sued the subcontractors, with whom he was not in contractual relationship, for the cost of repairing floors. These floors became expensive to maintain due to an inherent defect, which appeared two years after they were laid. The owner also sued for associated costs of closing the factory during the repairs. The majority applied Lord Wilberforce's test of proximity in *Anns* and awarded damages for both the cost of repairs and economic loss. The case bears surprising resemblance to *Donoghue v Stevenson*. Both are Scots appeals and both came before the House of Lords on demurrer — that is,

---

30 *Home Office v Dorset Yacht Co. Ltd* [1970] AC 1004, 1027.
31 [1978] AC 728.
32 Lord Wilberforce's views that the damage was physical was rejected by Lord Keith of Kinkel in *Murphy v Brentwood District Council* [1990] 2 All ER 908, 919 and by Deane J in *Sutherland Shire Council v Heyman* (1985) 60 ALR 1, 60–61.
33 [1932] AC 562.
34 *Home Office v Dorset Yacht Co. Ltd* [1970] AC 1004, 1027.
35 [1983] 1 AC 520 (HL).

to decide if cause of action lies — and in neither case was there a contractual relationship between the plaintiff and the defendant. Because of the nature of the proceedings, the contractual relationship with the other parties was not considered. Had the contractual relationship between the plaintiff and the head contractor in *Junior Books v Veitchi* been considered, some interesting facts would have come to light. The contracts between Junior Books and Ogilvy, the contractor, contained a limitation clause, barring any action after the expiration of ten months after the completion of the work. As a result, Junior Books could not sue the contractor in contract, so they sued, and succeeded, against the subcontractor in negligence.

The impact of *Junior Books* may be summarised as follows:

1. Claims for economic loss are assimilated into the mainstream of negligence.
2. Tort actions are now permitted even in respect of qualitative defects which pose no danger whether actual or threatened, to person or property, and merely reduce the value of the product.
3. The liability is based on the virtually undefined concept of proximity.
4. Whether a party to the action is in any contractual relationship regarding the subject matter of the action appears to be irrelevant and of no consequence.
5. There is, in effect, established some vague warranty of quality running with the product, which is actionable in tort.

The wide concept applied by the House of Lords is evident from the speech of Lord Roskill:

> My Lords, I think there is no doubt that *Donoghue v Stevenson* ... by its insistence upon proximity, in the sense in which Lord Atkin used that word, as the foundation of care which was there enunciated, marked a great development in the law of delict and of negligence alike.... But that advance having been thus made in 1932, the doctrine then enunciated was at first confined by judicial decision within relatively narrow limits.... Though initially there is no doubt that because of Lord Atkin's phraseology in *Donoghue v Stevenson* ... 'injury to the consumer's life or property', it was thought that the duty of care did not extend beyond avoiding physical injury or physical damage to the person or the property of the person to whom the duty of care was owed; that limitation has long since ceased....[36]
>
> The only suggested reason for limiting the damage (*ex hypothesi* economic or financial only) recoverable for the breach of the duty of care just enunciated is that hitherto the law has not allowed such recovery and therefore ought not in the future to do so. My Lords, with all respect to those who find this a sufficient answer, I do not. I think this is the next logical step forward in the development of this branch of the law. I see no reason why what was called

[36] *Id.* 539.

> during the argument 'damage to the pocket' simpliciter should be disallowed when 'damage to the pocket' coupled with physical damage has always hitherto been allowed. I do not think that this development, if development it be, will lead to untoward consequences. The concept of proximity (used to establish the duty of care under Lord Wilberforce's first proposition) must always involve, at least in most cases, some degree of reliance — I have already mentioned the words 'skill' and 'judgment'....[37]

Lord Roskill expressed quite different views seven years later in *Caparo Industries PLC v Dickman*.[38] There was a strong dissent by Lord Brandon.

The broad new formulation of the concept of liability for negligence, formulated by Lord Wilberforce in *Anns* and applied in *Junior Books*, has been subject to strong criticism. It was criticised and repudiated by the House of Lords itself,[39] the Privy Council[40] and the High Court of Australia.[41] The Supreme Court of Canada generally followed *Anns*,[42] but some recent decisions of the provincial courts show reluctance.[43]

In *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co. Ltd*,[44] Lord Keith of Kinkel, with whom the other Law Lords concurred, stressed in his speech that the general principles of the law of negligence, enunciated among others in *Anns*, should not be treated as being of a definitive character. The true question in each case is whether a particular defendant owed to the particular plaintiff a duty of care and whether there was a breach of that duty. 'A relationship of proximity in Lord Atkin's sense must exist before any duty of care can arise, but the scope of the duty must depend on all the circumstances of the case.'[45] He further stressed that 'in determining whether or not a duty of care of particular scope was incumbent upon a defendant it is material to take into consideration whether it is just and reasonable that it should be so.'[46] Lord Keith

---

[37] *Id.* 546, words in parenthesis added.

[38] [1990] 2 WLR 358, 374–5.

[39] *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co. Ltd* [1985] AC 210 (HL); *Leigh and Sillavan Ltd v Aliakmon Shipping Co. Ltd* [1986] AC 785 (HL); *Curran v Northern Ireland Co-Ownership Housing Assn Ltd* [1987] AC 718 (HL); *Hill v Chief Constable of West Yorkshire* [1989] AC 53 (HL); *D & F Estates Ltd v Church Commissioners for England* [1989] AC 177 (HL); *Caparo Industries PLC v Dickman* [1990] 2 WLR 358 (HL); *Murphy v Brentwood District Council* [1990] 2 All ER 908 (HL).

[40] *Candlewood Navigation Corp. Ltd v Mitsui OSK Lines Ltd ('The Mineral Transporter')* [1986] AC 1 (PC); *Yuen Kun Yeu v Attorney-General of Hong Kong* [1988] AC 175 (PC); *Rowling v Takaro Properties Ltd* [1988] AC 473 (PC).

[41] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424.

[42] *City of Kamloops v Nielsen* [1984] 2 SCR 2; *BDC Ltd v Hofstrand Farms* [1986] 2 SCR 147; *Rothfield v Manolakos* (1989) 63 DLR (4th) 449; *Just v British Columbia* (1989) 64 DLR (4th) 689.

[43] cf. *Longchamps v Farm Credit Corp.* [1990] 6 WWR 536 (QB) and *London Drugs Ltd v Kuehne & Nagel International Ltd* (1990) 4 WWR 289 (BCCA), both referring to the 'just and reasonable' test.

[44] [1985] AC 210.

[45] *Id.* 240. This passage was quoted with approval by Gibbs CJ in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 441.

[46] [1985] AC 210, 241.

thus suggested a new test of 'proximity, foreseeability and what is fair and reasonable'.

Anns and *Junior Books* were also held to be of restricted application in *'The Mineral Transporter'*,[47] where it was held that a time charterer could not recover damages for pecuniary loss resulting from a disablement of the chartered vessel caused by a third party. Lord Fraser of Tullybelton, who himself concurred in the majority judgment in *Junior Books*, reasserted the exclusionary rule:

> Their Lordships consider that some limit or control mechanism has to be imposed upon the liability of a wrongdoer towards those who have suffered economic damage in consequence of his negligence. The need for such a limit has been repeatedly asserted in the cases, from *Cattle's* case ... to *Caltex*, ... and their Lordships are not aware that a view to the contrary has ever been judicially expressed.
>
> Almost any rule will have some exceptions, and the decision in the *Caltex* case may perhaps be regarded as one of the 'exceptional cases'. ...[48]

Incidentally, Lord Fraser severely criticised the varied reasons for the decision in *Caltex*.[49]

In *The Aliakmon*,[50] Lord Brandon, delivering the unanimous judgment of the House of Lords, quoted with approval Lord Keith's dicta in *Peabody* and observed that Lord Wilberforce could not have intended his passage in *Anns* to be a universally applicable test of negligence. He observed further that *Anns* dealt with a novel type of factual situation and that the same type of approach should not be adopted in a situation where there had been repeatedly held that a duty of care did not exist.[51] He also stated:

> In any event, where a general rule, which is simple to understand and easy to apply, has been established by a long line of authority over many years, I do not think that the law should allow special pleading in a particular case within the general rule to detract from its application. If such detraction were to be permitted in one particular case, it would lead to attempts to have it permitted in a variety of other particular cases, and the result would be that the certainty, which the application of the general rule presently provides, would be seriously undermined. Yet certainty of the law is of the utmost importance, especially but by no means only, in commercial matters. I therefore think that the general rule, reaffirmed as it has been so recently by the Privy Council in *The Mineral Transporter*, [1986] A.C. 1, ought to apply to a case like the present one, and that there is nothing in what Lord Wilberforce said in *Anns'* case [1978] A.C. 728, which would compel a different conclusion.[52]

---

[47] *Candlewood Navigation Corp. Ltd v Mitsui OSK Lines Ltd ('The Mineral Transporter')* [1986] AC 1.
[48] *Id.* 25.
[49] (1976–77) 136 CLR 529.
[50] *Leigh and Sillavan Ltd v Aliakmon Shipping Co. Ltd* [1986] AC 785 (HL).
[51] *Id.* 815.
[52] *Id.* 816–17.

The long-established principle referred to is that for a claim in negligence to succeed, the cargo buyers have to have the legal ownership or a possessory title and not merely contractual rights.

Yuen Kun Yeu v Attorney-General of Hong Kong[53] is a Privy Council decision hostile to *Anns*. Depositors, who lost their money when a deposit-taking company went into liquidation, sued the Attorney-General for Hong Kong for damages on the ground of negligence in the supervision of the companies. The Judicial Committee dismissed the appeal from the Hong Kong Court of Appeal, striking out the plaintiff's claim as disclosing no reasonable cause of action. Lord Keith of Kinkel, delivering the advice of their Lordships, stated that the two-stage test, formulated by Lord Wilberforce in *Anns*, had been elevated to a degree of importance greater than it merited and perhaps greater than its author intended. The first stage of the test carries with it the risk of misinterpretation, as pointed out by Gibbs CJ in *Sutherland Shire Council v Heyman*.[54] The second stage is one that will rarely have to be applied, as it will arise only in limited categories of cases for policy considerations, such as barristers' or police liability.[55] According to Lord Keith, 'the primary and all-important matter for consideration' is close and direct relations between the parties which gives rise to a duty of care, i.e. proximity.[56]

D & F Estates Ltd v Church Commissioners for England[57] is another House of Lords decision denying liability for economic loss resulting from a jerry-built house. The plaintiffs, who were lessees of a flat in a house 15 years old, were not allowed to recover costs if repairing loose wall plaster. Lord Bridge of Harwich refused to follow *Junior Books*,[58] stating that it applied to its unique facts and did not lay down any principle of general application to the law of torts and expressed preference for the dissent of Lord Brandon. Lord Bridge also commented on the unsatisfactory state of the English authorities regarding liability for economic loss: '[T]he authorities, as it seems to me, speak with such an uncertain voice that, no matter how searching the analysis to which they are subject, they yield no clear and conclusive answer.'[59]

The recent English House of Lords decision in *Caparo Industries PLC v Dickman*,[60] very critical of *Anns*, suggested different approaches to economic loss. Their Lordships took a rather restrictive view of the duties of auditors. They held that the purpose of an audit of public companies under the UK *Companies Act 1985* is to enable the shareholders to exercise their powers in general meeting. It is not to provide material for investment decisions in the company by the shareholders, let alone non-

[53] [1988] AC 175.
[54] (1985) 157 CLR 424.
[55] [1988] AC 175, 193.
[56] *Id.* 194.
[57] [1989] AC 177 (HL).
[58] [1983] 1 AC 520.
[59] [1989] AC 177, 201.
[60] [1990] 2 WLR 358.

shareholders. They consequently held that the auditors were not liable for economic loss suffered by investors who purchased additional shares relying on a negligently audited balance sheet. In their speeches, Lords Bridge, Roskill, Ackner and Oliver expressed, in varying words, the view that searching for any single formula which will serve as a general test of liability for negligence is futile. That is clearly a reference to Lord Wilberforce's two-stage formula in *Anns*. The law should develop new categories of negligence incrementally, case by case, and their Lordships quoted with approval dicta of Brennan J of the High Court of Australia in *Sutherland Shire Council v Heyman*[61] to that effect.

Lord Bridge of Harwich suggested that a new formula of 'foreseeability, proximity and what is fair and reasonable' emerges from the recent decisions of the House of Lords and notably from the speeches of Lord Keith of Kinkel.[62] He also stressed the significance of the traditional approach of recognised categories and precedents:

> What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other. But it is implicit in the passages referred to that the concepts of proximity and fairness embodied in these additional ingredients are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope. Whilst recognising, of course, the importance of the underlying general principles common to the whole field of negligence, I think the law has now moved in the direction of attaching greater significance to the more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes. We must now, I think, recognise the wisdom of the words of Brennan J. in the High Court of Australia in *Sutherland Shire Council v Heyman* (1985) 60 A.L.R. 1, 43–44, where he said: '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 person to whom it is owed." '[63]

---

[61] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 481.

[62] cf. Lord Keith in *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co. Ltd* [1985] AC 210, 241.

[63] *Caparo Industries PLC v Dickman* [1990] 2 WLR 358, 365.

The following passage from a short speech of Lord Roskill sums up the opinions of their Lordships. It is an indication of the changing views on the concept of the duty of care, as Lord Roskill himself clearly approved of Lord Wilberforce's two-stage test in his own speech in *Junior Books*.[64]

> But subsequent attempts to define both the duty and its scope have created more problems than the decisions have solved. My noble and learned friends have traced the evolution of the decisions from *Anns v Merton London Borough Council* [1977] A.C. 728 until and including the most recent decisions of your Lordships' House in *Smith v Eric S. Bush* [1989] 2 W.L.R. 790. I agree with your Lordships that it has *now* to be accepted that there is no simple formula or touchstone to which recourse can be had in order to provide in every case a ready answer to the questions whether, given certain facts, the law will or will not impose liability for negligence or in cases where such liability can be shown to exist, determine the extent of that liability. Phrases such as 'foreseeability', 'proximity', 'neighbourhood', 'just and reasonable', 'fairness', 'voluntary acceptance of risk', or 'voluntary assumption of responsibility' will be found used from time to time in the different cases. But, as your Lordships have said, such phrases are not precise definitions. At best they are but labels or phrases descriptive of the very different factual situations which can exist in particular cases and which must be carefully examined in each case before it can be pragmatically determined whether a duty of care exists and, if so, what is the scope and extent of that duty. If this conclusion involves a return to the traditional categorisation of cases as pointing to the existence and scope of any duty of care, as my noble and learned friend Lord Bridge of Harwich suggests, I think this is infinitely preferable to recourse to somewhat wide generalisations which leave their practical application matters of difficulty and uncertainty. This conclusion finds strong support from the judgment of Brennan J. in *Sutherland Shire Council v Heyman*, 60 A.L.R. 1, 43–44 in the High Court of Australia in the passage cited by my noble and learned friends.[65]

Alcock v Chief Constable of South Yorkshire Police[66] is a House of Lords decision disallowing a claim for nervous shock by relatives or friends who witnessed a disaster at a football match or watched it on television. Lord Jauncey of Tullichettle referred with approval to the 'carefully reasoned judgment of Deane J. in the High Court of Australia in *Jaensch v Coffey*'[67] and reiterated that duty of care does not depend on foreseeability alone. Reasonable foreseeability is subject to controls, and 'proximity' is an important control. Further, a 'proper approach is to examine each case on its own facts'.[68] Lord Oliver stated in his speech:

---

[64] [1983] 1 AC 520, 545.
[65] *Caparo Industries PLC v Dickman* [1990] 2 WLR 358, 374–5 (*emphasis* added).
[66] [1992] 1 AC 310 (HL).
[67] (1984) 155 CLR 549, 578–86.
[68] *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310, 420–2.

> ... in the end it has to be accepted that the concept of 'proximity' is an artificial one which depends more upon the court's perception of what is the reasonable area for the imposition of liability than upon any process of analogical deduction.[69]

A final quietus was given *Anns* by the decision of the House of Lords in *Murphy v Brentwood District Council,*[70] where their Lordships unanimously disapproved of Lord Wilberforce's two-stage formulation of the basic duty of care and overruled the decision in the case itself. Lord Keith of Kinkel, in his leading judgment, said that there could be no doubt that *Anns* had for long been widely regarded as an unsatisfactory decision. There had been extreme difficulty, highlighted most recently by the speeches in *D & F Estates,* in ascertaining upon exactly what basis of principle it had proceeded. It had now to be recognised that it had not proceeded on any basis of principle at all but had constituted a remarkable example of judicial legislation. It had engendered a vast spate of litigation, and each of the cases in the field that had reached the House of Lords had been distinguished. Others had been distinguished in the Court of Appeal. He further held that *Anns* had been wrongly decided as regards the scope of any private law duty of care resting on local authorities in relation to their function of taking steps to secure compliance with building by-laws or regulations and should be departed from under the terms of *Practice Statement (Judicial Precedent),*[71] which left it open to the House to depart from a previous decision if it so chose.

It followed that *Dutton*[72] should be overruled, as should all decisions subsequent to *Anns* that had been decided in reliance on it.[73] Lords Mackay, LC, Bridge, Oliver and Jauncey delivered concurring opinions, and Lords Brandon and Ackner agreed.

In *Department of the Environment v Thomas Bates & Son,*[74] which followed closely after *Murphy,* the House of Lords disallowed claims for economic loss against a builder resulting from defective building.

AUSTRALIA

Whilst the English courts have formulated, although not altogether satisfactorily, the concept of liability for economic loss, the Australian and Canadian courts have reacted to it. However, the High Court of Australia in a series of cases decided from the mid-1970s, has attempted to explain the principles governing this branch of the law of negligence.

---

[69] *Id.* 411.
[70] [1990] 2 All ER 908 (HL).
[71] [1966] 1 WLR 1234.
[72] *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373.
[73] *Murphy v Brentwood District Council* [1990] 2 All ER 908, 914–24.
[74] [1990] 2 All ER 943 (HL).

The leading Australian case on recovery of pure economic loss is the High Court judgment in *Caltex Oil (Aust.) Pty Ltd v The Dredge 'Willemstad'*.[75] Caltex and the Australian Oil Refinery (AOR) had a contract which provided that Caltex would supply crude oil to AOR's refinery and AOR would deliver the refined product to Caltex's terminal via an underwater pipeline which AOR owned. The dredge *Willemstad* negligently broke the pipeline. Caltex claimed damages for the additional costs they incurred in order to transport the oil while the pipeline was being repaired.

Although the trial judge had dismissed the action, the High Court of Australia unanimously imposed liability for the pure economic loss. All five judges held that the right of the plaintiff to recover must rest on more than just foreseeability but each judge suggested different approaches, making it difficult to determine a clear ratio.

Three cases were greatly relied upon in the judgment — namely, *Cattle v The Stockton Waterworks Co.*,[76] *Greystoke Castle*[77] and *Hedley Byrne*.[78] Gibbs J, in his judgment, reasserts the exclusionary rule first laid down in *Cattle v The Stockton Waterworks Co.*[79] and comments that prior to the *Hedley Byrne*[80] decision economic loss was not recoverable.[81] He states his view on recoverability of economic loss as follows:

> 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 damage by his negligent act. It is not necessary, and would not be wise, to attempt to formulate a principle that would cover all cases in which such a duty is owed; to borrow the words of Lord Diplock in *Mutual Life & Citizens' Assurance Co. Ltd. v Evatt* (44): 'Those will fall to be ascertained step by step as the facts of particular cases which come before the courts make it necessary to determine them.' All the facts of the particular case will have to be considered. It will be material, but not in my opinion sufficient, that some property of the plaintiff was in physical proximity to the damaged property, or that the plaintiff, and the person whose property was injured, were engaged in a common adventure.[82]

---

[75] (1976–77) 136 CLR 529.
[76] (1875) LR 10 QB 453.
[77] [1947] AC 265.
[78] [1964] AC 465.
[79] (1875) LR 10 QB 453.
[80] [1964] AC 465.
[81] *Caltex Oil (Aust.) Pty Ltd v The Dredge 'Willemstad'* (1976–77) 136 CLR 529, 544–5.
[82] *Id.* 555.

He thus upholds the exclusionary but recognises exceptional cases, based on the defendant's knowledge of the plaintiff individually. It would not be wise to attempt to formulate a principle that would cover all cases — each case has to be considered on its own facts. These are nearly prophetic words in a pre-*Anns* situation.

Mason J, like Gibbs J, appears to be saying that liability will be imposed for purely economic loss if the defendant knew or ought to have known that the plaintiff personally, as opposed to a member of an unascertained class, would be likely to suffer economic loss as a consequence of his or her negligent conduct.[83]

Steven J suggests that liability should be limited by a requisite degree of proximity, not clearly defined[84] and Jacobs J opted for a physical proximity test.[85] Murphy J appears to reject the exclusionary clause by implication and stresses social responsibility and public policy, not elaborated:

> Social responsibility carries with it a duty of care and liability for damage caused by breach of this duty. Persons causing damage by breach of duty should be liable for all the loss unless there are acceptable reasons of public policy for limiting recovery.[86]

Incidentally, the varied reasons for the decision in *Caltex* were severely criticised by Lord Fraser of Tullybelton in *The Mineral Transporter*:

> With regard to the reasons given by Gibbs and Mason JJ., their Lordships have difficulty in seeing how to distinguish between a plaintiff as an individual and a plaintiff as a member of an unascertained class. The test can hardly be whether the plaintiff is known by name to the wrongdoer. Nor does it seem logical for the test to depend on the plaintiff being a single individual. Further, why should there be a distinction for this purpose between a case where the wrongdoer knows (or has the means of knowing) that the persons likely to be affected by his negligence consist of a definite number of persons whom he can identify either by name or in some other way (for example as being the owners of particular factories or hotels) and who may therefore be regarded as an ascertained class, and a case where the wrongdoer knows only that there are several persons, the exact number being to him unknown, and some or all of whom he could not identify by name or otherwise, and who may therefore be regarded as an unascertained class? Moreover much of the argument in favour of an unascertained class seems to depend upon the view that the class would normally consist of only a few individuals. But would it be different if the class, though ascertained, was large? Suppose for instance that the class consisted of all the pupils in a particular school. If it was a kindergarten school with only six pupils they might be regarded as constituting an ascertained class, even if their names were unknown to the wrongdoer. If the school was a large one with over a thousand pupils it might be suggested that they were

[83] *Id.* 593.
[84] *Id.* 575–6.
[85] *Id.* 597.
[86] *Id.* 606.

> not an ascertained class. But it is not easy to see a distinction in principle merely because the number of possible claimants is larger in one case than in the other. Apart from cases of negligent misstatement, with which their Lordships are not here concerned, they do not consider that it is practicable by reference to an ascertained class to find a satisfactory control mechanism which could be applied in such a way as to give reasonable certainty in its results.
>
> Similarly they are, with the utmost respect to Stephen J., not able to find in his speech a statement of principle which appears to them to offer a satisfactory and reasonably certain guide. The opinion of Jacobs J. does appear to the Lordships to provide a reasonably certain test, namely the traditional test of physical propinquity.[87]

After *Caltex* comes the important High Court decision in *Jaensch v Coffey*.[88] In this case, the High Court awarded damages for nervous shock to a wife of an injured motorcyclist because of what she saw and heard at the hospital where her husband was admitted after the accident caused by the negligence of the defendant Jaensch.

Deane J's judgment was referred to with approval by Lord Jauncey as a 'carefully reasoned judgment' in *Alcock*.[89] The majority of the High Court in *Australian Safeway Stores Pty Ltd v Zaluzna*[90] adopted Deane J's approach to the duty of care concept, and it was also applied by Mason J in *Stevens v Brodribb Sawmilling Co. Pty Ltd*.[91] Deane J's analysis concentrates 'upon the interrelationship of reasonable foreseeability and proximity as constituent elements of the duty principle.'[92]

The neighbour requirement or proximity constitutes a control test upon the test of reasonable foreseeability. 'The "neighbourhood" requirement [is] a substantive and independent one which was deliberately and expressly introduced to limit or control the test of reasonable foreseeability.' His Honour deplores the common, although mistaken tendency since *Donoghue v Stevenson* to see the test of foreseeability as a panacea and the sole determinant of the duty of care.[93] He then gives his explanation of proximity:

> Lord Atkin identified proximity 'as a limitation upon the test of reasonable foreseeability'. It was left as a broad and flexible touchstone of the circumstances in which the common law would admit the existence of a relevant duty of care to avoid reasonably foreseeable injury to another. It is directed to the relationship between the parties.... It involves the notion of nearness or closeness and embraces physical proximity..., circumstantial proximity ... and causal proximity....[94]

---

87 *Candlewood Navigation Corp. Ltd v Mitsui OSK Lines Ltd ('The Mineral Transporter')* [1986] AC 1, 24.
88 (1984) 155 CLR 549.
89 [1992] 1 AC 310.
90 (1987) 162 CLR 479.
91 (1986) 160 CLR 16, 30.
92 R.P. Balkin and J.L.R. Davis, *Law of Torts* (Sydney: Butterworths, 1991), 209.
93 *Jaensch v Coffey* (1984) 155 CLR 549, 579–81.
94 *Id.* 584–5.

Gibbs CJ agreed in general with the reasoning of Deane J.[95]

Although the factual situation in *Sutherland Shire Council v Heyman*[96] was similar to *Anns*, faulty foundations inadequately inspected, the High Court declined to follow the *Anns* decision. Gibbs CJ rejected the proposition that foreseeability alone is sufficient to establish the existence of a duty of care. In his view, the establishment of proximity is an anterior requirement to the existence of a duty of care, and the principle was correctly stated by Lord Keith of Kinkel in *Peabody Donation Fund v Sir Lindsay Parkinson & Co. Ltd*:

> The true question in each case is whether the particular defendant owed to the particular plaintiff a duty of care having the scope which is contended for, and whether he was in breach of that duty with consequent loss to the plaintiff. A relationship of proximity in Lord Atkin's sense must exist before any duty of care can arise, but the scope of the duty must depend on all the circumstances of the case.[97]

Deane J referred to his analysis in *Jaensch v Coffey*[98] and to Lord Keith's *dicta* in *Peabody*[99] and reiterated that whilst reasonable foreseeability in more settled areas of negligence, such as physical injury or damage, commonly satisfies the requirement of proximity, Lord Atkin's notions of reasonable foreseeability and proximity were distinct. The requirement of proximity remains the touchstone and control of the existence of duty of care.[100] His Honour again restated his understanding of proximity exposed in *Jaensch v Coffey*:

> The requirement of proximity is directed to the relationship between the parties in so far as it is relevant to the allegedly negligent act or omission of the defendant and the loss or injury sustained by the plaintiff. It involves the notion of nearness or closeness and embraces physical proximity (in the sense of space and time) between the person or property of the plaintiff and the person or property of the defendant, circumstantial proximity such as an overriding relationship of employer and employee or of a professional man and his client and what may (perhaps loosely) be referred to as causal proximity in the sense of the closeness or directness of the causal connexion or relationship between the particular act or course of conduct and the loss or injury sustained.[101]

He then added that the identification of that requirement should not be divorced from the notions of what is 'fair and reasonable' and referred to

---

[95] *Id.* 551.
[96] (1985) 157 CLR 424.
[97] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 441.
[98] (1984) 155 CLR 549.
[99] *Supra* nn. 44–46.
[100] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 498.
[101] *Id.* 497–8.

dicta of Lord Morris of Borth-Y-Gest in *Dorset Yacht Co. v Home Office*[102] and Lord Keith of Kinkel in *Peabody Fund v Parkinson.*[103]

Brennan J. said in the course of his judgment:

> 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 person to whom it is owed.'[104]

Brennan J's statement clearly indicates his disapproval of the broad concept of duty of care, formulated by Lord Wilberforce in *Anns*, and incidentally advocated by Lord Reid in the *Dorset Yacht* case,[105] and his preference for a more traditional common law approach of building a principle incrementally, case by case. Brennan J was quoted with approval by Lords Bridge, Roskill and Oliver in *Caparo Industries PLC v Dickman.*[106]

In *San Sebastian,*[107] the High Court rejected a claim for economic loss by developers who relied on a scheme of redevelopment based on 'study documents' which was subsequently abandoned. The court rejected the claim because the plan was not certain of implementation and the reliance on the plan was not established.

In a joint judgment, Gibbs CJ and Mason, Wilson and Dawson JJ stressed the vital importance of the notion of proximity as a control of foreseeability. 'When the economic loss results from negligent misstatement, the element of reliance plays a prominent part in the ascertainment of a relationship of proximity....' They also stated that liability for negligent misstatements and the treatment of the duty of care in the context of misstatements are but instances of the application of the general principles governing the duty of care in negligence.[108]

Brennan J, in a separate but concurring judgment, voiced his criticisms of *Anns* and the proximity principle. In a case of damage to property, the neighbourhood test is satisfied by reasonable foreseeability, but in other categories of cases further and particular propositions of law have to be applied. He also doubted 'whether proximity, if it is understood as having wider connotation than reasonable foreseeability, will prove to be a unifying principle.'[109]

Hawkins v Clayton[110] is a case of limited application, dealing with the duty of care of solicitors. The majority of the split High Court (Brennan,

---

[102] [1970] AC 1004, 1038–9.
[103] [1985] AC 210, 241.
[104] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 481.
[105] [1970] AC 1004, 1027.
[106] [1990] 2 WLR 358, 365, 374–5, 379–80.
[107] *San Sebastian Pty Ltd v Minister Administering the Environmental Planning and Assessment Act 1979* (1986) 162 CLR 340.
[108] *Id.* 354–5.
[109] *Id.* 367–9.
[110] (1988) 164 CLR 539.

Deane and Gaudron JJ) held that the solicitors committed a breach of a duty of care to the executrix and beneficiary of a will in their custody when they failed to inform him of the existence of the will, whilst Mason CJ and Wilson J held that there was no contractual duty and no tort duty of care.

Brennan J again voiced his distrust of the wider concept of proximity and compared it to a Delphic criterion, lacking the specificity of a precise proposition of law. He referred to his expositions in *San Sebastion*[111] and to his preference for the incremental development of the new categories of negligence suggested in *Sutherland Shire Council v Heyman* ((1985) 157 CLR 424, 481).[112]

CANADA

The Canadian law of pure economic loss is fluid. There are two reasons: first, there are few decisions, particularly by the Supreme Court of Canada; and second, there is uncertainty about the continuing impact of *Anns*. In two recent decisions of the Supreme Court,[113] Lord Wilberforce's two-stage approach was applied and described as sound; however, the provincial courts have indicated preferences for other approaches, especially to consider what is just and reasonable.[114]

Canadian courts tended to follow the exclusionary rule. A willingness to modify the traditional approach is shown in the 1959 decision in *Seaway Hotels Ltd v Gragg (Canada) Ltd.*[115] The plaintiff owned a hotel. The defendant gas company negligently damaged a feeder line, resulting in electric power failure. Consequently, the plaintiff suffered economic loss due to food spoilage, lost hotel room rentals and restaurant sales.

The trial judge awarded the plaintiff damages for his economic loss. It is important to note that the judge accepted the exclusionary rule against recovery for pure economic loss, but held that it did not apply, because there was physical damage to the plaintiff's property as the food had spoiled. McLennan J stated: 'But if an actionable wrong has been done to the plaintiff, he is entitled to recover all the damage resulting from it even if some part of the damage considered by itself would not be recoverable.'[116]

---

[111] *Id.* 555.
[112] *Id.* 556.
[113] *City of Kamloops v Neilsen* [1984] 2 SCR 2; *BDC Ltd v Hofstrand Farms* [1986] 2 SCR 147.
[114] cf. *Longchamps v Farm Credit Corp.* [1990] 6 WWR 536 (QB); *London Drugs Ltd v Kuehne & Nagel International Ltd* (1990) 4 WWR 289 (BCCA).
[115] (1959) 17 DLR (2d) 292, aff'd (1960) 21 DLR (2d) 264 (Ont. CA).
[116] (1959) 17 DLR (2d) 292, 297.

The Ontario Court of Appeal affirmed the result but via another path. The court based its decision on the principles proclaimed in *Donoghue v Stevenson*[117] and *Bolton v Stone*.[118] Laidlaw J held:

> The facts in this case are not in dispute and when the court applies the principles stated in *Bolton v Stone* and elsewhere there can be only one conclusion, namely that the defendants ought reasonably to have foreseen the injury that resulted from interference with the duct.[119]

It appears, therefore, that the Court of Appeal in *Seaway* threw the doors open for the recovery of pure economic loss. By not expressly distinguishing between physical and economic injury, the court appeared to have ruled that, providing a risk is foreseeable and there is sufficient proximity to create a duty of care, *any* ensuing damage is recoverable whether it is physical or economic in nature.

Rivtow Marine Ltd v Washington Iron Works[120] is the only decision of the Supreme Court that fully addresses the issue of the liability for pure economic loss. It was also the first occasion upon which the Supreme Court has been called to determine the liability for pure economic loss. It has been referred to with approval by the House of Lords[121] and the High Court of Australia.[122]

In *Rivtow Marine*, the defendant manufacturer, Washington Iron Works, had negligently designed and manufactured a type of crane. The plaintiff rented one of these cranes for its logging operations from a distributor named Walkem. Although both defendants became aware of the crane's defects, they failed to warn the plaintiff. Another identical crane chartered to another company collapsed, killing a workman. Rivtow Marine then immediately took its crane out of service for repairs, this occurring during the peak logging season. Consequently, Rivtow Marine lost more profits than it would have, had the defendants warned them of the defects earlier. The plaintiff sued for the cost of repairing the crane and for the additional profits it lost while the crane was being repaired.

In awarding damages for lost profits, Ritchie J (for the majority) found that the proximity of the relationship between the plaintiff and the defendant imposed on the defendant a duty to warn the plaintiff of the known defects. Ritchie J further found that the defendant breached this duty. This breach constituted an independent tort unconnected with any contractual obligations.[123] Damages for the cost of repairs were denied,

---

[117] [1932] AC 562.
[118] [1951] AC 850.
[119] (1960) 21 DLR (2d) 264, 266.
[120] [1974] SCR 1189.
[121] For example, Lord Wilberforce in *Anns v Merton London Borough Council* [1978] AC 728, 760 cited Laskin J's dissent, whilst Lord Keith, overruling *Anns* in *Murphy v Brentwood District Council* [1990] 2 All ER 908, 921–2 approved the majority judgment.
[122] For example, by Gibbs and Mason JJ in *Caltex Oil (Aust.) Pty Ltd v The Dredge 'Willemstad'* (1976–77) 136 CLR 529, 552–3 and 586, 593 respectively.
[123] *Rivtow Marine Ltd v Washington Iron Works* [1974] SCR 1189, 1207.

based on the majority's finding that liability thus connected was contractual in nature and therefore unenforceable by strangers to the contract.[124]

In his dissent, Laskin J claimed that he would have extended recovery so as to include the cost of repairs.

> A plaintiff injured by another's negligence is required to act reasonably to mitigate his damages.... Where the defective product is used by the plaintiff, it may be reasonable for him upon learning of the threat of likely injury from its continued use, to expend money on its repair to make it fit for service. Such an expenditure then becomes part of the economic loss for which [the defendant] must respond.[125]

The significance of the judgment is in the Supreme Court recognising in principle liability in tort for economic loss arising wholly in the absence of associated physical injury or damage. However, much of its reasoning has been overcome by subsequent developments in England, Australia and Canada.

Haig v Bamford,[126] another Supreme Court decision, dealt with liability for injury to those relying on professional services of accountants. Judgment by Dickson J, as he then was, follows essentially the *Hedley Byrne* pattern.

In *Haig*, Dickson J looked at various tests of liability for negligently prepared financial statements and concluded that the relevant choice in that case was actual knowledge by the defendant of the limited class of persons who could use and rely on the statement. On this basis, he found liability for the economic loss to the plaintiff.

In *City of Kamloops v Nielsen*,[127] the Supreme Court of Canada, by a majority of three to two, found the municipal authority liable for allowing the construction of a house with faulty foundations. The defective foundations were discovered during the construction, a 'stop-work' order was issued but not enforced, and the owner was allowed to occupy the building after completion without the requisite occupancy permit. Three years later the house was sold and the buyer discovered the defects. He sued the original owner in fraud and the authority in negligence for not enforcing the 'stop-work' order and allowing occupation of the house without a permit. They were held jointly liable for purely economic loss of the cost of making good the foundations.

There were three main issues involved:

1. *Liability for pure economic loss*. The judgment of the majority, delivered by Wilson J, is philosophically close to *Anns* and appears to reject the exclusionary clause. The following passage from the judgment of Wilson J is indicative of the attitude of the majority.

[124] *Id.* 1213–15.
[125] *Id.* 1218–19.
[126] [1977] 1 SCR 466.
[127] [1982] 2 SCR 2.

> It took the decision of the House of Lords in *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd....* to spark a review and reassessment of the economic loss rule by legal scholars and judges, and this review has been going on now for almost two decades. How, it is asked, can one justify to injured plaintiffs the difference in treatment the law accords to physical and to economic loss caused by a defendant's negligent acts? In one you are compensated by the wrongdoer: in the other you have to bear the loss yourself. Does it make sense to permit the recovery of economic loss for negligent words but not for negligent acts? What is the significant difference between them? Why, if economic loss is reasonably foreseeable as a consequence of negligent acts, should it not be as recoverable as reasonably foreseeable physical injury to persons or to property? And should Chief Judge Cardozo's fear of indeterminate liability to an indeterminate class preclude recovery by a very specific plaintiff in a very specific amount? Can a policy consideration which leads to a manifest injustice in certain types of cases be a good policy consideration? Is there some rationale whereby injustice in specific cases can be avoided and Chief Judge Cardozo's fear guarded against at the same time?[128]

2. *Commencement of limitation period.* Wilson J disagreed by implication with the views expressed in *Pirelli*[129] and *Cartledge*[130] that any alteration in the limitation rules should be made by legislation and not by judicial decision. She applied the discoverability rule and laid down a general rule that a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence.

3. *Policy/operational dichotomy.* A public authority is liable in negligence in its operational or administrative activities. In the matters of policy or discretionary decisions it can also be liable, but only for a lack of good faith.

BCD Ltd v Hofstrand Farms Ltd[131] involved the liability in tort of a courier for loss suffered by a third party as a result of the late delivery of a parcel containing title deeds. The case concerned a claim for pure economic loss. Estey J in a leading judgment, Chouinard and Lamer JJ concurring, Wilson J agreeing, stated that the appeal concerned a claim for pure economic loss. He referred to a previous judgment of the Supreme Court in *Rivtow*[132] as recognising in principle liability for pure economic loss. As Estey J found that no duty of care was owed by the defendant, he

---

[128] *Id.* 28–29.

[129] *Pirelli General Cable Works Ltd v Oscar Faber & Partners* [1983] 2 AC 1 (HL).

[130] *Cartledge v E. Jopling & Sons Ltd* [1963] AC 758 (HL).

[131] [1986] SCR 228; for a more detailed analysis of this case, and also of *Central Trust Co. v Rafuse* [1987] 1 SCR 711, see E.J. Hayek, 'The Supreme Court of Canada Speaks on Liability in Contract and Tort' (1988) 1 JCL 43.

[132] [1974] SCR 1189.

did not have to deal with any principles governing the liability for economic loss.

Estey J also stated an alternative ratio for denying the liability — namely, the remoteness of damage. He held that, according to established principles, the damage in this case was too remote and consequently not recoverable. His exposition of established principles is of significance. First, he held that the same principles of remoteness apply to both contract and tort. Next he applied the 'rule' in *Hadley v Baxendale*[133] as the proper test by which remoteness should be measured. He pointed out that *Hadley v Baxendale* itself involved a case of a carrier, who was not held liable for loss of profits due to a late delivery of a shaft, because the carrier could not have known of the 'special circumstances' that, without that particular shaft, the mill had to close.

In dealing with the issue of the duty of care, Estey J assumed, but only for the purposes of examining the issues arising on the facts of the appeal, that Lord Wilberforce's two-stage test, formulated in *Anns*, sets out the applicable principles of law. As factors establishing liability for economic loss, he stressed the knowledge of the defendant of the identifiable plaintiff, the extremely close proximity between the parties, just short of contract, and above all the knowledge of the defendant of the transaction and the reliance by the plaintiff.

Estey J's treatment of *Anns* is equivocal. He assumes that it states the correct principles of law, but does not apply it, and he warns on the necessity of defined limits on liability:

> The *Anns* principle sets out a broad and independent right and a concomitant liability in the law of negligence. It has found application in a variety of ways and circumstances in the courts of this country and elsewhere in the years since it was decided. Doubtless, the principle and its reach will be the subject of discussion in the courts as the law of torts continues to evolve. This appeal does not, on its facts, face the court with the need to re-examine the parameters of the doctrine or its definitive role in our jurisprudence. No doubt the courts of this country will continue to search for reasonable and workable limits to the liability of a negligent supplier of manufactured products or services, to the liability of a negligent contractor for contractual undertakings owed to others, and to the liability of persons who negligently make misrepresentations. In this search courts will be vigilant to protect the community from damages suffered by a breach of the 'neighbourhood' duty. At the same time, however, the realities of modern life must be reflected by the enunciation of defined limit on liability capable of practical application, so that social and commercial life can go on unimpeded by a burden outweighing the benefit to the community of the neighbourhood historic principle.[134]

[133] (1854) 9 Ex 341, 354–5; 156 ER 145, 151.
[134] [1986] SCR 228, 243.

The case thus, first, indicates the weariness of the *Anns* two-stage test; second, applies *Hadley v Baxendale* as a test of remoteness for economic loss; and third, reaffirms liability for pure economic loss.

Central Trust Co. v Rafuse[135] is a complex case dealing with negligence of solicitors, who were employed by the plaintiffs in connection with a mortgage loan. They overlooked a particular provision of the *Companies Act* and in consequence the mortgage was declared void. The case dealt with three issues:

1. *Concurrent liability in contract and torts.* Le Dain J, speaking for the court, in a scholarly judgment authoritatively confirmed concurrent liability in Canada and stated propositions regulating it. He further elaborated these principles in *Canadian Pacific Hotels Ltd v Bank of Montreal*[136] and followed *Rafuse* in affirming the concept of concurrent liability, notwithstanding *dicta* against concurrent liability in the Privy Council decision in *Tai Hing Cotton Mills Ltd v Liu Chong Hing Bank Ltd.*[137]
2. *Commencement of limitation period.* Following the majority decision in *Kamloops,*[138] Le Dain J held that the discoverability rule applies to determine the commencement of the limitation period in tort.
3. *Liability of solicitors.* There is no sound reason in principle why a solicitor should be treated differently from other professionals in respect of concurrent liability. The solicitor's liability in tort for negligence is based on the general principles of tortious liability and is not confined to professional advice, but extends to the performance of any act for which the solicitor has been retained. As there was no disclaimer clause, the liability of the solicitor followed the *Hedley Byrne*[139] principle.

Probably the most comprehensive survey of authorities on economic loss in any Canadian judgment was undertaken by MacQuigan JA in the Federal Court of Appeal in *'Jervis Crown'*.[140] In a judgment analysing English, Australian and Canadian authorities, MacQuigan JA reached the following conclusion:

> In my view, this survey of the law leads to the apparent conclusion that in Canada there is no absolute rule preventing recovery for pure economic loss even where there is no physical damage to the plaintiff's property. This it seems to me, is the only possible conclusion to be drawn from *Rivtow Marine, Agnew-Surpass, Haig* and *Baird.*

---

[135] [1986] 2 SCR 147 and see *supra* n. 131.
[136] [1987] 1 SCR 711 and see a case study by E.J. Hayek under the same title in (1988) 12 *Canadian Business Law Journal* 361.
[137] [1986] AC 80 (PC).
[138] [1982] 2 SCR 2.
[139] *Hedley Byrne & Co. Ltd v Heller & Partners Ltd* [1964] AC 465 (HL).
[140] *Canadian National Railway Co. v Norsk Pacific Steamship Co. Ltd and Tug 'Jervis Crown'* (1990) 104 NR 321, (1990) 65 DLR (4th) 321; aff'd (1992) 91 DLR (4th) 289 (SCC).

> What the courts insist upon for liability, again and again from *Hedley Byrne* on, is that there must be a special relationship or sufficient proximity between the plaintiff and the defendant: 'sufficient proximity' (Stephen, J., in *Caltex* and Estey, J., in *B.D.C.*); 'proximity' (Lord Roskill in *Junior Books*); 'loss ... not too remote' (Lord Denning, M.R.), in *Spartan Steel & Alloys Ltd. v Martin & Co. (Contractors) Ltd.*, [1973] 1 Q.B. 27 at 37 (C.A.), as cited by Ritchie, J., in *Rivtow Marine* [[1974] S.C.R. 1189]. I think it is thus latent in the cases that a principle of sufficient proximity is required, in addition to the requirement of reasonable foresight, for liability to arise in the case of pure economic loss.[141]

The tug *Jervis Crown* pulled a barge up the Frazer River in British Columbia. The barge collided with and damaged a rail bridge owned by the Department of Works, but used by the Canadian National Railways (CNR), who incurred additional cost in redirecting the traffic. MacQuigan JA agreed with the findings of the trial judge:

1. The captain of the tugboat was specifically aware of the CNR as a party likely to suffer damage.
2. The precise nature of the economic loss was actually known by the tortfeasor as a result of similar previous accidents.
3. The tracks on both sides of the Frazer River, owned by the CNR, are not only in close proximity to the bridge, but cannot be used without the essential link of the bridge.

MacQuigan JA commented that all that was required was reasonable foreseeability and sufficient proximity, which was established in ground (3) above, which, in his view, constitutes in Deane J's language both physical and circumstantial closeness.[142] The actual knowledge of the tortfeasors, expressed in grounds (1) and (2) above, was not, in his view, necessary to establish the liability.[143]

The Supreme Court of Canada on appeal affirmed the Federal Court of Appeal decision in *'Jervis Crown'*.[144] The judgment of the Supreme Court typifies the 'uncertain voice of authorities'.[145] It was passed by a majority of four to three, and even the majority gave two differing reasonings.

In a leading judgment, McLachlin J, L'Heureux-Dube and Cory JJ concurring, gave an interesting analysis of the English and Canadian approach. In her opinion, the House of Lords in *Murphy*[146] took the view that what is required is a rule which deals with the problem in an exhaustive and definitive way. Examples of such a rule are criteria for physical damage and personal injury. The policy-oriented approach in *Anns*[147] did

---

[141] (1990) 104 NR 321, 344.
[142] *Jaensch v Coffey* (1984) 155 CLR 549, 551.
[143] (1990) 104 NR 321, 346.
[144] *Canadian National Railway Co. v Norsk Pacific Steamship Co. Ltd and Tug 'Jervis Crown'* (1990) 104 NR 321, (1990) 65 DLR (4th) 321; aff'd (1992) 91 DLR (4th) 289 (SCC).
[145] *D & F Estates Ltd v Church Commissioners for England* [1989] AC 177.
[146] [1990] 2 All ER 908 (HL).
[147] *Anns v Merton London Borough Council* [1978] AC 728 (HL).

not provide such a rule and was therefore rejected. The Supreme Court of Canada, on the other hand, adopted in *Kamloops*[148] the incremental approach, which in McLachlin J's view is to be preferred to the insistence on the logical precision of *Murphy* as being more consistent with the incremental character of common law. As the courts will recognise new categories of cases of economic loss, rules will emerge. *Hedley Byrne*[149] is an example of the emergence of a rule.

Dealing with the appeal case, McLachlin J's view is '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' and she refers to Deane J's description of proximity in *Sutherland Shire Council*.[150] In the present case, such a proximity between the negligent act and the loss was established and the plaintiff should recover its economic loss.[151]

Stevens J, whilst agreeing with McLachlin J's conclusions, reached them by a different analysis. In this view, Canadian courts do not accept the exclusionary rule, although it has been recently emphatically reaffirmed in *Murphy*.[152] As a result of *Hedley Byrne*,[153] the House of Lords recognised a right to compensation for purely economic loss caused by a negligent misstatement. Other exceptions to the exclusionary rule followed. Stevens J classifies the appeal case as one of a relational loss and refers to Professor Fleming's description of relational losses as those which do not arise directly from an injury but rather as a result of a relationship with the injured party. He further quotes Professor Fleming's reference to the tort law's 'most ingrained opposition' to the recovery of economic loss for relational losses and the explanation that recovery for relational losses would be oppressive, as most accidents entail repercussions for all persons with whom an injured party is associated.[154] In other words, the floodgate arguments.[155] Recovery of relational losses is therefore exceptional — for example, *Caltex*.[156] It is therefore necessary to limit the liability. He rejects the application of the concept of proximity, which he finds elusive, and prefers the approach of Mason J in *Caltex*,[157] that a defendant will be liable for economic loss due to his negligent conduct when he can reasonably foresee that a specific individual, as distinct from a general class of persons, will suffer financial loss as a consequence of his conduct.[158] Clearly, Stevens J was not influenced by Lord Frazer's criticism of the High Court's *Caltex* judgment in *'The Mineral Transporter'*.[159]

---

148 [1982] 2 SCR 2.
149 *Hedley Byrne & Co. Ltd v Heller & Partners Ltd* [1964] AC 465 (HL).
150 *Sutherland Shire Council v Heyman* (1985) 157 CLR 424.
151 (1992) 91 DLR (4th) 289, 366–9.
152 [1990] 2 All ER 908 (HL).
153 *Hedley Byrne & Co. Ltd v Heller & Partners Ltd* [1964] AC 465 (HL).
154 *Supra* n. 3.
155 (1992) 91 DLR (4th) 289, 385.
156 *Caltex Oil (Aust.) Pty Ltd v The Dredge 'Willemstad'* (1976–77) 136 CLR 529, 544–5.
157 (1976–77) 136 CLR 529, 593.
158 (1992) 91 DLR (4th) 289, 366–9, 387.
159 [1986] AC 1, 24.

There was a lengthy dissenting judgment by La Forest J, Sopinka and Jacobucci JJ concurring. The analysis of the judgment consists of four parts and La Forest J summarised them as follows:

> Part I of the analysis in this judgment examines the appellants' contention and focuses on the narrow problem of contractual relational economic loss. In my view, this question has been unhelpfully bound up with the larger question of pure economic loss. The first part of these reasons retraces these developments and sets forth the rationale for considering this narrow issue as a separate problem.
>
> Part II examines C.N.'s arguments to the effect that it has more than a mere contractual interest. My conclusion is that it does not.
>
> Part III returns to the issue of contractual relational economic loss. It examines the various proposals that have been made to relax the bright line rule excluding recovery for contractual relational economic loss, including those set forth by my colleagues McLachlin and Stevenson JJ.
>
> Part IV examines the rationale for the exclusionary rule. My conclusion is that the bright line rule excluding recovery for economic loss owing to interference with contractual relations that results from damage to a third party's property should not be modified, at least on the facts of this case. I should underline from the outset that this conclusion is not a rejection of recovery for pure economic loss in general terms. It is limited, for reasons that will be set forth, to cases where property damage to a third party has occurred and where the plaintiff's interest is contractual.[160]

'Jervis Crown' was distinguished in *Abramovic v Canadian Pacific Ltd*,[161] a decision of the Ontario High Court. There was a derailment on the Canadian Pacific rail-line, spillage of dangerous chemicals and subsequent evacuation of the site. The plaintiffs' place of employment was shut down and they brought an action against Canadian Pacific for loss of wages. The court dismissed the action, holding that generally pure economic loss by a party who has not sustained actual physical injury or property damage is not recoverable. It further held, without stating reasons, that the case did not fall into any exceptions and was not analogous to *'Jervis Crown'*.[162]

Three recent decisions of the Supreme Court took a liberal approach to the liability of public authorities and considerably broadened the concept of the operational sphere, subject to ordinary negligence standards of care.

In *Just v British Columbia*,[163] the Crown was held negligent in its monitoring and precautions systems against avalanche threats on a section of a highway. Cory J, delivering the majority judgment, stated that once the

---

[160] (1992) 91 DLR (4th) 289, 298–9.

[161] (1989) 69 OR (2d) 487 (Ont. HCJ).

[162] *Canadian National Railway Co. v Norsk Pacific Steamship Co. Ltd and Tug 'Jervis Crown'* (1990) 104 NR 321, (1990) 65 DLR (4th) 321; aff'd (1992) 91 DLR (4th) 289 (SCC).

[163] (1989) 64 DLR (4th) 689 (SCC).

public authority decided on the program of monitoring and inspection of rocky slopes, all decisions relating to the program were of operational character and subject to negligence law.

Laurentide Motels Ltd v Beaufort (Ville)[164] took a similar approach to the maintenance of fire hydrants. Again, once the municipality decided to have a fire-fighting system, all issues relating to the system were operational.

Rothfield v Manolakos[165] dealt with the liability of a municipality regarding building inspections and permit issues. The divided court held that matters pertaining to the supervision and the conduct of the inspection and permit-issue system were operational, although they involved many discretionary determinations. The municipality's exercise of the powers to regulate building constructions imposed on it a duty towards third parties and the builders, the breach of which resulted in liability for injury, property damage and even economic loss.

This expansionary approach to the liability of public authorities is clearly at odds with the more restrictive trend evidenced in English[166] and Australian decisions.[167]

CONCLUSION

Lord Bridge of Harwich recently commented that 'the authorities ... speak with such an uncertain voice that ... they yield no clear and conclusive answer'.[168] This applies not only to the English authorities, but to Australian and Canadian authorities as well. Nonetheless, certain tendencies, often mutually opposing or contradictory, are discernible.

There is the expansionary or liberal and the restrictive approach. The expansionary approach, tending to liberalise the tort law and expand the scope of the liability in negligence, is evident in such judgments as *Anns*,[169] *Junior Books*,[170] *Caltex*,[171] *Jaensch*[172] and in all the Canadian cases dealt with in this survey with the possible exception of *Rivtow*[173] and *Hofstrand Farms*.[174]

---

[164] [1989] 1 SCR 705.

[165] (1989) 63 DLR (4th) 449.

[166] cf. *Governor of the Peabody Donation Fund v Sir Lindsay Parkinson & Co. Ltd* [1985] AC 210 (HL); *D & F Estates Ltd v Church Commissioners for England* [1989] AC 177 (HL); *Murphy v Brentwood District Council* [1990] 2 All ER 908 (HL).

[167] cf. *Sutherland Shire Council v Heyman* (1985) 157 CLR 424; *San Sebastian Pty Ltd v Minister Administering the Environmental Planning and Assessment Act 1979* (1986) 162 CLR 340.

[168] *D & F Estates Ltd v Church Commissioners for England* [1989] AC 177, 201.

[169] *Anns v Merton London Borough Council* [1978] AC 728 (HL).

[170] [1983] 1 AC 520 (HL).

[171] *Caltex Oil (Aust.) Pty Ltd v The Dredge 'Willemstad'* (1976–77) 136 CLR 529, 544–5.

[172] (1984) 155 CLR 549, 578–86.

[173] [1974] SC 1189.

[174] [1986] SCR 228.

The restrictive approach in relation to liability for economic loss is influenced by an anxiety of liability 'in an indeterminate amount for an indeterminate time to an indeterminate class'.[175] It is embodied in the so-called exclusionary rule,[176] still considered the main principle governing the liability for economic loss.[177] The restrictive approach is manifested in the English authorities after *Junior Books*,[178] starting with *Peabody*[179] and in the Australian cases *Sutherland Shire Council*[180] and *San Sebastian*.[181]

A dichotomy similar to the expansionary–restrictive approach is to be found in the efforts to develop a general principle determining the liability and the traditional case-by-case approach. The most general formula was, of course, Lord Wilberforce's two-stage approach, now in disfavour. In England, a new formula based on 'foreseeability, proximity and what is fair and reasonable' was proposed by Lord Keith of Kinkel in *Peabody*.[182] His *dicta* in *Peabody* were approved in *Aliakmon*,[183] and Lord Bridge of Harwich suggested in *Caparo Industries Ltd* that a new formula of 'foreseeability, proximity and what is fair and reasonable' emerges from the recent decisions of the House of Lords.[184] Lord Oliver also referred to 'the court's perception of what is the *reasonable* area for the imposition of liability' in *Alcock*.[185]

It is questionable, however, if the notions of 'fairness and reasonableness' will add any more specificity to the elusive 'neighbourhood' test.

The concept of reasonableness as a touchstone of liability or validity is, of course, not new. It was advocated by Lord Denning as a test for exemption clauses in *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd*[186] and by Wilson J, L'Heureux-Dube J concurring, in the Supreme Court of Canada in *Hunter Engineering Co. v Syncrude Canada Ltd*.[187] The concept is also entrenched in contract and consumer protection legislation.[188]

In Australia, the exposition of Deane J in *Jaensch* based on proximity as a control upon foreseeability has been widely approved and was also

---

[175] (1931) 255 NY 171, 179.

[176] *Cattle v The Stockton Waterworks Co.* (1875) LR 10 QB 453, 457.

[177] cf. Gibbs J in *Caltex Oil (Aust.) Pty Ltd v The Dredge 'Willemstad'* (1976–77) 136 CLR 529, 544–5; Lord Fraser in *Candlewood Navigation Corp. Ltd v Mitsui OSK Ltd ('The Mineral Transporter')* [1986] AC 1, 25; MacQuigan JA in *Canadian National Railway Co. v Norsk Pacific Steamship Co. Ltd and Tug 'Jervis Crown'* (1990) 104 NR 321, 344.

[178] [1983] 1 AC 520.

[179] [1985] AC 210.

[180] (1985) 157 CLR 424.

[181] (1986) 162 CLR 340.

[182] *Supra* nn. 44–46.

[183] [1986] 1 AC 785.

[184] *Caparo Industries PLC v Dickman* [1990] 2 WLR 358, 365.

[185] [1992] 1 AC 310 (*emphasis* added).

[186] [1983] 1 QB 284, 299–301 (CA) and see E.J. Hayek, 'Recent Developments in the Law of Contracts' (1983) 15 *Ottawa Law Review* 600, 626–7.

[187] [1989] 1 SCR 426, 508–9 and see E.J. Hayek, 'Exemption Clauses — The Canadian Approach' (1991) 4 JCL 51, 55–58.

[188] cf. various Unfair Contracts Acts, Misrepresentations Acts, Sale of Goods Acts, Unfair Trading Acts, etc., both in Australia and the United Kingdom.

referred to with approval by Lord Jauncey in *Alcock*.[189] The more traditional viewpoint, distrusting any general formula as a panacea for all issues and preferring the incremental, case-by-case approach, is best expressed in the oft-quoted passage of Brennan J in *Sutherland Shire Council*.[190]

Another two factors, stressed in several judgments, is the knowledge by the defendant of the plaintiff as an individual or a member of an identifiable class and the reliance by the plaintiff on the words or acts of the defendant.[191]

Finally, there is the doubt if any sufficiently specific and generally applicable principles can be developed. This view has been voiced both in judgments and by commentators. Brennan J, in several judgments, expressed his lack of faith in the proximity concept.[192] Lord Roskill referred to phrases such as 'foreseeability', 'proximity', 'neighbourhood', etc., as labels or phrases but not precise definitions,[193] and Lord Oliver stated that the concept of 'proximity' is an artificial one.[194]

Professor Smillie has this to say about the concept of proximity:

> The sole utility of the proximity concept is to obscure the fact that decisions in hard cases are based on controversial value judgements by the courts, and to preserve the appearance of value-free adjudication by reference to a fundamental pre-existing legal principle.[195]

Professor Cane describes the law of economic loss as a 'conceptual morass'.[196]

As against that, it has been advocated that the scope, and even the existence, of the liability for economic loss should be a matter of policy. The formulations of the liability for negligence by Brett MR in *Heaven v*

---

[189] See text under nn. 88–95 and cf. McLachlin J in *Canadian National Railway Co. v Norsk Pacific Steamship Co. Ltd and Tug 'Jervis Crown'* text under n. 150.

[190] See text under nn. 104–6, 112 and cf. Gibbs J in *Caltex Oil (Aust.) Pty Ltd v The Dredge 'Willemstad'* (1976–77) 136 CLR 529, 555; Brennan J in *San Sebastian Pty Ltd v Minister Administering the Environmental Planning and Assessment Act* (1986–87) 162 CLR 340, 367–8, and McLachlin J in *Canadian National Railway Co. v Norsk Pacific Steamship Co. Ltd and Tug 'Jervis Crown'* (1990) 104 NR 321, 347–8.

[191] cf. Gibbs and Mason JJ in *Caltex Oil (Aust.) Pty Ltd v The Dredge 'Willemstad'* (1976–77) 136 CLR 529, 593; judgment of the majority in *San Sebastian Pty Ltd v Minister Administering the Environmental Planning and Assessment Act* (1986–87) 162 CLR 340, 355; Lord Bridge in *Caparo Industries PLC v Dickman* [1990] 2 WLR 358, 367–8; Estey J in *BCD Ltd v Hofstrand Farms Ltd* [1986] SCR 228; Dickson J in *Haig v Bamford* [1977] 1 SCR 466.

[192] cf. *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 481; *San Sebastian Pty Ltd v Minister Administering the Environmental Planning and Assessment Act* (1986–87) 162 CLR 340, 367–8; and *Hawkins v Clayton* (1988) 164 CLR 539, 555–6.

[193] *Caparo Industries PLC v Dickman* [1990] 2 WLR 358, 374–5 (*emphasis* added).

[194] *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310, 411.

[195] J.A. Smillie, 'The Foundation of Care in Negligence' (1989) 15 *Monash Law Review* 302, 315.

[196] P. Cane, 'Economic Loss in Tort: Is the Pendulum Out of Control?' (1989) 52 *Modern Law Review* 200, 214.

Pender,[197] Lord Atkin in *Donoghue*[198] and Lord Wilberforce in *Anns*[199] are expressions of policy. So is the exclusionary clause by Blackburn J in *Cattle*[200] and Cardozo CJ's floodgate argument.[201] The test of 'fairness and reasonableness', proposed by Lord Keith of Kinkel and gaining increasing approval, also involves policy considerations.[202]

Lord Denning's observations on the role of policy considerations in economic loss decisions are, as always, worth noting:

> At bottom, I think the question of recovering economic loss is one of policy. Whenever the courts draw a line to mark out the bounds of duty, they do it as a matter of policy so as to limit the responsibility of the defendant. Whenever the court sets bounds to the *damages* recoverable — saying that they are, or are not, too remote — they do it as a matter of policy so as to limit the liability of the defendant....
>
> The more I think about these cases, the more difficult I find it to put it into its proper pigeonhole. Sometimes I say: 'There was no duty.' In others I say: 'The damage was too remote.' So much so that I think the time has come to discard these tests which have proved so elusive. It seems to me better to consider the particular relationship in hand, and see whether or not, as a matter of policy, economic loss should be recoverable.[203]

[197] (1883) 11 QBD 503.
[198] [1932] AC 562.
[199] [1978] AC 728.
[200] (1875) LR 10 QB 453.
[201] (1931) 255 NY 171, 179.
[202] See text under nn. 182–5.
[203] *Spartan Steel & Alloys Ltd v Martin & Co. (Contractors) Ltd* [1972] 3 All ER 557, 561–2.