Frank Stewart Dethridge Memorial Address 1994

Pride And Precedent: Economic Loss — The Search for a New Bright Line

The Honourable Mr Justice CSC Shelter *

I am honoured to be asked to deliver this address, in memory of a great contributor to maritime law in Australia and a founder of this Association, Frank Stewart Dethridge. Rather as, on that fateful early morning in July 1981, the *Mineral Transporter,* after her starboard anchor failed, drifted away towards the *Ibaraki Maru,* so have I, in the last few years moved away from close involvement with the law of the sea. Your invitation has reminded me of the influence that the law developed in maritime cases has had upon the common law generally. It is striking how many of the leading cases on economic loss have to do with seafaring.

THE TAR BABY

According to 'Uncle Remus', Brer Rabbit was bred and born in the briar patch. Brer Fox much wanted Brer Rabbit to join him for dinner. To forestall refusal of the invitation, he set up a Tar Baby contraption by the side of the road. Brer Rabbit came by and greeted the Tar Baby, but the Tar Baby said nothing. Thinking her stuck-up, Brer Rabbit decided to bust the Tar Baby wide open. He hit her with one fist and

° Justice of Appeal, Court of Appeal, New South Wales.

1 See Joel Chandler Harris 'The Essential Uncle Remus'.

it stuck, he hit her with the other fist and that, too, stuck. Then he kicked her and both feet stuck. He head butted her and his head stuck. He was at the mercy of Brer Fox. But by using his wits Brer Rabbit escaped. In an inspired moment of reverse psychology he told Brer Fox that he did not care what Brer Fox did, as long as he did not throw him into the briar patch. So Brer Fox was persuaded to do just that and Brer Rabbit made his escape.

The judgment of Mr Justice Oliver Wendell Holmes in *Robins Dry Dock & Repair Co* v *Flint,* which has been treated as having affirmed a 'bright line rule' excluding recovery of damages in negligence for economic loss in the absence of injury to the plaintiff, was described in 1985 as the Tar Baby of tort law with a briar patch far away. This intriguing metaphor may have been intended to call attention to the traps of unyielding adherence to precedent and the increasing difficulty of escape as precedent builds on precedent.

CONSEQUENTIAL AND PURE ECONOMIC LOSS

The expressions 'consequential economic loss and, in contrast, 'pure economic loss" have acquired particular meanings. Consequential economic loss is financial loss causally consequent upon physical injury to the plaintiff or the plaintiff's property and, in negligence cases, is a head of damages recovered every day by the injured victims of motor vehicle accidents whose earning capacity is diminished in consequence.

Pure economic loss, (to which, on occasion, I shall refer simply as economic loss) is a financial loss which is not causally consequent upon physical injury to the plaintiff's own person or property. In his comprehensive and scholarly book on economic negligence, Professor Feldthusen has identified five different categories of economic loss cases. This paper concerns one of those categories,

2 (1927) 275 US 303 at 309.
3 *State of Louisiana v MV Testbank* 752 F 2d 1019 (1985) at 1035 per Circuit Judge Wisdom.
4 Feldthusen, *Economic Negligence,* 2nd ed, Carswell (1989), 1.
5 Feldthusen, *Economic Negligence,* 2nd ed, Carswell (1989).
6 'Negligent Misrepresentation; Negligent Performance of a Service; Negligent Manufacture of Shoddy Products; Relational Economic Loss; and Public Authority's

relational economic loss, where the plaintiff's economic loss is causally linked to damage by the negligent wrongdoer, not to the plaintiff's person or property, but to the property of another party or to a public resource. Should the plaintiff be able to recover for this loss? The difference between consequential economic loss and relational economic loss is illustrated by 'an unusual concatenation of events on the Buffalo River' on the night of 21 January 1959, which might have been used as a model for a recent TV advertisement encouraging viewers to take out third party property insurance. A thaw had set in after freezing weather and it was raining. The Kinsman Transit Company's vessel, the *MacGilvray Shims,* was moored at a dock operated by the Continental Grain Company.

> (A)s the result of the negligence of the Kinsman Transit Company and the Continental Grain Company, the SS *MacGilvray Shiras* broke loose from her moorings and careened stern first down the narrow, S-shaped river channels. She struck the SS *Michael K Tewksbury,* which in turn broke loose from her moorings and drifted downstream — followed by the *Shiras* — until she crashed into the Michigan Avenue Bridge. The bridge collapsed and its wreckage, together with the *Tewksbury* and *Shiras,* formed a dam which caused extensive flooding and an ice jam reaching almost 3 miles upstream. As a result of this disaster, transportation on the river was disrupted for a period of about two months.

Kinsman, Continental and the City of Buffalo, which employed the operators of the drawbridge, were held liable to the property owners for the physical injury to their properties. But there were other claims. Cargill Inc was prevented by the accident from transporting wheat it had contracted to deliver and sued the tortfeasors to recover the costs incurred in obtaining alternative supplies to fulfil its contract. Another claimant, Cargo Carriers Inc, was, when the

Failure to Confer an Economic Benefit'. Dr Chambers in his chapter 'Economic Loss' in PD Finn (ed), Essays *on Tort,* LBC (1989) identified seven categories of case where damages for pure economic loss were held to be recoverable.

7 *Re Kinsman Transit Company* (1968) 388 F 2d 821 at 822.

8 *Re Petitioner of Kinsman Transit Co* (1964) 338 F 2d 708.

calamity occurred, unloading corn from the *Merton E Fan,* which was docked above the bridge. One of the drifting vessels knocked her loose from her mooring and she lodged a short distance from the dock. Ice accumulated in the space between, making regular unloading impossible. Cargo Carriers sued the tortfeasors to recover the cost of renting special equipment needed to complete the unloading. Neither Cargill nor Cargo Carriers had sustained physical injury to their property and so both claims failed. A 'bright line' was drawn between the property owners' consequential loss, which was compensable, and the pure economic loss sustained by Cargill and Cargo Carriers, which was not.

Damage to property tends to have a ripple effect on the economic well-being of many people. A line limiting the extent of the wrongdoer's liability must be drawn somewhere. There has long existed and still exists a judicial fear of opening the flood gates and exposing the defendant to liability in what Cardozo CJ described as 'an indeterminate amount for an indeterminate time to an indeterminate class. Moreover if the fund available to meet claims for the economic consequences of injury is limited, how is it to be divided fairly between those who have suffered serious injury to person or property and those who have suffered no more than a downturn of their business takings? The conflict has been between the predictability but perceived injustice of the bright line rule of exclusion and the uncertainties involved in other control mechanisms (such as proximity) which have been lately preferred in the hope of doing greater justice. The exclusion of damages for pure economic loss is a rule which provides a certain, if unjust, solution.

THE DIFFICULTIES OF REFORM

The doctrine of precedent and adherence to long standing precedent, has inhibited the rejection or confinement of the exclusory rule. When a final appellate court has dealt with a principle of law, after painstaking research and careful consideration, it is not easy for the

9 Re *Kinsman Transit Company* (1968) 388 F 2d 821.
10 *Ultramares Corp v louche* (1931) 174 NE 441 **at** 444.

judges concerned or their successors, if and when the same subject returns for decision, to change their minds to take account of different and more recent perspectives and points of view. But it is ironic that in the first of two important cases about pure economic loss, decided in the NSW Admiralty Court, the Court was overruled by the High Court for applying long established precedent and, in the second, by the Privy Council for not doing so. The 1976 decision of the High Court of Australia in the *Willemstad was the product of both precedent and innovation. Yet it exemplifies the constraints imposed by the doctrine of precedent and may itself, as a precedent, limit further progress and change. If Lord Atkin*[12] *was right to base the law of negligence upon a general public sentiment of moral wrongdoing for which the offender must pay, the law must or does change as public sentiment changes.*

The *Willemstad* has been followed, somewhat gingerly, in Australia and New Zealand. The law of negligence has been considerably explained and developed in the eighteen years since it was decided. The time is ripe to reassess in what circumstances and by whom damages for pure economic loss are recoverable in actions in negligence. How is this to be done?

THE LAW OF NEGLIGENCE

Donoghue v *Stevenson,* the fount of the modern law of negligence, concerned liability for physical injury to the person. It did not concern pure economic loss. Until 1964 damages were not recoverable for negligent misstatement. It was generally accepted (at least in England) that economic loss not causally consequent upon physical injury to the plaintiff's own person or property was not compen-sable in negligence. In 1964 this broad exclusory principle was rejected by the House of Lords in *Hedley Byrne & Co Ltd* v *Heller & Partners Ltd.* Speculation followed as to whether any of the exclusory

11 *Caltex Oil (Australia) Pty Limited* v *The Dredge 'Willemstad'* (1976) 136 CLR 529.
12 [1932] AC 562 at 580.
13 *New Zealand Forest Products Ltd* v *Attorney General* [1986] 1 NZLR 14.
14 [1932] AC 562.
15 *Candler* v *Crane Christmas & Co* [1951] 2 KB 164 and *Le Lievre* v *Gould* [1893] 1 QB 491.
16 [1964] AC 465.

rule survived. The 1978 decision of the House of Lords in *Anns* v *Merton London Borough Council*[17] and Lord Wilberforce's two stage approach for establishing whether a duty of care arose in a particular situation further fuelled this speculation.

THE ORIGIN OF THE EXCLUSORY RULE

The bright line rule, conspicuous and certain, was originally narrow in scope. If a defendant negligently injured the property of a third party, a plaintiff with only contractual rights to the use or services of that property (but no possessory or proprietary rights in it) could not recover damages from the defendant for the pure economic loss which resulted from the injury. This narrow rule dates back in England to 1875 and the decision of a Divisional Court of the Queen's Bench which held that Mr Cattle could not recover from the Stockton Waterworks Company the loss he had sustained in consequence of damage done when that Company negligently let water escape onto Mr Knight's property through which Mr Cattle had contracted to make a tunnel.

Two years later, in *Simpson* & Co v *Thomson,* Lord Penzance said that there was no principle that where damage is done by a wrongdoer to a chattel, anyone, who had no property and no possessory right in the chattel but whose obligations under a contract with the owner had become more onerous, or whose advantages under the contract had become less beneficial by the damage done to the chattel, had a right of action against the wrongdoer.

In 1921 in *Elliott Steam Tug Co Ltd* v *The Shipping Controller*[20] Scrutton LJ said there was no doubt about the position.

> In case of a wrong done to a chattel the common law does not recognise a person whose only rights are a contractual right to have the use or

17 [1978] AC 728 at 751-2.
18 *Cattle v Stockton Waterworks Company* [1875] LR10 QB 453 **at** 457.
19 [1877] 3 App Cas 279 at 289.
20 [1922] 1 KB 127 at 139; see also *Weller* & Co v *Foot & Mouth Disease Research Institute 11966]* 1 QB 569 and *Spartan Steel & Alloys Limited* v *Martin & Co (Contractors) Limited* [1973] QB 27.

services of the chattel for purposes of making profits or gains without possession of or property in the chattel.

Holmes J has been called the most illustrious figure in the history of American law.[21] Accordingly it is not surprising that his judgment in 1927 in the United States Supreme Court in *Robins, a* case concerning a time charterer's claim against a ship repairer, has had enormous influence in that country and elsewhere. He said '... no authority need be cited to show that, as a general rule, at least, a tort to the person or property of one man does not make the tortfeasor liable to another merely because the injured party was under a contract with that other, unknown to the doer of the wrong .....The law does not spread its protection so far.' Yet this opinion has been derided by judicial supporters in the United States as delphic and by judicial detractors as the Tar Baby of tort law.

The explanation for the bright line rule was a pragmatic one. '(T)he physical consequences of negligence usually have been limited, but the indirect economic repercussions of negligence may be far wider, indeed virtually open-ended.' The rule emerged in commercial cases of no general public interest.

ECONOMIC INTERRELATIONSHIP — POLLUTION

In 1985 in *State of Louisiana* v *MV Testbank,*[26] the United States Court of Appeals (Fifth Circuit) had to consider a case of a very different type. In the early evening of 22 July 1980, the *Sea Daniel,* an inbound bulk carrier, and the *Testbank,* an outbound container ship, collided at approximately mile forty one off the Mississippi River Gulf Outlet. A white haze of hydrobromic acid enveloped the ships. Containers aboard the *Testbank* containing about twelve tons of pentachlorophe-

21 Posner, *The Essential Holmes* (1992) 1.
22 (1927) 275 US 303.
23 He referred with approval to Scrutton LJ's judgment in 1921 in *Elliott Steam Tug Co Ltd* v *The Shipping Controller* [1922] 1 KB 127 at 139-140.
24 *State of Louisiana* v *MV Testbank* 752 F 2d 1019 (1985) at 1022 and 1035.
25 Professor James 'Limitation on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal' 25 Vand L Rev 43 at 44-6 (1972).
26 752 F 2d 1019 (1985).

nol, PCP, were damaged and lost overboard. The United States Coast Guard closed the outlet to navigation for three weeks; all fishing, shrimping and related activities were suspended not only in the outlet but over four hundred square miles of surrounding marsh and waterways. Forty-one lawsuits were filed on behalf of commercial and recreational fishermen, marina and boat rental operators, marine suppliers, wholesale and retail seafood enterprises, seafood restaurants, tackle and bait shops, cargo terminal operators, a railroad freight car operator, seeking demurrage, and vessel operators seeking expenses (demurrage, crew costs, tug hire) and losses of revenues caused by the closure of the outlet. They were all dismissed.

The case was considered to be of such significance that the Court sat in a full bane of fifteen judges. The scope and rationale of the *Robins' Dry Dock* rule was re-examined. All the judges agreed that *Robins* made eminent sense in its own particular fact situation but differed in what they considered to be the scope of its operation. The majority upheld the rule as applying broadly to exclude all claims for economic loss in the absence of physical injury to the plaintiff. They praised it for its predictability. Circuit Judge Higginbotham, who gave the principal majority judgment, acknowledged that the bright line rule combined the virtue of predictability with the vice of creating results in cases at its edge that were said to be unjust or unfair, but pointed out that the line drawing sought by the plaintiffs in that case was no less arbitrary 'because the line drawing appears only in the outcome — as one claimant is found too remote and another is allowed to recover. The true difference is that plaintiffs' approach would mask the results. The present rule would be more candid, and in addition, by making results more predictable, serves a normative function. It operates as a rule of law and allows the court to adjudicate rather than manage.'

Circuit Judge Gee raised the major concern of whether the dispute resolution systems of courts, developed to decide who owned the title to Blackacre, or whether it was Smith or Jones who

27 Ibid at 1029.
28 Ibid at 1029.

ran the stop sign in his wagon, can be applied to manage the consequences of general disasters flowing from oil spills, the spread of noxious industrial gases or the use of material such as asbestos. What was called for was management of the consequences of a disaster rather than the resolution of a dispute between the time charterer and repairer of a ship.

It was Circuit Judge Wisdom who, in the principal dissenting judgment, characterised *Robins* as the Tar Baby of tort law in the circuit and said: This Court's application of *Robins* is out of step with contemporary tort doctrine, works substantial injustice on innocent victims and is unsupported by the considerations that justified the Supreme Court's 1927 decision.' He considered *Robins* was limited to preventing plaintiffs, who were neither proximately nor foresee-ably injured by a tortious act or product, recovering solely by claiming a contract with the injured party. The difficulty of drawing a workable line between workers out of their jobs and restaurant owners supplying the workers' lunches, was to be resolved by the requirements of proximate cause, foreseeability and 'particular damage' a concept derived from the cause of action in public nuisance and identified as distinguishing the plaintiff from the general population. This would have allowed for recovery by commercial fishermen, ships trapped or delayed by the closure of the outlet and some claimants whose business of supplying vital commodities or services to those in the maritime industry or into the condemned area was interrupted by the collision, the closure or the embargo. A claim for damages that was indistinguishable from a general grievance furnished no basis for recovery.

The majority opinion in the *Testbank* favouring the administrative convenience and predictability of an exclusory and conspicuous bright line rule has been repeatedly affirmed in the United States.

29 Ibid at 1035.
30 Ibid at 1039.
31 Ibid at 1049.
32 In the matter of the complaint of *Bollard Shipping Co* (1993) AMC 1413. On 23 June 1989 the *World Prodigy* hit the Brenton Reef off the coast of Newport, Rhode Island and spilled a substantial amount of heating oil into Narragansett Bay. Twenty-nine claimants

THE DOCTRINE OF PRECEDENT

In 1986 in *Leigh and Sillavan Limited* v *Aliakmon Shipping Co Limited* [oo] the House of Lords was called upon to consider a conventional commercial case about goods damaged in transit as the result of bad stowage. Lord Brandon, with the concurrence of the other members of the House, spoke of a long line of authority supporting the exclusory rule where the plaintiff had only contractual rights to the property lost or damaged. His Lordship extolled the virtues of precedent and certainty:

> 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.

Professor Markesinis has described the tone of the judgment as carrying the infallibility doctrine to extremes. What does it matter that it is simple to understand and easy to follow, if it is wrong? What of a certainty already riddled with exceptions?

In 1991 in *Murphy* v *Brentwood District Council* the House of Lords refused to follow *Anns* case. Lord Keith remarked that, at the

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alleging purely economic loss arising out of the oil spill sued the owner Ballard Shipping Company. The claimants included seafood dealers, tackle shop operators, restaurant owners and employees, a scuba equipment and canoe rental shop, and a variety of other shoreline businesses operating in the bay area. In 1993 the United States District Court, District of Rhode Island dismissed their claims. The court concluded that the Robins Dry Dock rule, limiting recovery to those who have suffered physical injury to their personal property, barred the claims by the twenty-nine claimants.

33 [1986] AC 785.
34 Ibid at 809.
35 Ibid at 816-7.
36 BP Markensinis 'An Expanding Tort Law — The Price of a Rigid Contract Law' (1987) 103 LQR 354 at 387.
37 [1991] 1 AC 398.

time it was decided, the right to recover for pure economic loss did not extend beyond the situation where the loss had been sustained through reliance on negligent misstatements, as in *Hedley Byrne.* Lord Oliver referred to what he described as 'an uninterrupted line of cases since 1875' wherein it had consistently been held that a third party cannot successfully sue in tort for the interference with his or her economic expectations or advantage resulting from injury to the person or property of another person with whom the third party has or is likely to have a contractual relationship.

THE EXCEPTIONS TO THE EXCLUSORY RULE

For the most part the exceptions to the exclusory rule have been cases in categories other than relational economic loss: cases like *Hedley Byrne* and the 1973 decision of the Supreme Court of Canada in Rivtow Marine Limited v Washington Iron Works.

Lurking in the shadows and perhaps truly an exception to the application of the exclusory rule in relational cases was the 1947 decision of the House of Lords in *Morrison Steamship Co Ltd* v *Greystoke Castle (Cargo Owners).* Lord Roche's speech has been regarded as authority for the proposition that, in certain circumstances, economic loss, such as the expense incurred by the owner of undamaged cargo as a result of a collision between the wrongdoer and the carrying ship or vehicle, is recoverable in an action in negligence on the basis that the parties wronged were engaged in a common adventure.

38 [1964] AC 465 468.
39 ibid 485.
40 (1973) 40 DLR (3d) 530 Washington had designed and manufactured a crane which was fitted on the Rivtow Carrier, a self-loading and unloading log barge, demise chartered to Rivtow. Washington failed to give prompt notice of *a* defect in the crane. Had the notice been given promptly the crane could have been repaired without significant loss of earnings. Rivtow recovered damages for the loss of earnings it sustained as the result of the failure to warn. So that the defect could be remedied, the Rivtow Carrier was out of commission at one of the busiest seasons of the year in the logging business. The case falls into the category concerned, in the language of Professor Feldthusen, with the tort liability of the non-privity manufacturer of a defective product rather than that concerned with economic loss consequential upon damage to the property of another.
41 [1947] AC 265.

A clearer exception was the 1974 decision of the United States Court of Appeals (Ninth Circuit) in *Union Oil Co* v Oppen.[42] A mishap at an oil drilling platform introduced hundreds of thousands of gallons of oil into the ocean off the coast of Santa Barbara, California. The Court awarded damages to fishermen whose livelihood was affected.

Finally there is the *Willemstad,* the dredge which fractured the submarine pipeline used to supply refined product at the supplier's risk to the Caltex Banksmeadow terminal and sued by Caltex for the cost of alternative transportation and of using other distribution points, pure economic loss.

The US Court of Appeals in the *Testbank* did not mention the *Willemstad.* Lord Brandon in *Aliakmon* had no need to. He was a member of the Judicial Committee of the Privy Council which in the *Mineral Transporter* had said, less than a year before, that the members were entitled, and indeed bound, to reach their own decision without the assistance of any single ratio decidendi to be found in the *Willemstad**[3]

INNOVATION

In the *Willemstad* remarkable pioneering attempts were made to formulate a unifying principle for determining when damages for economic loss could be recovered. The cases in England (notably *Cattle* v *Stockton Waterworks* Co[44] and Elliott *Steam Tug Co),**[5] the United States (notably *Robins* and *Oppen)* and Canada (notably *Rivtow)* were reviewed. While the attempts were bold the result was unsatisfactory. The position adopted by the High Court in five disparate judgments has been described as 'of almost fugal complexity'. Thus it could later be side stepped by the Privy Council.

42 501 F 2d 558 (1974).
43 [1986] AC 1 at 24.
44 [1875] LR 10 QB 453.
45 [1922] 1 KB 127.
46 See per Glass JA 'Duty to Avoid Economic Loss' (1977) 51 ALJ 372.
47 [1986] AC 1 at 22.

Hedley Byrne was treated as breaching what was thought to have been a general exclusory rule. Four members of the Court recognised that there must be some limit to what would otherwise be indeterminate liability. Gibbs and Mason JJ saw the case as one of the exceptional cases in which the defendant had knowledge or the means of knowledge that the plaintiff individually and not merely as a member of an unascertained class would be likely to suffer in consequence of the negligence. That was the relationship upon which, in their opinion, recovery depended.

The judgment which has been the most influential in later High Court cases was that of Stephen J. His Honour recognised that because of the inherent capacity of economic loss to manifest itself at several removes from the direct detriment inflicted by the defendant's carelessness, reasonable foreseeability was an inadequate control mechanism and insisted upon the need for sufficient proximity between tortious act and compensable detriment. He regarded policy considerations, if treated as the sole criterion, as leading to too great uncertainty.

Lord Atkin's 'general public sentiment of moral wrongdoing for which the offender must pay' :

> .. .will only be present when there exists a degree of proximity between the tortious act and the injury such that the community will recognise the tortfeasor as being in justice obliged to make good his moral wrongdoing by compensating the victims of his negligence. Again, as Lord Morris said in the *Dorset Yacht* case courts may have recourse to a consideration of what is fair and reasonable in determining in particular circumstances whether a duty of care arises ..

48 Gibbs, Stephen, Mason and Jacobs JJ-
49 [1964] AC 465 see per Gibbs J at 555 and Mason J at 593.
50 Ibid at 574-5.
51 (1976) 136 CLR 529 at 566.
52 [1932] AC 562 at 580.
53 *Home Office* v *Dorset 'Yacht Co Limited* [1970] AC 1004.
54 (1976) 136 CLR 529 at 575.

Certainty would emerge, in his Honour's opinion, with the gradual accumulation of decided cases and the impact of evolving policy considerations.

Speaking of the role of insurance and 'loss spreading' Stephen J said-[55]

> The task of the courts remains that of loss fixing rather than loss spreading and if this is to be altered it is, in my view, a matter for direct legislative action rather than for the courts. It should be undertaken, if at all, openly and after adequate public inquiry and parliamentary debate and not worked towards covertly, in the course of judicial decision, by the adoption of policy factors which assume its desirability as a goal and operate to further its attainment.

Jacobs J applied a test of physical propinquity. Murphy J found no reason for limiting recovery. All members of the Court were agreed that the plaintiff should succeed but for different reasons. None of the justices discriminated between the different categories of case giving rise to claims for pure economic loss. All but Murphy J acknowledged the need for a line of limitation but rejected the bright line rule; instead they sought to find some other universal and comprehensive formula for recovery. This, I suspect, was an impossible task.

REACTION

Seven and a half years later there followed a reversion to the ex-elusory rule in a classic contractual relational economic loss claim. *Candlewood Navigation Corporation Limited* v *Mitsui OSK Lines Limited* was a case in the traditional mode. Candlewood owned the *Mineral Transporter* which, due to the negligence of the crew, collided with and damaged the *Ibaraki Maru.* The *Ibaraki Mam* was the subject of a bare boat charter from Mitsui OSK Lines Limited (her owner and the first plaintiff) to Matsuoka Steamship Company Limited (the

55 Ibid at 580.
56 Ibid at 597.
57 Ibid at 606.
58 [1986] 1 AC 1.

second plaintiff) and a time charter of the same date from Matsuoka to Mitsui OSK. The case proceeded on the basis that Mitsui OSK had at the relevant time no proprietary or possessory interest in the *Ibaraki Maru.* Mitsui OSK, as time charterer, sued Candlewood to recover damages for the amount of hire wasted and profits lost while the vessel was out of service, that is for pure economic loss. The plaintiff succeeded at first instance by application of the reasoning of the High Court in the *Willemstad.* On this point Candlewood's appeal to the Privy Council was upheld.

Their Lordships referred to the general principle stated in *Cat tie v Stockton Waterworks Co* and *Simpson & Co* v *Thompson.* These two cases had stood for over a hundred years. The justification for denying a right of action to a person who had suffered economic damage through injury to the property of another was practical policy. It was inexpedient to admit the claim. Their Lordships said that neither *Anns* case nor any of the trilogy of cases referred to in the speech of Lord Wilberforce were dealing with claims against a wrongdoer by a person who was not the victim of his negligence but a third party whose only relation to the victim was contractual. Their Lordship applied 'the generally accepted' common law limitation of liability for economic damage in negligence stated by Scrutton LJ in *Elliott Steam Tug Co Ltd.*[62]

Their Lordships analysed the judgments in the *Willemstad* in detail. Of the reasons given by Gibbs and Mason JJ their Lordships said they had difficulty in seeing how to distinguish between a plaintiff as an individual and a plaintiff as a member of an unascertained class. Why, they asked, should there be a distinction between a case where the wrongdoer knows (or has the means of knowing) that the group likely to be affected by its negligence consists of *a* definite number of persons who can be identified either by name or

59 *Elliott Steam Tug Co Ltd v The Shipping Controller* [1922] 1 KB 127 at 139-40 per Scrutton LJ.
60 [1978] AC 728.
61 Ibid at 751-2.
62 [1922] 1 KB 127 at 139-40.
63 [1986] AC 1 at 24.

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 unknown, and some or all of whom could not be identified by name or otherwise, and who may therefore be regarded as an unascertained class. They were not able to find in the reasons of Stephen J a statement of principle which appeared to offer a satisfactory and reasonably certain guide. On the other hand the judgment of Jacobs J appeared to provide a reasonably certain test, namely the traditional test of physical propinquity, but that did not assist the time charterer plaintiff's argument. They were unable to find any single ratio decidendi to assist them. Thus the innovatory advance made by the High Court in the *Willemstad* faltered.

The law on the recovery of pure economic loss might have been thought to have proceeded to a dead end. In England and the United States loss suffered consequent upon damage to the property of another was not recoverable. Only in Australia and possibly New Zealand did the flame of a more expansive rule still flicker.

RESURGENCE

Then in 1992 came the decision of the Supreme Court of Canada in the *Canadian National Railway Co v Norsk Pacific Steamship Co,* a case about contractual relational economic loss. The judgments have rightly been said to demonstrate a keen interest in foreign law (the majority supported their conclusions by reference to civil law systems), an obvious predeliction towards economic and policy oriented arguments, and an impressive command of the relevant academic literature.

On 28 November 1987 heavy fog shrouded the Eraser River between Surrey and New Westminster, Vancouver. While being

64 Todd, *The Law of Torts in New Zealand,* (1991) p 166, para 4.7.
65 [1992] 1 SCR 1021.
66 Markesinis and Deakin "The Random Element of Their Lordships' Infallible Judgment' (1992) 55 MLR 619 at 646.

towed downstream by the *Jervis Crown,* a tug owned and operated by the appellants Norsk Pacific Steamship Co and Norsk Pacific Marine Services Limited, the barge *Crown Forest No 4* collided with the New Westminster Bridge. The accident caused extensive damage to the bridge which was closed for several weeks. The appellants admitted negligence. The bridge carried a single railway track. It was owned by Public Works Canada (PWC). It was used by four railway companies under a contract which reserved full ownership of the bridge to PWC and left no possibility of a proprietary or possessory interest in the railway companies. Its sole purpose was to service railway traffic, both passenger and freight. While the bridge was closed the four railway companies which used it had to re-route traffic over another bridge further upstream. Freight was either delayed or not transported at all. Three of the railway companies sued Norsk to recover damages for the resultant economic loss. The claim succeeded both at first instance and in the Court of Appeal. Norsk appealed to the Supreme Court.

The Supreme Court, by a majorityof four to three dismissed the appeal. Of the majority only one, Stevenson J, adopted the known plaintiff test. He observed that while this approach might not provide an adequate final limit on recovery of relational economic loss, at least it precluded the threat of indeterminate liability. He seems to have been drawn to this approach by published criticisms of proximity as a test for fixing the limit of liability. Madam Justice McLachlin delivered the principal majority judgment. She said, to borrow a phrase of La Forest J, who gave the dissenting judgment, that the 'known plaintiff test or the 'ascertained class' test placed a premium on notoriety. McLachlin J affirmed that the broad and

67 L'Heureux-Dube, Cory, McLachlin and Stevenson JJ-
68 La Forest, Sopinka and lacobucri JJ-
69 [1992] 1 SCR 1021 at 1181.
70 Id at 1178. He referred to McHugh J in his chapter 'Neighbourhood, Proximity and Reliance' in PD Finn in Essays *an Torts* (1989) and Brennan J's judgment in *San Sebastian Pty Limited* v *Minister Administering the Environmental Planning and Assessment Act 1979* (1986) 162 CLR 340 at 368.
71 [1992] 1 SCR 1021at 1163.
72 Ibid.

flexible approach set out in *Anns* case governed the right to recover for economic loss in tort but agreed that the law of tort did not permit recovery for all economic loss.

> We further agree that where the plaintiff establishes a joint venture with the owner of the damaged property, it should be able to recover economic loss. Where we differ, in the final analysis, is on the test for determining joint venture.

La Forest J[yo] stressed the practical difficulties in applying the known plaintiff test. In his opinion problems also existed at the level of principle. He quoted from an article by Professor Feldthusen on the function of the defendant's knowledge in those cases where the duty of care is derived from a business relationship between the parties which antedates, and is independent from, the negligent act. The assumption of responsibility or special relationship duty tests and the known limited class remoteness test were developed to deal with transaction-specific negligence, such as involve voluntary representation, as opposed to accidents. La Forest J agreed with Stephenson J that proximity was incapable of providing a principled basis for drawing the line on the issue of liability. It expressed a result rather than a principle.

IS PROXIMITY THE NEW BRIGHT LINE?

In Australia proximity has emerged as the decisive factor in delimiting the class of persons to whom a duty of care is owed whether for physical damage or pure economic loss. Since the *Willemstad* was decided, proximity's part has been discussed and explained by the High Court in other cases, notably *Council of the Shire of Sutherland v Heyman.* In that case Mason J said that the concept of proximity as explained by Stephen J in *The Willemstad* had 'certainly been an influential factor in setting limits to the far-ranging effect of the

73 Ibid at 1110.
74 'Economic Loss in the Supreme Court of Canada: Yesterday and Tomorrow' (1990-91) 17 Can Bus LJ 356 at 376-7.
75 (1985) 157 CLR 424.
76 Ibid at 461-2.

foreseeability doctrine and in confining the class of persons to whom a duty of care may be owed.' Deane J said that, in cases where the damage sustained had been merely economic in its nature, 'the mere fact that it is reasonably foreseeable that carelessness on the part of a person may be likely to cause damage to another person is not in itself sufficient to give rise to a prima facie duty of care; a relevant duty of care will only arise if the requisite element of 'proximity', in the broad sense in which Lord Atkin used the term in *Donoghue v Stevenson* is satisfied.' The two stage approach taken by Lord Wilberforce in *Anns* case was inappropriate in such cases.

Deane J went on to explain what he meant by proximity as a requirement of all liability for negligence. He described it as the notion of nearness or closeness, embracing physical, circumstantial and 'causal' proximity. Both the identity and the relative importance of the factors, which are determinative of an issue of proximity, are likely to vary in different categories of case. While there is no scope for idiosyncratic notions of justice or morality the identification of the content of proximity is not divorced from notions of what is fair and reasonable or from considerations of public policy. This is a sophisticated concept and will call for careful analysis and application in future cases. I suspect judges concerned to weigh pure economic loss claims by hotel proprietors, their retrenched employees and those who service the employees, may find the task of applying this test of proximity difficult. It is far removed from the rather basic propositions found in the *Willemstad* and is not without its critics.

Professor Feldthusen writes that, while no one can quarrel with the fact that the proximity principle is a common theme in all negligence cases, to say that the principle of proximity is central to all pure economic loss claims 'is useful only at the highest level of abstraction'. The separation of the notion of proximity from the

77 Ibid at 507.
78 [1978] AC 728 at 751-2.
79 (1985) 157 CLR 424 at 497.
80 (1991) 17 Can Bus LJ 356 at 376.

notion of reasonable foreseeability of harm, favoured by most members of the present High Court, has been criticised in an article published by McHugh J and referred to by Stevenson J in the *Norsk Pacific* case. McHugh J prefers Brennan J's view, expressed in *Heyman's* case, that the law should rather develop novel categories of negligence incrementally and by analogy with established categories. Policy factors are influential and may be decisive. According to McHugh J, in determining whether a defendant should compensate those who have as a result of the defendant's negligence suffered pure economic loss, the court should have regard to administrative factors, such as the capacity of the courts to process claims of the kind in issue, ethical or moral factors, such as the restrictions on freedom of action, economic factors, such as whether the cost of imposing a duty will outweigh the benefits, justice factors, such as whether the imposition of a duty produces a fair and reasonable result and public interest factors, such as the effect of imposing a duty on the public interest as opposed to the private interests of plaintiffs and defendants. The abandonment of proximity is favoured for reason that while the notions of nearness or closeness and physical proximity may be significant in limiting liability for, say, nervous shock they are of less assistance in other cases. On the one hand parties may be in different parts of the world and yet one will owe a duty of care to the other. On the other hand they may be in a close and direct relationship, such as that between pupil and driving instructor, where there is no such duty.

POLICY CONSIDERATIONS

In his judgment in the *Norsk Pacific Steamship* case, La Forest J referred to policy considerations which he considered favoured the exclusory rule in contractual relational cases. He said that:

- 'in this field the crucial problem remains that of limiting liability. All recognise that recovery of this type of claim must remain exceptional,

81 'Neighbourhood Proximity and Reliance', in Finn (ed) Essays *on Tort,* (1989).
82 *Jaensch* v *Coffey* (1984) 155 CLR 549.
83 *Cook* v *Cook* (1986) 162 CLR 376.

if only because the potential number of claims of this type is practically unlimited.'

- 'with respect to the need for limits to liability, it is important to underline that perfect justice is not possible in this area; it is impossible to compensate everybody who suffers loss owing to their contractual relationships with the property owner. Some losses, which were undoubtedly incurred as a result of a defendant's negligence, are going to remain uncompensated. The challenge, then, is to come up with a rule that divides the winners and the losers in 85 the best possible manner.' *

Such considerations apply to all relational economic loss cases.

La Forest J thought it legitimate to consider explicitly the ability of the plaintiff to bear the risk of loss. In Norsk the railway company was undoubtedly in a better position to bear the loss than the shipowner. It would be at least equally competent in terms of estimating the potential risks of bridge failure and in estimating the potential costs of bridge failure to its operations. It was better placed to protect itself from the consequences of those losses.

The judgment of La Forest J has been trenchantly criticised by one commentator, who prefers the majority approach but at the same time acknowledges that, although damages for pure economic loss will be recoverable in some cases, the line between those claims that 86 will succeed and those that will not remains as obscure as ever.

It is not to be forgotten that there is a respectable argument in favour of the exclusory rule founded upon the fundamental difference between economic loss and physical or property loss. People enjoy legal rights to property. No one enjoys similar legal rights to earn a living. Any right to earn a living is qualified almost to the point of extinction by the existence of a similar right in one's competitors. Losses caused by superior competition cannot be the

84 [1992] 1 SCR at 1122.

85 Id at 1103.

86 Anne L Mactavish, 'Tort Recovery for Economic Loss; Recent Developments', 21 Can Bus LJ, p 395.

87 See Lord Oliver in *Murphy* v *Brentwood District Council* [1991] 1 AC 398 at 487 and Weir, 'A Case Book on Tort', 6th ed. at 485; D Howarth 'Negligence After Murphy — Time to Rethink' (1991) 50 CLJ 58 at 88-91.

subject of compensation. Even an intention to inflict losses on another will not ground liability unless the defendant knowingly acted to interfere with the plaintiff's existing legal right or employed independently unlawful means. It follows that the merely negligent, as opposed to intentional, infliction of pure economic loss will not normally give rise to liability. Moreover if the plaintiff suffers a personal or private cost there is not necessarily a social cost to the community which would justify the court's intervention. The social cost of the plaintiff's loss may be counter-balanced by gains made by its competitors elsewhere. It is therefore preferable to let the loss lie where it falls rather than engage in an expensive and wasteful income transfer process. In *Oppen,* where an oil spill destroyed fishing stocks, the test of the best cost avoider was applied to impose liability on the oil companies operating the drilling platform. The oil spill led to a net reduction in the number of fish caught so that the plaintiffs' losses were not directly offset by gains made by their competitors. In this sense there was a genuine social cost.

Cases of catastrophic environmental damage raise special considerations. They generate a public outrage not enlivened by the pure economic loss claimed in commercial disputes. The ocean is a resource which accommodates a variety of uses now and should continue to do so in the future. By regarding those who pollute it as potentially liable to compensate others who use and enjoy it, an important social function is served by expressing the public's deep disapproval of injuries to the environment.

OPENING THE FLOODGATES — GOVERNMENT BY CATASTROPHE

The floodgates have now opened. We are governed by catastrophe; that is to say by laws formulated by governments only after disasters have occurred. Before 1967 the common law, confined as it was to

88 See generally Markesinis and Deakin, "The Random Element of Their Lordships' Infallible Judgment', (1992) 55 MLR at 623.
89 Feldthusen, *Economic Negligence,* 2nd ed, Carswell (1989), 243.
90 Lord Ritchie Calder, ACOPS Annual Report 1979 p2.

theories of tort based negligence, had failed to devise a way to remedy a major pollution catastrophe or to compensate its victims. One need only refer to the outcome of *Southport Corporation v Esso* in 1956, where foreshore owners failed in a claim against the owners of the *Inverpool* for damage done by the discharge of oil from the vessel.

The history of the three ship sourced oil spill disasters which eventually brought the legislature into this field with a vengeance is familiar. They each occurred in the month of March, at intervals of eleven years;

- on 18 March 1967 the *Torrey Canyon* ran aground 15 miles off the Isles of Scilly on her maiden voyage, spilling 120,000 tons of crude oil, which polluted the coasts of both England and France;
- on 16 March 1978 the *Amoco Cadiz* grounded off the coast of Brittany, spilling 68 million gallons of crude oil which impacted on approximately 130 miles of French coastline. The slick was 18 miles wide and 80 miles long;
- on 24 March 1989 the *Exxon Valdez* crashed into Bligh Reef in Prince William Sound, Alaska, spilling 11 million gallons of crude oil which coated more than 1000 miles of Alaskan coastline.

It has been said that such oil spills carry the kind of emotional charge usually reserved for the names of infamous military defeats. The environment and the lifestyle and business of many who directly or indirectly used the sea and the foreshore were ruined. The spill from the *Amoco Cadiz* was said to have destroyed about 230,000 tons of biomass, the tiny sea creatures that form the basis of other marine life. The process of reconstitution may not be complete until the year 2000.[93]

In 1967 the Royal Air Force in an attempt to limit pollution damage sank the grounded *Torrey Canyon* and burned her cargo. All that remained was a life boat with a salvage value of fifty dollars. Questions were raised about the extent to which, after such a casu-

91 [1954] 2 QB 197; [1956] AC 218.
92 Nulty Fortune Magazine, 16 July 1990 at p46.
93 New York Times, 28 April 1984.

alty, a government could intervene on the high seas to protect its territorial waters. Questions were also raised about the adequacy of limitation conventions, about compensation for those affected by the pollution and about the procedural difficulties which faced claimants. From this emerged the International Convention on Civil Liability for Oil Pollution Damage 1969 (CLC) and the 1976 Protocol which in 1981 together became, in large measure, part of Australian law. Strict but limited liability for pollution damage caused by oil escaping from a vessel was imposed on the ship owner irrespective of fault though subject to exceptions. The definition of pollution damage as 'loss or damage caused outside the ship carrying oil by contamination resulting from the escape or discharge of oil from the ship', did not make clear whether pure economic loss was recoverable. The revised definition in the 1984 and 1992 protocols provided expressly that compensation for impairment of the environment, other than loss of profit for such impairment, should be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken. This is said to make it clear that loss of profit may be recovered when it results from impairment of the environment.

The shipowner is entitled to limit its liability and to avail itself of a fund for the total sum representing the limit of its liability to be distributed among the claimants in proportion to the amounts of their established claims. This raises an old problem. How is the fund to be distributed between those who suffer devastating physical loss and those who suffer loss of profit well down the chain of cause and effect, for example foreign tourist operators? Are they all to be paid 50 cents in the dollar?

On occasion the Courts seem to have been overborne by catastrophe. On 15 March 1978 the *Amoco Cadiz* sailed into a severe storm as it approached Western Europe. The tanker's steering gear failed at

94 The Protection of the Sea (Civil Liability) Act 1981.
95 Articles III and V.
96 Article 1.6.
97 Articles V and VI.

9.45 am on 16 March while the ship was about nine miles northwest of Ushant. The captain ordered the engines stopped and advised nearby ships of the tanker's condition. The state of the steering compartment was such that the engineering crew could not repair the damage. At 11.20 am the captain called for tugs. There was only one salvage tug within 150 miles. Its attempts to take the tanker back out to sea failed. At 9.04 pm the *Amoco Cadiz* grounded. The accident was said to have cost $284 million. The French government was said to have incurred clean up costs estimated at $117 million. Claims were prosecuted and heard in a United States Court. Although the damage was caused by an oil spill in French territorial waters and the claimants were French, including the French government, the Court applied the law of the United States rather than France. The Civil Liability Convention was held inapplicable to the litigation. Further it was held that even if French law and the CLC applied it would not protect Amoco International Oil Company (Amoco) and Standard Oil Company of Indiana (Standard) since neither was the registered owner or the agent of the registered owner. In the result Amoco was found to have failed in its duty to maintain a seaworthy ship. Standard was held responsible for the torts of its wholly owned subsidiaries and instrumentalities, Amoco and Amoco Transport Company, the registered owner of the tanker.

The Court found the Amoco parties liable to pay damages of $85.2 million to various French claimants. An appellate court increased the award to $205 million. Criticism has been directed to the Court's rulings on forum conveniens and choice of law. The case is an example of a court's reaction to claims arising from a catastrophe in an atmosphere of internationally wide-spread hostile public feeling. On 18 August 1990, seventeen months after the *Exxon Valdez* disaster, the US Oil Pollution Act 1990 came into force, in the context of a state of the law described as one of unhappy tanker owners, relatively protected governments and frustrated private citizens. The legislation, said to be the child of a marriage of convenience

98 See Nancy J Eskenazi, 'Forum non conveniens and choice of law in Re: the Amoco Cadiz Oil Spill', (1993) 24 (2) Journal of Maritime Law and Commerce, 371.

between environmental groups and States rights politicians, overrules, in the case of oil discharged from a facility or ship, the bright line rule affirmed by the US Supreme Court in *Robins* and the US Court of Appeals in *Testbank.* Private citizens now have a speedy route to compensation by the presentation to the newly established Oil Spill Liability Trust Fund of claims not settled within 90 days by the responsible party. The Fund is subrogated to the payee to recover from the party responsible. According to one commentator, it is now safe to assume that remote parties with no direct interest in property damaged by oil discharge may properly recover from vessel owners, operators or other responsible persons for economic losses in the absence of a showing of impact to property. He instances restaurant owners whose source of shellfish has been cut off by an oil spill and tourist operators affected by the loss of image of damaged resorts.

CONCLUSION

We have to reconcile the traditional exclusory bright line with community driven reform, the need for certainty with the call for justice. Recent events have emphasised the necessity to find a uniform principle for determining when damages for economic loss consequent, not upon injury to the person or property of the plaintiff, but upon injury to a public resource or the person or property of a third party are recoverable. Yet between various jurisdictions and the courts and the legislature there is diversity. Circuit Judge Gee has said that the dispute resolution systems of courts are ill equipped to manage disasters of magnitude. Many would agree with Sir Ninian Stephen that courts are concerned with loss fixing according to the law as it has grown through precedent; loss spreading is a matter for direct legislative action after appropriate public investigation and debate. However, if trends in the case of oil spill damage represent international as well as national community attitudes the traditional

99 Christopher Kende, 'Liability for Pollution Damage and Legal Assessment of Damage to the Marine Environment', (1993) 11 (2) Journal of Energy and Natural Resources Law, 105 at 118.

common law doctrines designed for commercial losses are unlikely to survive. It may be thought undesirable that they should. If the consequences of the US Oil Pollution Act 1990 have been correctly anticipated the law will be revolutionised by catastrophe.

In the *Willemstad* the High Court tried to throw off the shackles of precedents not suited to modern concepts of responsibility for negligence. Unfortunately the disparity of reasoning in the judgments left the decision open to the criticism passed upon it in subsequent cases. Furthermore the way ahead suggested by Stephen J of using proximity to mark the boundary of liability may indeed express a result rather than a principle useful, in cases of relational economic loss, only at the highest level of abstraction. If it means no more than physical propinquity of the person or property of the plaintiff to the place where the negligent act or omission has its physical effect, as Jacobs J thought, a line is fixed which is scarcely less arbitrary than its predecessor. In *Heyman's* case[100] Deane J has given proximity a broader meaning. It is intended to serve as the touchstone and control of the categories of case in which the common law will adjudge that a duty of care is owed. The process is one of legal reasoning, induction and deduction not divorced from notions of what is fair and reasonable or from considerations of public policy.

Whether or not this approach ultimately prevails over the approach, favoured by Brennan J, of developing novel categories of negligence incrementally and by analogy with established categories, the way ahead is to look outwards and forwards rather than inwards and backwards. Where this may lead when next an Australian Court has to consider a claim by a time charterer for economic loss suffered as a result of damage done negligently to the chartered ship or by a resort hotel operator whose business has been affected by oil pollution remains, unfortunately, as difficult to predict as ever.

It may be that the sounder view about the recovery of damages for pure economic loss, consequent upon an injury to the person or property of a third party, is that of Professor Feldthusen and La

100 (1985) 157 CLR 424 at 497.

Forest J. At least this may be said. Their work and the work of others in this field has renewed the call for a rethinking not confined by history and precedent. Sir Ninian Stephen in the *Willemstad* perceived the need for open public debate. Sadly the United States experience suggests that resolution of the problem cannot be left to the legislature with any confidence. I believe that appropriate guidelines for setting limits which take account of suitable loss spreading and the management of limited resources can be effectively examined and developed only by the free and frequent interchange of the experience and expertise of those in the industries concerned and representatives of potential victims, as well as insurers, lawyers, economists, environmentalists and others. By such means it should be possible to produce a digestible body of material which courts can use to define the ambits of liability for pure economic loss. Undoubtedly courts face problems in evaluating the economic consequences of their decisions. Judges are not trained economists. They must be assisted to weigh up the economic consequences of awarding damages in a particular case and to resolve the problems of loss spreading and disaster management. Advocates arguing cases before the courts must explore the social effects of extending liability and familiarise not only themselves but the courts with the range of learning available. Not only lawyers but persons in other disciplines must assist in this task. In particular, pride in the achievements of courts or judges in developing or explaining the law must not stand in the way. Adherence to precedent must adapt to new concepts. Neither the *Willemstad* nor the *Mineral Transporter* should become the Tar Baby of Australian tort law. It must be hoped that the briar patch is close by and that Brer Rabbit, the advocate, will seek to persuade the judicial Brer Fox to adopt new and predictable formulas for the just and reasonable compensation of pure economic loss.

101 See Hoffman J in *Morgan Crucible Company* v *Hill Samuel* [1991] Ch 295.