

The Recovery of Pure Economic Loss in Canada: Proximity, Justice, Rationality, and Chaos

BRUCE FELDTHUSEN*

I. INTRODUCTION

THIS PAPER ORIGINATED FROM an invitation to participate at the Annual Colloquium 1994 of the United Kingdom National Committee of Comparative Law, entitled "Civil Liability for Pure Economic Loss." I was asked to speak about the Canadian law governing pure economic loss in negligence. I doubt whether even my host, Dr. Stathis Banakas, realized what a significant invitation this was. Ten years ago, it would have been impossible to address this topic. There were many Canadian economic loss cases, but none that stated a uniquely Canadian position. Although Canada abolished appeals to the Privy Council approximately forty-five years ago, until recently the courts have continued to rely on English law to make the common law of Canada. When I say "rely," I do not mean rely in the sensible sense of studying English decisions along with others while developing the Canadian answer. I mean rely in the formal sense of *stare decisi*; I mean to apply by rote the law of England, even the decisions of lower courts, as if English law were binding. I doubt whether there exists another sovereign jurisdiction whose lower courts have so frequently discredited or ignored decisions of their own appellate courts and turned instead to those of a foreign country. The appellate courts, including the Supreme Court of Canada, have been as much to blame.¹

Although all our courts have not yet freed themselves from their colonial approach,² the Supreme Court of Canada certainly has. On questions of pure economic loss, the Supreme Court has ruled recently on almost every major ques-

* Professor, Faculty of Law, University of Western Ontario.

¹ See B. Feldthusen, "City of Kamloops v. Nielsen: A Comment on the Supreme Court's Modest Clarification of Colonial Tort Law" (1985) 30 McGill L.J. 539; and see also the discussion of the Supreme Court's treatment of *Rivtow Marine* in section V below.

² See for example *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.* (1993), 15 C.C.L.T. (2d) 1 (Man. C.A.). This decision was later overruled. The Supreme Court's decision is discussed in section V below.

tion in the field. As often as not, it has adopted a different position from that reached by the House of Lords. And even when the Supreme Court has agreed with the House of Lords, it has done so after working its own way to the answer, not by simple deference to a "higher" court.

I am proud that our courts are finally striking out on their own. I am equally proud of the manner in which our courts are reaching their decisions. Take the leading Canadian economic loss case, *CNR v. Norsk Pacific Steamship Co.*³ as an example. The justices studied the common and civil law from a wide range of foreign jurisdictions, referred to many scholarly books and articles, and engaged in detailed explicit policy analysis.⁴ One is unlikely to see again a more comprehensive judicial treatment of relational economic loss. This is in striking contrast to the formal approach often taken by the House of Lords in recent years, best exemplified by *Murphy v. Brentwood District Council*.⁵ There, the House's approach was largely doctrinal, with virtually no explicit policy analysis.

Readers will be relieved to know that there are limits to my national pride. Generally, I find the law governing economic loss in England clearer and more satisfactory than that which prevails in Canada today. This is perhaps to be expected in a field of law where true lawmaking is a relatively new Canadian judicial activity.

The remainder of this article outlines the specific rules developed by the Canadian courts, and compares them critically to the law elsewhere. Immediately below, I suggest a framework that I find effective for dealing with economic loss. After that, I apply it to cases of misrepresentation and other professional malpractice, defective products and structures, public authority liability, and relational economic loss.

II. FRAMEWORK OF ANALYSIS FOR ECONOMIC LOSS

FEW SCHOLARS CAN HAVE BENEFITED more than I from the recognition of pure economic loss as a discrete area of the law of negligence. But the longer I think about it, I become convinced that more harm than good has come from the tendency to categorize loss as economic as opposed to physical. Categories are always arbitrary. They are necessary to assist us to process information effectively. Their value is less in their logic than in their utility. The test is whether a particular way of classifying information helps us to perform some relevant operation. In this

³ *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, 91 D.L.R. (4th) 289, 11 C.C.L.T. (2d) 1, 137 N.R. 241 [hereinafter *Norsk* cited to D.L.R.].

⁴ For a favourable comment, see J. Fleming, "Economic Loss in Canada" (1993) 1 Tort L. Rev. 68.

⁵ [1991] 1 A.C. 398; [1990] 2 All E.R. 908 (H.L.).

context, we should ask whether the general classification of a claim as one for "economic loss" assist courts and litigants to determine whether the loss is or ought to be recoverable? In my view, it does not.

Within the category of claims for economic loss there exist more differences between and among the cases than similarities. Take the *Norsk* case as a point of departure. The defendant vessel negligently damaged a bridge owned by one party, and used almost exclusively by another. The former suffered physical harm; the latter pure economic loss.⁶ The distinction is not enlightening. It seems to me that the user's claim is best analysed by asking whether, and if so what, pragmatic limits to liability are necessary for ordinary acts of negligence. Rhetoric and discussion of precedent aside, this what sensible courts invariably do consider in a case of this sort. Unfortunately, because of the way the law of economic loss generally has developed in the Commonwealth, many judges also seem to feel compelled to address some utterly irrelevant economic loss case law.

If we step back from the law as we know it today, it strikes me as obvious that the decision in *Hedley Byrne v. Heller & Partners*,⁷ or the decisions in the many negligent accountant cases⁸ are not going to enlighten us much about the claim in *Norsk*. Cases like *Kamloops (City) v. Nielsen*⁹ or *Murphy*¹⁰ that deal with the duty of a municipality to inspect buildings do not seem to tell us much about either misrepresentation or relational economic loss. Instead of grouping all these sorts of cases as "economic loss" cases, one might more productively categorize *Norsk* and *Kamloops* as variations of *Donoghue v. Stevenson*,¹¹ and the misrepresentation cases as extensions of contract law.

Until recently, one of the characteristics of Canadian economic loss case law, especially in the Supreme Court, had been the tendency to generalize from one type

⁶ This is a classic claim for "relational economic loss," a loss suffered because of some legal relationship which exists between the plaintiff and the owner of damaged property. See section VII below.

⁷ *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1964] A.C. 465, [1963] 2 All E.R. 575 (H.L.) [hereinafter *Hedley Byrne* cited to A.C.].

⁸ See for example *Haig v. Bamford*, [1977] 1 S.C.R. 466, 72 D.L.R. (3d) 68, [1976] 3 W.W.R. 331, 9 N.R. 43; and *Caparo Industries Plc. v. Dickman*, [1990] 2 A.C. 65, 2 W.L.R. 358, 1 All E.R. 68 (H.L.), discussed in section III below.

⁹ [1984] 2 S.C.R. 2, 10 D.L.R. (4th) 641, 5 W.W.R. 1, 29 C.C.L.T., 54 N.R. 1 [hereinafter *Kamloops* cited to S.C.R.].

¹⁰ *Supra* note 5.

¹¹ [1932] A.C. 562 (H.L.).

of economic loss case to another.¹² At the very least, this ensured that each decision was unnecessarily complicated and imprecise. Worse, rambling *dicta* in one type of case, *Norsk* for example, ended up having unwarranted and unnecessary implications for other quite different types of claims.¹³ This tendency to generalize about very different types of economic loss cases was, I think, the single biggest shortcoming of Canadian economic loss case law.¹⁴ Fortunately, in my opinion, the Supreme Court may have put an end to this tendency to over-generalize about economic loss in *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*¹⁵ La Forest J. gave the judgment of the full court, of which McLachlin J. was a member. He writes:

[t]his case gives this Court the opportunity once again to address the question of recoverability in tort for economic loss. In *Norsk*, *supra*, at p. 1049, I made reference to an article by Professor Feldthusen in which he outlined five different categories of cases where the question of recoverability in tort for economic loss has arisen ("Economic Loss in the Supreme Court of Canada: Yesterday and Tomorrow" (1990-91), 17 Can. Bus. L.J. 356, at pp. 357-58), namely:

1. The Independent Liability of Statutory Public Authorities;
2. Negligent Misrepresentation;
3. Negligent Performance of a Service;
4. Negligent Supply of Shoddy Goods or Structures; and
5. Relational Economic Loss.

I stressed in *Norsk* that the question of recoverability for economic loss must be approached with reference to the unique and distinct policy issues raised in each of these categories. That is because ultimately the issues concerning recovery for economic loss are concerned with determining the proper ambit of the law of tort, an exercise that must take account of the various situations where that question may arise. This case raises issues different from that in *Norsk*, which fell within the fifth category.¹⁶

Of course, most judges were always well aware of the distinctions between and among these different types of economic loss claims. What had developed in the case law was an attempt to justify the grouping. This is only possible at the highest level of abstraction. The best example is one that permeates the economic loss case

¹² See B. Feldthusen, "Economic Loss in the Supreme Court of Canada: Yesterday and Tomorrow" (1991) 17 Can. Bus. L. J. 356. This tendency is also dominant in the judgment of McLachlin J. in *Norsk*, *supra* note 3. It was explicitly rejected by La Forest J. in the dissent of the same case.

¹³ See *infra* note 70 and accompanying text.

¹⁴ In *Norsk* itself, *supra* note 3, the Supreme Court of Canada split four-to-three on this very point, with four of the judges rejecting the generalized approach. Stevenson J., although differing with La Forest J. (who gave the dissenting judgment) in the result, agreed the claim was for relational loss.

¹⁵ [1995] 1 S.C.R. 85; 121 D.L.R. (4th) 193; 18 C.L.R. (2d) 1 [hereinafter *Bird Construction* cited to S.C.R.].

¹⁶ *Ibid.* at 96.

law throughout the Commonwealth — the amorphous concept of “proximity.”¹⁷ Some courts add the equally vacuous requirement that liability will be imposed whenever it is “fair and reasonable”¹⁸ to do so. When one thinks about it, the entire law of torts, contracts, and most of the rest of private law and equity can be explained in terms of proximity, justice, and rationality. For certain purposes, explanation at this level of abstraction may be ideal. But abstractions like proximity are useless for allowing litigants, commercial litigants as they often are in economic loss cases, to have some idea in advance of their potential claim or liability.

At best, the identification of a loss as purely economic may be a rough indicator that other relevant concerns are present. For example, many economic loss claims signal potentially indeterminate liability;¹⁹ many signal cases where there is no risk of personal injury involved; many signal that contractual provisions may need to be considered; and many signal cases where the loss is a purely private transfer of wealth, rather than a net social loss.²⁰ Unfortunately, many do *not* suggest all, or even any, of these things. Classification based on economic loss is far too crude.

Recently, it has been suggested that each economic loss case ought to be examined in more detail to determine which of these or similar potential difficulties arise, and whether and how they may be addressed.²¹ For convenience, I shall call this the explicit policy approach. This is an improvement over the purely doctrinal approach and over empty phrases like proximity because it directs the court to

¹⁷ Of course, the term “proximity” has been used in negligence cases from the outset. Perhaps its recent origins as a “test” of liability can be traced to *Sutherland Shire Council v. Heyman* (1985), 60 A.L.R. 1, 59 A.L.J.R. 564 (H.C.) [hereinafter cited to A.L.R.] at 55–56 *per* Deane J. The modern House of Lords decisions which have embraced the idea are summarized by L. Bridge in *Caparo*, *supra* note 8 at 365. In the Supreme Court of Canada, the proximity focus is central to the judgment of McLachlin J. in *Norsk*, *supra* note 3 at 368–71, although four of the seven judges reject proximity explicitly as unhelpful. For an excellent criticism, see D. Howarth, “Negligence After *Murphy*: Time To Rethink” (1991) 50 *Camb. L.J.* 58 at 71–72.

¹⁸ Possibly the first case to introduce these words as if they constituted a test for liability for economic loss was *Governors Of The Peabody Foundation v. Sir Lindsay Parkinson & Co.*, [1985] 1 A.C. 210, [1984] 3 All E.R. 529 (H.L.) at 241 *per* Lord Keith [A.C.]. See also the cases cited *per* Lord Bridge in *Caparo*, *supra* note 8 at 365.

¹⁹ For example, this possibility is present in both misrepresentation and relational loss cases. But again the differences outweigh the similarities. The response in representation is to limit liability to a circumscribed set of contemplated transactions. Such an approach that would be incoherent to govern the relational consequences of random acts of physical damage negligence.

²⁰ See B. Feldthusen, *Economic Negligence*, 3d ed. (Scarborough: Carswell, 1994) at 15. See also B. Feldthusen & J. Palmer, “Economic Loss, Economic Analysis, and the Supreme Court of Canada: An Economic Critique of *Norsk Steamship* and *Bird Construction*” (1995) 74 *Can. Bar. Rev.* 427.

²¹ For two thoughtful examples, see J. Stapleton, “Duty of Care and Economic Loss: A Wider Agenda” (1991) 107 *L.Q. Rev.* 249, and J. Holyoak & F. Mazzocchi, “The Legal Protection of Economic Interests” (1993) 1 *Tort L. Rev.* 197.

consider the specific issues posed in the case. My objection to this approach is that we can do, and already have done, better.

Despite the tendency to generalize from one type of case to another, an overview of the case law in all jurisdictions reveals that the courts have recognized four or five discrete types of economic loss cases, conveniently characterized as they were by La Forest J. in the above quotation from *Bird Construction*: (i) negligent misrepresentation; (ii) other negligent performance of professional services; (iii) negligent manufacture of shoddy goods or negligent construction of shoddy structures; (iv) negligent exercise of statutory duties or powers contributing to economic loss; and (v) the altogether different case of relational economic loss.²² No doubt new variations will emerge. It is possible to modify these categories — to collapse misrepresentation and services, or building defect and public authority liability, for example.²³ It is possible to generalize across all the categories at a high level of abstraction. But this is the classification scheme that works best for me; best in the sense of enabling me to explain the law as it is and as I believe it should be. More or less the same scheme works in the United States where the common law of economic loss is much the same as that in the Commonwealth. Interestingly, until very recently, the courts there would never have considered grouping these cases together, let alone describing them all as economic loss cases. The term economic loss in this context was reserved exclusively for the shoddy product case.

Within each of these categories, the courts have historically considered specific considerations such as potentially indeterminate liability or relevant contractual obligations. These considerations play out somewhat differently in misrepresentation than in a relational loss case, for example. The case law reflects this. My only objection to the explicit policy approach discussed above is that it sets us back to square one with economic loss cases generally. Much of what that school seeks to accomplish has already been done by the courts. I believe that if we continue to work within the categories I have suggested, or something similar, we will make more progress. Treating every economic loss case as unique and requiring a case-specific policy analysis strikes me as unnecessarily cumbersome and inherently uncertain.

²² These categories were also cited with approval by La Forest J. in dissent in *Norsk*, *supra* note 3. Categories somewhat similar to mine are used in a most helpful article by L. Klar, "Recent Developments in Canadian Law: Tort Law" (1991) 23 *Ottawa L. Rev.* 177. See also R. Bernstein, *Economic Loss* (London: Longman Law, Tax & Finance, 1993). For further support of the categorical approach, see G.T. Schwartz, "Economic Loss in American Tort Law: The Examples of *J'Air* and of Products Liability" (1986) 23 *San Diego L. Rev.* 37.

²³ For an example of the former, see Bernstein, *supra* note 22 at Chapter 9. The latter was effectively done by *Murphy*, *supra* note 5.

III. NEGLIGENT MISREPRESENTATION

THE BEST ESTABLISHED AREA in the economic loss field is negligent misrepresentation. This is a credit to the magnificent decision of the House of Lords in *Hedley Byrne*,²⁴ a decision to which little important has been added by any court in the Commonwealth in the more than thirty years since it was decided. It is sometimes forgotten that *Hedley Byrne* was decided on the assumption that the parties had dealt with one another face-to-face in respect of a specific transaction. The question was under what circumstances the law would recognize *any* legal duties in speech apart from contract. Liability to a potentially indeterminate class for a potentially indeterminate amount was not raised on the facts. The House was concerned with the existence of the obligation in tort; not with the extent. On this point, *Hedley Byrne* remains the law in Canada.

One can find support for three “tests” or approaches to duty of care in *Hedley Byrne*: (i) special relationship, a conclusory term of little substance; and two more focussed approaches, (ii) known reasonable reliance and (iii) assumption of responsibility. The Canadian courts continue to employ all three approaches and have not found it necessary to choose between them.²⁵ This is a good indication that the choice is not crucial. In contrast, the courts in England seem to have promoted the reliance approach over the assumption of responsibility. I think this is an error. The choice is mainly significant when disclamatory language is in issue. In the face of such language, it is difficult to argue that the defendant assumed any responsibility. This is the basis for the actual decision in *Hedley Byrne* itself. In contrast, we all know how difficult it is to employ disclamatory language to extricate oneself from a pre-existing legal obligation. The simple words “without responsibility” would never have worked as a contractual disclaimer the way they worked to negate the duty in *Hedley Byrne*. Indeed, as was the very point in *Smith v. Eric S. Bush*,²⁶ it is sometimes forbidden by law to exculpate oneself from a pre-existing legal duty. I favour a common law approach that allows the speaker to control who may rely on his professional services other than those who contract to do so.

In *Smith v. Bush*, the majority found it necessary to hold that the law imposed a pre-existing duty on the defendant surveyors in favour of the plaintiff home buyers. The plaintiffs had clearly reasonably relied on, and indirectly paid for, their

²⁴ *Supra* note 7.

²⁵ In *Queen v. Cognos*, [1993] 1 S.C.R. 87, 14 C.C.L.T. (2d) 113, 99 D.L.R. (4th) 626, 147 N.R. 69 [hereinafter cited to C.C.L.T.] at 138, the court commented on the “debate in academic circles” over the choice among foreseeable reasonable reliance, voluntary assumption of responsibility, and this new proximity-reasonable approach, but declined to enter or resolve the debate.

²⁶ [1990] 1 A.C. 241, [1989] 2 All E.R. (H.L.) [hereinafter *Smith v. Bush* cited to A.C.].

survey. The majority felt that the *Unfair Contract Terms Act* which disallowed disclaimers of liability in such consumer transactions only applied to disclaimers from pre-existing duties. The majority believed it would not have been able to strike the disclamatory language if it conceptualized the tort duty as one voluntarily assumed. Therefore, the majority rejected the voluntary assumption of responsibility approach to duty in misrepresentation generally, imposed the duty, and employed the act to render the disclamatory language ineffective. I prefer the opinion of Lord Jauncey who held that the statute rendered the disclamatory language ineffective even with a "deemed assumption of responsibility" approach to duty. Either way, this case was correctly decided from a consumer protection point of view. The reasoning the majority found necessary to achieve that goal need not be extended beyond that context.

I have yet to see a satisfactory explanation for why a defendant should have to exercise care in speech, extend professional services without compensation, or disclaim liability for economic loss, simply because the plaintiff has chosen to rely on the defendant. In contrast, it is at least coherent to think of holding a defendant to an obligation it has assumed. Certainly, the assumption of responsibility is inferred, often a legal fiction. But it is a directed inference with a meaningful purpose. Another advantage is that precisely the same approach will resolve the duty question in the negligent services cases such as *Ross v. Caunters*,²⁷ where reliance plays no part whatsoever. It also leads naturally to the further questions of what responsibility was assumed and to whom, questions to which I now turn.

More common than the pure *Hedley Byrne* case are those where the defendant clearly owes a legal duty to someone and the question is whether additional duties are owed to third parties, and if so in respect of what loss. A common example is that of an accountant who owes a duty to the client by contract. There is no question, as in *Hedley Byrne*, that the defendant might be entitled to be as careless as it liked. The issue is who, other than the employing client, is entitled to rely on the published accounts.

The leading Canadian case is *Haig v. Bamford*, where the Supreme Court held that liability extended to members of a "known limited class."²⁸ There, the defendant accountant was hired to prepare accounts to help solicit investment. Potential investors were limited by statute to 50, the "known limited class" to which the court referred. More significant surely was the fact that the defendant knew its report would be used to solicit a known limited amount of \$20,000. The accountants were

²⁷ [1980] Ch. 297, [1979] 2 All E.R. 580 (Ch.).

²⁸ *Supra* note 8.

held liable for the very “end and aim”²⁹ of the transaction for which they assumed responsibility in their contract of employment. *Caparo v. Dickman*³⁰ is another application of the “end and aim” rule, this time employed to exculpate defendants for losses suffered in transactions for which they had not assumed responsibility.³¹ Canadian courts seem to see *Caparo* as consistent with *Haig*.³² Aside from the general unpredictability of the law in Canada after *Norsk*,³³ there is no reason to expect much divergence in the Canadian and English law as to the scope of liability in misrepresentation.

One area where the Canadian courts seem to have gone further than others is in allowing the plaintiff to sue in tort in respect of matters apparently dealt with specifically by contract.³⁴ In *Central Trust v. Rafuse*,³⁵ the Supreme Court approved concurrent liability in tort and contract for solicitor negligence, provided the tort was independent of the contract. This was clarified in the later decision in *BG Checo International Ltd. v. British Columbia Hydro & Power Authority*.³⁶ The plaintiff tendered on a contract to clear a hydro transmission line. The tender specified that the right-of-way had been cleared and was not part of the plaintiff’s responsibility. In fact, the right-of-way was obstructed putting the plaintiff to considerable extra cost in completing the contract. The plaintiff sued for breach of contract and a

²⁹ This quote comes from Cardozo J. in what was arguably the first successful negligent misrepresentation case, *Glanzer v. Shepard* (1922), 233 N.Y. 236, 135 N.E. 275 (N.Y.C.A.).

³⁰ *Supra* note 8.

³¹ It is difficult to suggest either that the plaintiffs did not reasonably rely or that the defendants ought not to have known they would; the case is better explained in terms of the responsibility the defendants had assumed.

³² Two cases quite consistent with *Caparo*, although decided before the House of Lords decision, are *MacPherson v. Schachter* (1989), 1 C.C.L.T. 1 (B.C.S.C.) and *Dixon v. Deacon Morgan McEwan Easson* (1989), 41 B.C.L.R. (2d) 82, 64 D.L.R. (4th) 441, [1990] 2 W.W.R. 500 (B.C.S.C.). Subsequently, see *Roman Corp. Ltd. v. Peat Marwick Thome* (1993), 11 O.R. (3d) 248, 8 B.L.R. (2d), 12 C.P.C. (3d) 192 (Gen. Div.) [hereinafter “*Roman I*”]; (1993) 12 B.L.R. (2d) 10 (Gen. Div.) [hereinafter “*Roman II*”]; *Flandro v. Miha* (1992), 93 D.L.R. (4th) 222 (B.C.S.C.); and *Canadian Commercial Bank v. Crawford, Smith & Swallow* (1993), 9 B.L.R. (2d) 311, 15 C.C.L.T. (2d) 273 (Ont. Gen. Div.), affirmed (March 29, 1994), Doc. CA C15240 (C.A.).

³³ *Supra* note 3.

³⁴ See also the curious decision in *V.K. Mason Construction Ltd. v. Bank of Nova Scotia*, [1985] 1 S.C.R. 271, 16 D.L.R. (4th) 598, 58 N.R. 195, effectively allowing a negligent misrepresentation action to shore up a weak claim in contract.

³⁵ [1986] 2 S.C.R. 147, 31 D.L.R. (4th) 481, 37 C.C.L.T. 117, 34 B.L.R. 187, 75 N.S.R. (2d) 109 [hereinafter *Rafuse* cited to S.C.R.].

³⁶ [1993] 1 S.C.R. 12, 99 D.L.R. (4th) 577, 147 N.R. 81, 14 C.C.L.T. (2d) 233, 75 B.C.L.R. (2d) 145 [hereinafter *BG Checo* cited to C.C.L.T.].

unanimous Supreme Court agreed. The plaintiff also alleged that precisely the same words in the tendering documents constituted an actionable misrepresentation in negligence. The justices split four-to-two in favour of recognizing concurrent liability. The difference was not so much whether to allow concurrent liability. That had been resolved, even if not well explained, earlier in *Rafuse*.³⁷ Rather, it concerned the point at which the representation could no longer be considered independent of the contract.

Iacobucci J., with whom Sopinka J. agreed, held that where the contract deals expressly with the very subject matter of the dispute — here the failure to have cleared the right-of-way — that the plaintiff could sue only in contract. He reasoned that commercial parties would have assumed that they would have to turn to the contract for relief in such a case. La Forest and McLachlin JJ., speaking for the majority, held that the fact that the contract expressly addresses the matter does not preclude automatically an action in negligence. Their test was whether “... the contract indicates that the parties intended to limit or negative the right to sue in tort.”³⁸ The outcome does not depend on the “mere fact” they have dealt with the matter, but rather on how they have dealt with it.³⁹ Prudent contracting parties in Canada ought in future to address concurrently liability specifically in their contracts. A contractual context, unless it contains an explicit disclaimer clause that refers to tort liability,⁴⁰ is unlikely to have any influence on the misrepresentation analysis in Canada.⁴¹

³⁷ *Supra* note 35.

³⁸ *Supra* note 36 at 246–47. To much the same effect, see *Canadian Pacific Hotels v. Bank of Montreal*, [1987] 1 S.C.R. 711, 41 C.C.L.T. 1, 40 D.L.R. (4th) 385, 77 N.R. 161.

³⁹ *Supra* note 36 at 247. This approach would make particular sense in the case of a pre-contractual statement. Then the tort is complete before the contract is made. A party wishing to relieve herself of the antecedent tort liability ought to bear the onus of clearly so specifying in the contract. Conversely, with post-contractual representation, it would be best to put the onus of resolving any ambiguity on the party seeking to vary the contract, as in *J. Nunes Diamonds Ltd. v. Dominion Electric Protection*, [1972] S.C.R. 769, 26 D.L.R. (3d) 699. The majority has decided to treat concurrent liability like pre-contractual representations.

⁴⁰ The court has indicated it will respect such disclamatory language in *Rafuse*, *supra* note 33, and in *Edgeworth Construction Ltd. v. N.D. Lea & Associates Ltd.*, [1993] 3 S.C.R. 206, 107 D.L.R. (4th) 169, 17 C.C.L.T. (2d) 101, 157 N.R. 241, 32 B.C.A.C. 221 [hereinafter *Edgeworth* cited to S.C.R.].

⁴¹ A related question concerns whether and how a contractual disclaimer might exculpate a third party from liability. See *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299, 97 D.L.R. (4th) 261, 13 C.C.L.T. (2d) 1, 18 B.C.A.C. 1 [hereinafter *London Drugs* cited to S.C.R.]. The majority held that employees could be held personally liable to persons doing business under contract with their employer. The fact that a negligent act occurred during performance of the very essence of the contractual obligations owed by the employer would not in and of itself negate a holding of personal duty owed by the employee. The majority then went on to modify the law of

The majority in *BG Checo* made another interesting observation. It said:

[r]ather than attempting to establish new barriers to tort liability in contractual contexts, the law should move towards the elimination of unjustified differences between the remedial rules applicable to the two actions, thereby reducing the significance of the existence of the two different forms of action and allowing a person who has suffered a wrong full access to all relevant legal remedies.⁴²

Unfortunately, the force of this suggestion to move toward a more coherent law of private obligation was dissipated by the decision itself. The majority listed, but did not critically evaluate, the reasons why a party might prefer one set of concurrent remedies to another. It suggested in a general way that damage assessment may turn out the same or similar in tort or contract. What is missing is a discussion of what could possibly justify any different remedy in the case before it.

IV. NEGLIGENT PERFORMANCE OF PROFESSIONAL SERVICES

ALMOST ALL THE MISREPRESENTATION CASES involve the negligent performance of professional services. Accounting and surveying services are common examples. They are “representation” cases because they do not cause loss until they are reflected in speech — accounts or surveys, for example — upon which the plaintiff detrimentally relies. Other professional services, however, have the capacity to injure persons directly; that is, without their having to rely on words or documents. The classic example is the frustrated beneficiary whose inheritance is lost because the solicitor was negligent in effecting the testator’s wishes. Perhaps the first case in the Commonwealth to impose liability in negligence in a case of this sort was the Canadian case of *Whittingham v. Crease & Co.*⁴³ It so happened that the frustrated beneficiary had been aware of and “relying” on the testator’s wishes, so the court was able to fit the claim within *Hedley Byrne* principles. It was *Ross v. Caunters*⁴⁴ that took the further step and imposed liability in favour of a frustrated beneficiary who had been unaware and not reliant. That case has just been affirmed in the English

contractual privity to allow the employees to take advantage of a limitation clause in their employer’s contract. For an example of a case in which the individual employee engineers were held not to have assumed a duty of care in misrepresentation, see *Edgeworth*, *supra* note 40. In that case, the employer engineering firm was held liable for misrepresentations in a report used by the Crown to receive construction tenders. The engineering firm was denied the benefit of disclamatory language contained in the contract between the Crown, and the plaintiff who had successfully tendered in reliance on the report. The clause in question referred specifically only to the limitation of the Crown’s liability.

⁴² *Supra* note 36 at 243.

⁴³ [1978] 5 W.W.R. 45, 6 C.C.L.T. 1, 3 E.T.R. 97, 88 D.L.R. (3d) 353 (B.C.S.C.).

⁴⁴ *Supra* note 27.

Court of Appeal. I see no reason to expect it would not be followed in Canada as well.

The more interesting question is whether and to what extent the *Ross v. Caunters* line of authority will be applied to other situations. The frustrated beneficiary cases have some unique aspects.⁴⁵ These wills cases could be isolated as an unusual exception to the so-called reliance line of cases derived from *Hedley Byrne*. I prefer the opposite view. *Ross v. Caunters* is a straightforward example of the solicitor assuming responsibility to convey the gift to the beneficiary and being held liable for the "end and aim" of his undertaking. The case is an easier one than most misrepresentation cases because there is no indeterminacy problem. It shows that reliance is not the central duty concept for professional negligence that it is often wrongly assumed to be. If I were to predict, I would see the Canadian courts applying *Ross v. Caunters* outside the beneficiary situation based on an assumption of professional responsibility. Both the ascendent conservatism of the House of Lords and the fixation on reliance suggest that the English courts might not move beyond the narrow confines of the frustrated beneficiary situation.

V. SHODDY PRODUCTS AND STRUCTURES

THE QUESTION HERE IS WHETHER the owner of a defective product or structure may sue the manufacturer or builder in negligence for physical damage to the property itself, or for the diminution in value or repair costs related to the defect. In England after *Murphy*,⁴⁶ the answer is an unequivocal "no." In New Zealand, the answer seems to be "yes."⁴⁷ Before this year, I would have defied anyone to say with confidence what was the law in Canada. Now, according to the recent decision of the Supreme Court in *Bird Construction*,⁴⁸ subsequent purchasers of structures or products may sue the builder or manufacturer directly in negligence to recover the cost of repairing dangerous defects.

The Canadian story begins in 1974, when the majority in the Supreme Court held in *Rivtow Marine v. Washington Iron Works*⁴⁹ that product defect economic loss was not recoverable in tort. The plaintiff sued the admittedly negligent defendant

⁴⁵ In favour of liability, the negligence action appears the only way to sanction professional malpractice when the client is deceased. Against liability, the negligence cases seem to circumvent the *Wills Act*.

⁴⁶ *Supra* note 5.

⁴⁷ *Hamlin v. Bruce Stirling Ltd.*, [1993] 1 N.Z.L.R. 374 (H.C.), citing *South Pacific Mfg. Co. v. New Zealand Security Consultants & Investigations Ltd.*, [1992] 2 N.Z.L.R. 282 (C.A.).

⁴⁸ *Supra* note 15.

⁴⁹ [1974] S.C.R. 1189, 40 D.L.R. (3d) 530, [1973] 6 W.W.R. 692 [hereinafter *Rivtow* cited to S.C.R.].

when it had to remove from service and repair a dangerously defective logging crane. With little discussion, the majority relied on a New York decision to hold that such claims must be resolved in contract, not tort. The court did, however, recognize the manufacturer's duty to warn the plaintiff about the dangerous defect when it became aware of the risk. The defendant's failure to promptly warn the plaintiff caused him to remove the crane from service during its peak business period, instead of during the slack period, when it *should* have been warned. The plaintiff did recover some economic loss — the excess loss of profit due to the difference between peak and slack period earnings. The only question fairly left unresolved was whether the plaintiff could have sued in negligence had the crane itself suffered calamitous or accident-caused damage — for example, had the crane violently snapped and collapsed. The House in *Murphy* clearly held that such loss was not recoverable, but some courts in the United States do recognize a tort claim for accident-caused damage to the product itself.⁵⁰

In *Rivtow*, Laskin J. dissented in part. Consistent with the accident deterrence rationale behind the duty to warn, he argued that the manufacturer ought to be held liable in negligence for the cost of repairing defects that pose a risk of physical injury to persons or other property. This safety concern was entirely consistent with the duty to warn recognized by the full court. Laskin J. left open the question of liability for non-dangerous defects. Laskin J. later became Chief Justice. His dissent was cited with approval in *Anns* where the House of Lords also recognized a duty for dangerous defects.⁵¹ Illustrating the colonialism to which I referred earlier, suddenly some lower Canadian courts began to follow *Anns*, or Laskin J.'s dissent, instead of the majority judgment in *Rivtow*.⁵² Until *Bird Construction*, the Supreme Court of Canada had never overruled *Rivtow*. It had, however, undermined it so often in *dicta*, most recently in *Norsk*,⁵³ that the basic question came to be taken as completely open.

In *Murphy*, the majority judgment in *Rivtow Marine* was approved and Laskin J.'s dissent criticized. For a very brief time, the law in Canada and in England was exactly the same. However, the conservative approach to recognition of new duties of care in *Murphy* received a hostile reception in Canada.⁵⁴ It was not surprising that

⁵⁰ See Feldthusen, *supra* note 20 at 178–82.

⁵¹ *Anns v. Merton Borough Council* [1978] A.C. 728, [1977] 2 All E.R. 492 (H.L.) [hereinafter *Anns* cited to A.C.].

⁵² See Feldthusen, *supra* note 12 at 370–73.

⁵³ *Supra* note 3. The sad history of *Rivtow* is discussed in Feldthusen, *supra* note 12 at 370–73.

⁵⁴ For example, notwithstanding their profound disagreements in *Norsk*, both McLachlin and La Forest JJ. endorse the *Anns* analysis to the disparagement of *Murphy*. In *Economic Negligence*, *supra* note 20 at 10n, I maintain that “McLachlin J.’s judgment is more consistent with a presumptive liability

the Supreme Court would reject the holding in *Murphy* also, which it did. The court in *Bird Construction* cited with approval Laskin J.'s dissent in *Rivtow*. It adopted a deterrence rationale, believing that builder-manufacturer liability for the cost of repairing dangerous defects would promote safety. Nothing in the case supports liability for non-dangerous defects. We can expect, therefore, some litigation about what does constitute a dangerous defect.

I would have preferred that the Canadian courts had stuck with the decision in *Rivtow*, although not for the reasons given in *Murphy*. The dismissal of Laskin J.'s opinion in *Murphy* was not compelling. To allow negligence recovery for dangerous defects to promote safety is both logical and keeping within the traditional confines of negligence law. At one time, I thought this the proper resolution of the issue.⁵⁵ I now believe that the real objection to the dangerous defect rule is that liability for dangerous defects will not in fact effectively promote safety. The risk of repairing dangerous defects has already been allocated to someone in the chain of distribution. The parties will presumably have allocated that risk to the party in the contractual chain who is best positioned to minimize or bear the risk most efficiently. They are presumably better able to identify that party *ex ante* than is the court *ex post*. Moreover, the price the subsequent purchaser paid for the building reflected that contractual allocation of risk. In *Bird Construction*, for example, the plaintiff paid less for the building than it would have had to pay if the builder was required to bear the risk of repairing dangerous defects. Sophisticated commercial parties with expert legal advice negotiated this transaction. If the builder was best positioned to prevent the defect, as the Supreme Court assumed, surely it would have been in the subsequent purchaser's interest to allocate the risk to the builder by contract.⁵⁶

The main impact of imposing additional liability in negligence is to provide another defendant when the party primarily liable in contract is judgment proof. This is an inefficient form of compulsory insurance, and one that commercial parties do not want or need. Consumer protection rationale might support liability in the residential housing market where the risks are great and the chances of self-protection small. Then, the case for negligence depends on the existing state of consumer protection legislation and the willingness of the court to supplement that

thesis, whereas La Forest J. seems to prefer a more 'neutral' and analytical approach."

⁵⁵ See B. Feldthusen, *Economic Negligence*, 2d ed. (Scarborough: Carswell, 1989) at Chapter 4.

⁵⁶ These arguments are too complicated to develop fully here. See generally C. Brown & B. Feldthusen, "Pure Economic Loss: Who Should Pay, When, and How?" in *Negligence After Murphy v. Brentwood DC* (Auckland: Legal Research Foundation, 1991) at 39; Palmer & Feldthusen, *supra* note 20; B. Feldthusen, "*Winnipeg Condominium Corporation No. 36 v. Bird Construction Co. Ltd.*: Who Needs Contract Anymore?" (1995) 25 Can. Bus. L. J. 143; and J. Palmer, "*Bird: A Confusion Between Property Rules and Liability Rules*" (1995) 3 Tort L. Rev. 240.

legislation. Otherwise, although I believe *Bird Construction* was wrongly decided, the consequences of the error are relatively small. Parties like *Bird Construction* who set the contract price in reliance on the previous law have been treated unjustly. Potential plaintiffs in future can contract out of the rule imposed in *Bird Construction* if they find it efficient to do so.

The question of liability for non-dangerous, or merely shoddy products and structures has not been thoroughly debated in Canada. There are two reasons why negligence liability is not warranted. First, as with dangerous defects, tort liability will have minimal deterrence effect. Second, danger aside, an assessment of quality depends entirely on the bargain made at sale. A rusty automobile may be shoddy at one price and an exceptional bargain at another. Absent a compelling consumer protection rationale, I prefer to think the parties are better placed to assess the adequacy of their bargains than the courts.

VI. STATUTORY PUBLIC AUTHORITIES

THE INTERESTING ISSUES CONCERNING negligence actions against statutory public authorities have little to do with economic loss. When Parliament delegates discretionary powers to public authorities, it is questionable whether, as a matter of separation of powers, the courts ought to be second-guessing the exercise of that discretion in negligence actions. There is also the matter of institutional competence. Are courts better positioned than civil servants to decide the appropriate allocation of a limited public budget? As the focus moves along the continuum from discretionary decision-making to implementation, or operational negligence, these reasons for immunity become less compelling. If the director tells an employee to do "X" and she does it negligently to the plaintiff's detriment, tort liability operates to reinforce, not usurp, the exercise of statutory discretion. The questions of duties and powers, discretionary and operational, acts and omissions were discussed brilliantly by Lord Wilberforce in *Anns v. Merton*.⁵⁷ Whether and to what extent that aspect of his opinion has been discredited in *Murphy*⁵⁸ remains to be seen.

In *Murphy*, the attack on public authority liability for economic loss came mostly through the back door. The Lords reasoned that it would be wrong to hold a municipality liable for a negligent exercise of its statutory duty to inspect if the builder was not liable in negligence. They then devoted most of their speeches to

⁵⁷ *Supra* note 51.

⁵⁸ *Supra* note 5. See J. Sopinka, "The Liability Of Public Authorities: Drawing The Line" (1993) 1 Tort L. Rev. 123 at 144, suggesting that *Murphy* did not affect the public authority analysis outside the defect economic loss point.

the matter of builder liability and held the builder could not be held liable in negligence for economic loss relating to defective structures.

At first glance, it would seem odd to exculpate the builder whose negligence was the direct cause of the defect, and whose negligence the inspection ought to have uncovered, but then to hold the municipality liable for the negligent inspection. However, the two duties are entirely different. There is no reason one legal approach could not be adopted to encourage care in building, and another to encourage care in the performance of statutory functions. If the premise of public authority liability is public authority accountability, then it is neither illogical nor necessarily unwise to hold the authority liable for negligent inspection, even where the builders will not be liable in negligence. This was the position taken by the Supreme Court of Canada in *Kamloops v. Nielsen*.⁵⁹ Given that the decision in *Kamloops* was strongly approved in preference to that in *Murphy* in the Supreme Court's later decision in *Norsk*,⁶⁰ there can be little doubt that public authority liability will remain much broader in Canada than in England in the foreseeable future. Even had the Supreme Court upheld the majority decision in *Rivtow* that effectively exculpates builders from negligence liability, *Kamloops* could have remained good law based on the different public authority duty. Given the decision in *Bird Construction*, the point is moot.

I have some problems with where the discretion-operational line is drawn in Canada to immunize some acts and omissions of public authorities from tort liability. I agree with Mr. Justice Sopinka⁶¹ that the Canadian courts are more likely to allow liability for discretionary matters than are the courts elsewhere in the Commonwealth.⁶² I think they are wrong in that regard.⁶³ However, nothing in that debate turns on a distinction between economic and physical damage.

Assuming there is no immunity, of what significance is the economic nature of the loss? Some statutory duties and powers, most perhaps, pertain to purely economic interests. If the purpose of public authority liability is public authority accountability, obviously tort liability ought to extend to the economic interests

⁵⁹ *Supra* note 9.

⁶⁰ *Supra* note 3.

⁶¹ *Supra* note 55 at 135. The leading cases are *Kamloops*, *supra* note 9; *Just v. British Columbia*, [1989] 2 S.C.R. 1228, 64 D.L.R. (4th) 689, 1 C.C.L.T. (2d) 1, 41 B.C.L.R. (2d) 350; *Brown v. British Columbia (Minister of Transportation and Highways)* [1994] 1 S.C.R. 420, 112 D.L.R. (4th) 1, 19 C.C.L.T. (2d) 268, [1994] 4 W.W.R. 194, 42 B.C.A.C. 1; and *Swinamer v. Nova Scotia*, [1994] 1 S.C.R. 445, 20 Admin. L.R. (2d) 39.

⁶² I am uncertain whether the New Zealand approach is not as liberal as the Canadian. See Feldthusen, *supra* note 20 at Chapter 6.

⁶³ *Ibid.*

pertaining to the statutory power or duty. What is needed in this area is a more detailed consideration of whether liability does deter public authority negligence, or perform some other important public function. Deterrence theory is problematic with a defendant that is not subject to exogenous economic constraints.⁶⁴ If deterrence cannot be accomplished through negligence actions, then all liability does is add to the public tax burden. If public authority liability operates merely as a form of public insurance, then this line of objection to liability in *Murphy*⁶⁵ deserves more respect. This is not necessarily an efficient form of housing insurance, and the legislature might be thought better able to devise such a scheme than the courts. Perhaps the best argument for negligence liability in the properly defined operational sphere is that it should prompt the legislatures to enact a better response if needed.

VII. RELATIONAL ECONOMIC LOSS

IN THIS TYPE OF CASE, the defendant negligently damages the person or property of a third party. The defendant ordinarily will be held liable for the physical damage. The plaintiff, however, is an additional claimant who, because of some legal relationship with the third party, suffers pure economic loss. The basic question is to whom and for what, in addition to liability for the physical harm, ought the defendant to be held liable.

Relational loss cases are strikingly different from all the other the economic loss cases discussed above. Cases of this type, perhaps once better known as "negligent interference with contractual relations cases," antedate the decision *Hedley Byrne* by more than one hundred years.⁶⁶ The defendant's conduct is precisely that ordinarily dealt with by negligence law. There are no problems with speech; no contradictory contractual obligations; and no public authority immunity concerns. The problem is essentially pragmatic. Every time there is injury to person or property, there will be an indeterminate number of persons whose indeterminate economic interests may be damaged. Nothing is more foreseeable than economic interdependence, so foreseeability alone will not limit the number of claims. It is universally agreed, and rightly so, that some limits to relational loss claims must be imposed. The question is where to draw the line.

⁶⁴ D. Cohen & J.C. Smith, "Entitlement and the Body Politic: Rethinking Negligence in Public Law" (1986) 64 Can. Bar Rev. 1 at 8.

⁶⁵ *Supra* note 5.

⁶⁶ See *Anthony v. Slaid* (1846) 52 Mass. 290 (Sup. Jud. Ct.) and *Cattle v. Stockton Waterworks Co.* [1874-80] All E.R. Rep. 220, (1875) L.R. 10 QB 453.

Before the Supreme Court's decision in *CNR v. Norsk Pacific Steamship Co.*,⁶⁷ there were no leading Appellate decisions on point in Canada. Most claims had failed in the lower courts, but the courts never adopted an outright exclusionary rule. Historically, courts everywhere have always been uncomfortable about basing an outright exclusionary rule on the often arbitrary distinction between physical damage and economic loss. The challenge comes in attempting to define any other rule that can distinguish *ex ante* a practical boundary for relational loss claims. The English courts seem recently to have abandoned any attempt to improve on an outright exclusionary rule.

Interested readers will want to consider *Norsk* in more detail than I can do here. Briefly, the facts were as follows. The plaintiff was one of three, and certainly the principal user, of a rail bridge owned by the government of Canada. The bridge was actually known as "the CNR bridge," although the plaintiff had no proprietary interest in the bridge. There were a great many factors that suggested that the owner and the plaintiff's business relationship was an unusually close one. The bridge was damaged by the admittedly negligent defendant barge, putting the defendant to considerable expense in making alternate transport arrangements, entirely foreseeable losses suffered by a known plaintiff.

The Court ruled four-to-three in favour of the plaintiff. One majority judgment was given by McLachlin J. on behalf of herself and two others. The dissenting judgment was given by La Forest J. on behalf of himself and two others. The seventh Justice, Stevenson J., disagreed with the reasoning in both those judgments. Stevenson J. favoured the liability to a "known plaintiff" rule which he derived from the Australian decision in *Caltex Oil (Aust.) Pty. Ltd. v. The Dredge "Willemstad"*.⁶⁸ All six of the others disagreed with him. The bizarre result is an apparent three-to-three split over the two most promising approaches to the issue. Effectively, the Canadian courts are now free to choose between the judgment of McLachlin J. or that of La Forest J. It is too early to decide which will prevail.

McLachlin J. dealt with the claim at a high level of abstraction. Much of her judgment seems directed to discrediting the *Murphy* approach to negligence law in favour of the *Arns* and *Kamloops* approach. It appears that she associated any rule-based approach to economic loss with the *Murphy* philosophy, and objectionable on that ground. Perhaps for the same reason, she resisted any attempt to categorize different economic loss claims. Her judgment ranges from one type of economic loss case to another, and seldom deals with relational loss specifically. Ultimately, noting

⁶⁷ *Supra* note 3.

⁶⁸ (1976) 11 A.L.R. 227, 136 C.L.R. 529 (H.C.) [hereinafter cited to A.L.R.].

many distinctive aspects in the relationship between the plaintiff and the bridge owner, she employs a “proximity” test to allow recovery.⁶⁹

For the reasons given earlier, I find these aspects of her judgment disturbing. Her judgment runs all the economic loss cases together and seems to suggest that each economic loss case must be approached as a unique problem. One can surely reject the rigidity of *Murphy* without going to the opposite extreme of open-ended proximity. The uncertainty inherent in her judgment is having an impact already. Lower courts are declining to dismiss at the preliminary stage claims for product defect loss that would, and should, clearly have failed earlier.⁷⁰

Consistent with how the case was argued by both parties, La Forest J. isolated the issue as concerning relational loss only. He declined to drift into discussion of other types of economic loss cases, and criticized McLachlin J. for doing so. Like McLachlin J., he endorsed the general approach to tort duties in *Anns* and *Kamloops* in preference to the restrictive incremental approach in *Murphy*. Where La Forest J. apparently differed with her on this point is that he saw no inconsistency with the *Anns* approach and a general exclusionary rule for relational loss subject to principled exceptions. Accordingly, he acknowledged not only the previously recognized exceptions to the exclusionary rule, but also the desirability of creating new categories of exceptional cases in the future. In particular, he considered two previously recognized exceptions to the exclusionary rule, the “transferred loss” and the “joint venture.” He concluded that neither these, nor new arguments of policy, supported abrogating the exclusionary rule in this particular case. His excellent analysis is far too thorough and detailed to summarize here. I shall mention only the two exceptions to the exclusionary rule that he reviewed.⁷¹

In the “transferred loss” cases the property owner has allocated to the plaintiff by contract the risk of property damage and consequential loss. When the property is damaged by a tortfeasor, the owner suffers no loss and unless the exclusionary rule is excepted the tortfeasor may escape liability altogether. The plaintiff is not under an obligation to reimburse the owner, but rather is under a contractual obligation to bear the loss directly. The plaintiff’s position in these cases can often be usefully

⁶⁹ *Supra* note 3 at 368–71.

⁷⁰ See, for example, *British Columbia Ferry Corp. v. T&N, plc*, [1994] B.C.J. No. 688 (S.C.); *British Columbia v. R.B.O. Architecture Inc.*, (1993) 8 C.L.R. (2d) 262 (B.C.S.C.), varied (June 9, 1994), Doc. CA016637, CA016661 (B.C.C.A.); *Viswalingam v. Fort Smith Health Centre Board of Management*, [1993] N.W.T.J. No. 2 (S.C.); *Can-Dive Services Ltd. v. Pacific Coast Energy Corp.* (1993), 77 B.C.L.R. (2d) 128, 14 C.C.L.T. (2d) 207, 25 B.C.A.C. 175 (B.C.C.A.), leave to appeal to S.C.C. refused (1993), 82 B.C.L.R. (2d) xxxi (note), 17 C.C.L.T. (2d) 284 (note) (S.C.C.); and *Hudson v. Hudson*, [1994] B.C.J. 231 (S.C.).

⁷¹ See *Feldthusen & Palmer*, *supra* note 20, in which the authors offer lukewarm support for the “transferred loss” exception, and reject the “joint venture” exception.

compared to that of a property insurer who could recover by subrogation.⁷² This line of exception was once recognized in England, but has now been rejected in favour of the certainty of the exclusionary rule.⁷³ It continues to be recognized in the United States and probably Australia.⁷⁴ The situation in Canada is uncertain. Only *La Forest J.* addressed the transferred loss cases in *Norsk*. Correctly, he concluded that CNR's claim was for its own loss of use, not one for loss transferred from the owner. It is not clear that he would have favoured exceptions of this sort even in a true transferred loss case.⁷⁵ Neither *McLachlin J.* nor *Stevenson J.* predicated judgment for the plaintiff on a transferred loss theory, although there is every reason to expect *McLachlin J.* to allow recovery for true transferred loss on the basis of proximity.

The "joint venture" cases constitute the second line of exception to the exclusionary rule. There, the use value of the damaged property is shared between the property owner and the relational loss plaintiff. At least three such groups of exceptional cases have emerged from maritime law. One permits ship charterers by demise to recover loss of use damages, recognizing that the charterer is in all respects save a legal technicality the effective owner of the ship. Another is a more flexible exception that allows commercial fishermen to recover relational losses in a variety of circumstances. Still another permits cargo owners to recover their general average contributions. The joint average and share the catch exceptions are based on pure joint venture theory — the parties share *the same* risks of the venture and so should they share the entitlement to compensation when the risks materialize. Once again, an exception based on that rationale should be recognized in other cases where it arises.⁷⁶ It is, however, a different matter to recognize as a "joint venture" situations where the relational loss claimant has a different and unshared interest in the damaged property from that of the property owner.

⁷² Unlike an insurer, the plaintiff is not under an obligation to reimburse the owner; rather, she is contractually obliged to bear the loss directly. See generally *Feldthusen*, *supra* note 20 at 236–40.

⁷³ *Leigh & Sillavan Shipping Co. v. Aliakmon Shipping Co.*, [1986] 2 All E.R. 145 (H.L.), overruling *The "Irene's Success"*, [1982] QB 481.

⁷⁴ *Amoco Transport Co. v. S/S Mason Lykes* (1986), 768 F. 2d 659 (5th Cir.) See also *Caltex Oil*, *supra* note 68, where the transporter AOR was awarded damages for the value of the oil owned by Caltex without any discussion whatsoever.

⁷⁵ See, for a general discussion of transferred loss, *Norsk*, *supra* note 3 at 326–31. *La Forest J.* referred to *Aliakmon*, *supra* note 69, several times with apparent approval. Relying on *McLachlin J.*'s judgment, a "transferred loss" claim was allowed, although not referred to as such, in *Canastrand Industries Ltd. v. Lara S (The)* [1993] F.C.J. No. 134 (T.D.).

⁷⁶ For an example, see *Domar Ocean Transportation Ltd. v. M/V Andrew Martin* (1985), 754 F. 2d 616 (3d Cir.).

At the end of her judgment in *Norsk* and after having read the dissenting judgment, McLachlin J. expresses her conclusion quite differently from the blending and proximity approach that dominates the rest of her judgment. There she states that the only difference between her judgment and that of *La Forest J.* is how they interpret the breadth of the “joint venture” exception. *La Forest J.* had concluded that this arrangement did not constitute a “joint venture” in the sense described above.⁷⁷ There was no agreement to share the risk; in fact precisely the opposite was specified by the contract. The government owner had one use for the bridge, to contract it out to various railways. It was compensated for all its loss. The railways had another use of the bridge.⁷⁸ McLachlin J. felt the terms of the contract were not determinate of the nature of the “joint relationship.” She relied on numerous factors relevant to the relationship between the CNR and the owner, and the relationship between the plaintiff and the defendant, to conclude that there was sufficient proximity to make recovery fair and just.⁷⁹ This can only be described as an application of the joint venture principle in the loosest sense. Should her judgment prevail, a plaintiff who shares the use of damaged property with the owner, albeit a different sort of use entirely, may be able to recover if there are a sufficient number of distinguishing factors in their relationship to enable the plaintiff to differentiate its claim plausibly from that of other relational users. It is far from clear that this approach, any more than her proximity approach, is either just or certain.⁸⁰

In summary, the Canadian position on relational loss is totally uncertain, both because of the unusual split among the judges, and because of the inherent uncertainty in the judgment of McLachlin J. I would predict that the majority of relational loss claims will continue to fail, but that considerable time will be wasted litigating supposedly special cases of proximity.

⁷⁷ *Supra* note 3 at 332–35.

⁷⁸ In a similar United States case, the plaintiff was denied recovery for additional expenses incurred in detouring trains after the defendant allegedly damaged a train bridge: *Louisville Rd. Co. v. Arrow Tpt. Co.* (1959) 170 F. Supp. 597 (N.D. Ala.).

⁷⁹ *La Forest J.* points out that none of the unique aspects of the owner-plaintiff relationship constitute principled reasons upon which to base recovery: *Norsk*, *supra* note 3 at 336, 344, and 354. For a criticism of her interpretation of joint venture, see Bernstein, *supra* note 20 at 166–68. Interestingly, despite her unequivocal rejection of the “known plaintiff” approach in *Caltex Oil*, *supra* note 68, McLachlin J.’s judgment is strikingly similar to the judgments in *Caltex*, especially those of Gibbs and Stephen JJ.

⁸⁰ The railways are notorious for inflicting unrecoverable relational losses on others through derailments and chemical spills. Two smaller users of the bridge far less able to protect themselves than CNR would not be able to recover under either of her approaches (they did in fact recover based on an agreement that their claims would stand or fall with the CNR’s but they would not have recovered otherwise).

VII. CONCLUSION

DURING THE PAST FIVE YEARS, the Supreme Court of Canada has been establishing a uniquely Canadian body of law governing the recovery of economic loss in negligence. In the aftermath of the split decision in the Supreme Court of Canada in *Norsk*,⁸¹ I regret to say that one dominant aspect of this Canadian law is its uncertainty. Lower courts could be forgiven for abandoning many of the earlier guidelines established in Canada and elsewhere, and for approaching each case afresh employing an open-ended test of proximity. This is an unfortunate legacy of *Norsk*, and two of the most thorough and thoughtfully reasoned judgments on the question of economic loss ever rendered anywhere.

Even if one takes a more orderly approach — such as that suggested by La Forest J. in *Norsk* and adopted by the full court in *Bird Construction* — the law of economic loss in Canada is still not as clear as it is elsewhere in the Commonwealth. There is probably little unique in the Canadian law of negligent misrepresentation. Perhaps less deference is paid to co-existing contractual arrangements than may be the case in England. The Canadian courts will probably extend the negligent will drafting line of authority to other negligent performances of professional services, whereas the English courts may not. With public authorities, the Canadian courts appear to extend less deference to the authority's constitutional position or institutional competence than do the English courts. After *Norsk*, it is unclear whether relational loss will be recognized as a distinct category of claim, let alone unclear how such claims will be resolved. Only the Canadian law on recovery for shoddy building construction or product manufacture is now completely clear. Unfortunately, it is also wrong, in my opinion. One may predict with confidence that Canadian lawyers will enjoy the opportunity to litigate relatively more economic loss claims than lawyers elsewhere in the Commonwealth. Whether any other group in Canadian society will benefit from this strikes me as highly doubtful.

⁸¹ *Supra* note 3.