RECOVERY IN THE HIGH COURT OF PURELY ECONOMIC LOSS CAUSED BY NEGLIGENT ACTS

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Perhaps the most important currently unresolved issue in the law of negligence is the location of the proper limits of recovery of damages for economic loss which is unaccompanied by physical damage to the plaintiff's person or property.[1] Existing authority, most of which is English,[2] draws a distinction between recovery for such loss when caused by negligent acts on the one hand and negligent misstatements on the other. In two recent and extremely significant cases[3] the High Court has given careful and detailed consideration to the issues raised by the former type of case.

THE FACTS

The dredge "Willemstad" was being used to dredge certain areas of Botany Bay, during which operation the dredge damaged an oil pipeline belonging to Australian Oil Refining Limited ("A.O.R.") which ran across the bed of the bay from an oil refinery operated by A.O.R. to a terminal operated by Caltex Oil (Australia) Pty. Limited ("Caltex"). These events gave rise to four actions, three of which came on appeal to the High Court. Two actions were *in rem* in the

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1 This definition of "purely economic loss" is inadequate, as is "economic loss standing alone", but both are used in this article for the sake of brevity. By "purely economic loss" is meant the loss of money or money's worth either in circumstaces where the plaintiff has suffered no physical damage at all—as, for example, in Hedley Byrne—or in circumstances where the plaintiff has suffered some physical damage as a result of the defendant's act but where the economic loss is not a causal consequence of the material loss—as in the present case, infra p. 247—or where it is such a remote consequence of the material loss—as in Spartan Steel, infra note 2—that a value judgment is made to the effect that it should be treated as causally independent.

2 Most notably Hedly Byrne & Co. v Heller & Partners, [1964] A.C. 465; Mutual Life and Citizens Assurance Co. v Evatt, [1971] A.C. 793; S.C.M. (United Kingdom) Ltd. v W. J. Whittall & Son Ltd., [1971] 1 Q.B. 337; Spartan Steel and Alloys Ltd. v Martin & Co. (Contractors) Ltd., [1973] Q.B. 27.

3 Caltex Oil (Aust.) Pty. Ltd. v The Dredge "Willemstad"; Caltex Oil (Aust.) Pty. Ltd. v Decca Survey Australia Ltd., (1977) 11 A.L.R. 227

Admiralty Division of the Supreme Court of New South Wales against the dredge, one brought by A.O.R. and the other by Caltex, and both alleging negligence. The other two actions were brought by A.O.R. and Caltex respectively against Decca Survey Australia Limited ("Decca") which had supplied certain navigation equipment installed on the dredge. A.O.R. was awarded an agreed amount of $125,000 for damage to its pipeline in its action against Decca and from this judgment no appeal was brought to the High Court.

Three issues were presented for the consideration of the High Court. The first, which arose out of the actions *in rem*,[4] was whether the trial judge had been correct in refusing to enter judgment against the master of the dredge. This issue was decided in favour of the master on the basis that he had no relevant interest in the dredge.[5] The second issue was whether the trial judge was correct in finding that Decca had been negligent and that its negligence had been the cause of the economic damage for which recovery was sought in the action in which it was defendant.[6] This issue was decided in favour of Caltex.[7]

The third issue was whether Caltex had the right in each of its actions[8] to recover damages for purely economic loss caused by the respective defendants' negligence. The facts relevant to that loss were these: under an agreement between A.O.R. and Caltex, Caltex supplied crude oil to A.O.R. for processing in its refinery, and the processed products were delivered to Caltex either into a vessel at the A.O.R. wharf or by way of the pipeline to the Caltex terminal. The crude oil and the processed products remained at all times the property of Caltex, A.O.R. being bailee of the goods[9] from the time of delivery to them until the time of redelivery to Caltex. In the case of products delivered by the pipeline redelivery took place when the products

4 Caltex Oil (Aust.) Pty. Ltd. v The Dredge "Willemstad"; Australian Oil Refining Ltd. v The Dredge "Willemsted", (1977) 11 A.L.R. 227.

5 Id. per Gibbs, J. at 233; Stephen, J. at 268 (Mason, Jacobs and Murphy, J.J., concurring).

6 Caltex Oil (Aust.) Pty. Ltd. v Decca Survey Australia Pty. Ltd.

7 Id. per Gibbs, J. at 236; Stephen, J. at 267-8 (Mason, Jacobs and Murhpy, J.J., concurring).

8 Supra note 3.

9 See especially Stephen, J. at 249-50. The bailment existed despite the fact that as a result of the bailee's actions the crude oil would be transformed into other products and might also be commingled with oil not belonging to Caltex. The agreement was satisfied by redelivery to Caltex of a quantity of products proportional to the amount of oil delivered by Caltex to A.O.R. regardless of the provenance of the products.

reached the Caltex terminal. During the period of the bailment the goods were at A.O.R's risk. As a result of the damage to the pipeline a small quantity of products escaped and in addition Caltex suffered economic loss consisting of the cost[10] of obtaining delivery of petroleum products to its terminal by means other than the pipeline while the pipeline was being repaired. A.O.R. was not, in the circumstances, liable under the agreement for their failure to deliver by pipeline.

THE PREVIOUS LAW

The current state of the relevant authorities may be summarized[11] as follows. When the economic loss standing alone is caused by a negligent misstatement, such loss is recoverable, if at all, not on the basis of the reasonable foreseeability test laid down by Lord Atkin in *Donoghue v Stevenson*[12] but on the basis of the narrower principles couched in terms of duty of care and laid down in *Hedley Byrne & Co. Ltd. v Heller & Partners.*[13]

When such loss is caused by a negligent act the basic rule is that economic loss unaccompanied by physical damage to the person or property of the plaintiff is irrevocable. Despite *dicta* in *Hedley Byrne*[14] to the effect that no rational distinction can be drawn between physical and economic loss so as to justify allowing recovery of the former and denying recovery of the latter, it has been held by the Court of Appeal[15] that economic loss caused by a negligent act is not recoverable unless it is so proximate to physical injury caused by the same act that it can be described by some such phrase as "truly consequential on the material damage"[16] or "the immediate consequence of the negligence".[17] There have been dissentients. Edmund

10 Caltex claimed $95,000 under this head.

11 There is such an extensive literature in this area that there is no need to survey the cases in detail. Attention is drawn particularly to P. S. Atiyah, "Negligence and Economic Loss" (1967) 83 *L.Q.R.* 248 and P. P. Craig, "Negligent Misstatements, Negligent Acts and Economic Loss" (1976) 92 *L.Q.R.* 213.

12 [1932] A.C. 562.

13 [1964] A.C. 465.

14 Id. at 517 per Lord Devlin; 509 per Lord Hodson.

15 S.C.M. (United Kingdom) Ltd. v W. J. Whittall & Son Ltd., supra note 2; Spartan Steel and Alloys Ltd. v Martin & Co. (Contractors) Ltd., supra note 2.

16 S.C.M. v Whittall, id. at 346 per Lord Denning; at 352 per Winn, L.J.; Spartan Steel, id. at 39 per Lord Denning; at 46-7 per Lawton, L.J.

17 S.C.M. v Whittall, id. at 345 per Lord Dennning; Spartan Steel, id. at 47 per Lawton, L.J. It is assumed that in the minds of their Lordships 'truly

Davies L.J. (as he then was) in his dissent in *Spartan Steel*[18] rejected the need for a nexus between the economic and the physical loss and was prepared to allow damages for "purely economic loss, provided that it was a reasonably foreseeable and direct consequence of failure in a duty of care".[19]

Finally, there are cases where it is very difficult to draw the distinction between acts and misstatements. *Ministry of Housing and Local Government v Sharp*[20] and *Dutton v Bognor Regis U.D.C.*[21] are examples. In both of these cases a majority at least of the Court of Appeal was prepared to impose liability on the basis of Lord Atkin's principle without modification and without regard to whether the loss was purely economic or purely physical or a combination of physical and economic.[22]

THE ISSUE CRYSTALLIZED

The three classes of case mentioned in the above summary can, it is submitted, be drawn together to illustrate the issue which lies at the heart of the debate over liability for purely economic loss. The most commonly expressed reason for denying recovery for purely economic loss is the fear that to allow recovery might lead to indeterminately wide liability and multiplicity of litigation. The fear is based on the easily demonstrable proposition that purely economic loss is more likely to spread widely than physical damage. The main objection is not to recovery for economic loss as such but to burdening the defendant (or those amongst whom the loss will be spread by means of insurance or increased charges to the defendant's customers) with an unreasonably heavy load of responsibility and the courts with an excessive amount of litigation as a result of allowing such recovery.[23] The costs of transferring the burden from the victims to the defendant,

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consequential upon' and 'immediate consequence of' are synonymous. It must also be assumed that their Lordships intend the two phrases to refer to the same test despite the fact that in one the nexus is with material damage and in the other with the negligence. Otherwise their Lordships have created two tests, one of which is the same as that of Edmund Davies, L.J. in Spartan Steel. This interpretation is supported by the result reached in Spartan Steel and the fact that Edmund Davies, L.J., dissented from it.

18 Id. at 39.

19 Id. at 45.

20 [1970] 2 Q.B. 223.

21 [1972] 1 Q.B. 373.

22 See Craig, supra note 11 at 220-227.

23 Spartan Steel, supra note 2 at 38-39 per Lord Denning.

his customers and fellow participants in the loss causing activity, may outweigh any benefit in so doing.[24]

Such arguments and others based on the intuitively felt injustice of imposing on the defendant a liability which seems quite disproportionate to the seriousness of his negligent act, cut across the rule that reasonable foreseeability is the basic determinant of the scope of liability. At the same time, these arguments cannot be given effect to by classifying purely economic loss as too remote, in terms of foreseeability, to be recoverable, because reasonable foreseeability has been given such an extended meaning in its application to physical loss[25] that one would have to use a different definition of foreseeability in order to exclude any significant amount of economic loss. This would clearly be unsatisfactory.

Therefore, in order to provide a principled basis for such degree of refusal to allow recovery for puerly economic loss as is thought necessary and sufficient to overcome the objections to recovery of such loss, what is needed is some control mechanism additional to reasonable foreseeability which will make the scope of liability for purely economic loss narrower than that for physical and consequential economic loss. In *Hedley Byrne* this device took the form of a narrowing of the duty of care. In *S.C.M. v Whittall*[26] and the judgments of Lawton L.J. and Edmund Davies L.J. in *Spartan Steel* it took the form of a reinforcement of foreseeability as the test of remoteness with a requirement of casual proximity. In the judgment of Lord Denning M.R. in *Spartan Steel* foreseeability was tempered by an assessment of policy issues in the light of the facts of the particular case.[27] In *Dutton*[28] and *Sharp*[29] the issue was and could be ignored because the range of potential plaintiffs was strictly and identifiably limited.

THE QUESTION BEFORE THE COURT

The precise question before the court was not a straightforward one. It will be recalled that the pipeline was owned by A.O.R. while

24 See Atiyah, supra note 11 at 269 et seq.
25 E.g., Chapman v Hearse, (1961) 106 C.L.R. 112.
26 Supra note 2.
27 His Lordship's "fifth consideration" (39) would seem to rest the decision on essentially the same basis as that in S.C.M. except that in Spartan Steel the policies supporting the decision are made more explicit.
28 Supra note 21.
29 Supra note 20.

the products in it, some of which were lost, were owned by Caltex. Caltex, therefore, *had* suffered some physical damage, and the whole case could perhaps have been disposed of on the basis of the *S.C.M. v Whittall* principle if it had been possible to categorize the economic loss as "truly consequential" upon the physical loss. But this was not possible because, in the words of Stephen J.,[30] "the loss of the product which escaped through the damaged pipeline did not cause any measurable part of the economic loss which Caltex seeks to recover" and although some of that loss may have been so caused, "Caltex neither sought to quantify that loss nor to recover on that footing". Therefore, the most that could be said was that the economic loss suffered by Caltex "happened to be caused by the negligent act that caused the physical damage".[31]

Here it is clear that the difference between the formulation 'truly consequential on the material damage' on the one hand and the formulation 'truly consequential on the defendant's breach of duty' on the other, is crucial. The loss suffered by Caltex was foreseeable, but while its proximity to other factors would probably satisfy Edmund Davies L.J's test it would probably not satisfy Lawton L.J's. The question, then, was whether Caltex should be denied recovery because its loss was purely economic and not consequential upon damage to its property, or whether the limits of recovery for purely economic loss should be set more widely than under the *S.C.M. v Whittall* principle so as to allow Caltex to recover its loss.

THE DECISION

The Court unanimously decided that Caltex was entitled to recover the agreed amount of $95,000 on account of economic loss suffered by it as a result of the negligence of Decca and the dredge "Willemstad".

THE REASONS

Gibbs J.[32] reaffirmed the basic rule that economic loss which is not consequential upon injury to the plaintiff's person or property is irrecoverable and that the fact that the loss was foreseeable is not enough to make purely economic loss recoverable. His Honour rejected

30 Supra note 3 at 250.
31 Id. at 236 per Gibbs J.
32 Id. at 245.

the approach of Lord Denning in *Spartan Steel* of deciding in each particular case on the basis of overtly expressed policy considerations whether or not the economic loss in question ought to be recoverable.

His Honour was prepared, however, to create an exception to the general rule, and in so doing Gibbs J. chose to approach the problem not from the angle of the remoteness, in causal or policy terms, of the damage but, as in *Hedley Byrne,* by way of circumscribing the duty of care. His Honour said,[33]

> . . . there are exceptional cases in which the defendant has knowledge or means of knowledge that the plaintiff individually, and not merely as a member of an unascertained class, will be liable to suffer economic loss as a consequence of his negligence, and owes the plaintiff a duty to take care not to cause him such damage by his negligent act.[34]

Whether the defendant has knowledge or means of knowledge is to be decided on the facts of each case. Material factors will be that the plaintiff has property in physical proximity to the damaged property and that the plaintiff and the owner of the damaged property were, as here, engaged in a common adventure.[35]

This test is well suited to a case, like the present, where there are no more than one or two potential plaintiffs. However, it is respectfully submitted that His Honour's test would raise a number of difficulties if applied in a case where the number of potential plaintiffs was relatively large. The first difficulty lies in the term "unascertained class". That the class of victims is ascertainable does not alter the fact that recovery for purely economic loss may impose an unreasonably heavy burden on the defendant or entail very high transfer costs. It is not the indeterminacy of the liability, as such, which creates the difficulty since, given sufficient information, the number of potential plaintiffs will always be determinable. Thus, in the classic example of Blackburn J. in *Cattle v The Stockton Waterworks Company*[36] the class of mineworkers is not unascertainable, just very large. The real nature of the problem is that the plaintiff may be a member of a very large class of affected individuals. At some point the decision may have to be made that the burden of liability on the defendant is as great as it should be or that the costs

33 Ibid.
34 This test resembles that suggested by Mr. Craig, supra note 11.
35 It appears that his Honour is using this phrase in a non-technical sense.
36 (1875) L.R. 10 Q.B. 453, 457.

of transferring the burden to the defendant and those to whom it will be passed on outweigh any benefit of so doing.

This particular difficulty in designing a limited duty of care has not arisen in the *Hedley Byrne* type of case where this technique is already in use, because in all those cases the plaintiff has been the only foreseeable victim. The element needed to decide cases in which it does arise is a workable general definition of "limited class".[37] At present I cannot see any way of achieving this. The term will probably have to be defined from case to case. From this point of view the duty of care approach is little more attractive than the remoteness approach which requires case-by-case definition of "foreseeable and consequential".

A second difficulty resides in his Honour's attempt to create an exception by requiring foresight of the plaintiff 'individually'. This is because it is not open to the defendant in *any* negligence case to argue that he ought not be expected to have foreseen the plaintiff individually. If one of Mr. Justice Blackburn's mineworkers resorted to litigation he might well fail, but it is respectfully submitted that this would not be on account of a refusal by the court to accept the proposition that the reasonable man in the position of the plaintiff would have foreseen that if the mine was flooded each individual mineworker would be put out of work. Would his Honour be satisfied to impose liability for purely economic loss in a case where the number of potential plaintiffs was relatively large on the basis of reasonable foreseeability (resulting from knowledge or means of knowledge) of damage to a specific and limited class of individuals rather than of damage to a particular individual? Perhaps in such a case Gibbs, J. would apply the general rule and not his exception.

Gibbs J. considered[38] that in this case Decca and the persons interested in the dredge had the requisite means of knowledge having regard to the *particular* features of the relationship between these parties in the *particular* circumstances.

One final comment may be made about the approach of Gibbs J. His Honour endorses[39] Lord Denning's *dictum*[40] to the effect that

37 The test would be something like, "A duty of care to avoid inflicting purely economic loss arises if the defendant, because of his knowledge or means of knowledge, ought to foresee that his negligence will cause damage to a specific and limited (i.e. relatively small) class of person of which the plaintiff is a member".

38 Supra note 3 at 245.

39 Id. at 244.

40 In Spartan Steel, supra note 2 at 37.

it is pointless and very difficult to seek to classify the problem of purely economic loss as either a duty or a remoteness problem.[41] This disenchantment with the duty, breach and damage framework of the tort of negligence is becoming increasingly common. However, it is suggested that it is at least partially unjustified. It is true that the tripartite division is only a tool of classification and that the interpretation of all three heads in terms of foreseeability has perhaps reduced the usefulness of the classification. On the other hand, it is still profitable to separate duty questions—those concerning the relationship between the plaintiff and the defendant such as arise, for example, in the area of injuries to unborn children—from remoteness questions—those concerning the nature of the loss and the relationship between the defendant's act and the loss. The considerations relevant under the two heads may well be different.

Mason J., like Gibbs J., adopts a duty of care approach, but unlike Gibbs J., His Honour does not create an exception to the *S.C.M. v Whittall* rule as to the recovery of purely economic loss. Rather his Honour creates a new rule to replace it. Mason J. criticizes tests which employ as an extra control device proximity between the loss and the negligence, on the basis that this involves a reversion to the pre-*Wagon Mound*[42] position of distinguishing between culpability and compensation. It is respectfully submitted that there is an answer to this criticism. *The Wagon Mound* rested on the notion that it is unfair to impose liability on the defendant for unforeseeable damage no matter how direct it is. But no test of recovery for purely economic loss does this—they all seek only to limit recovery of *foreseeable* loss. *The Wagon Mound* certainly did extend foreseeability from the duty head to the damage head but it did not thereby fuse the two heads. Simply finding a duty of care does not answer all questions relevant to the existence and scope of any particular defendant's liability.[43]

The test put forward by Mason J. is that:[44]

> A defendant will be liable for economic damage due to his negligent conduct when he can reasonably foresee that a specific individual, as distinct from a general class of persons, will suffer financial loss as a consequence of his conduct.

41 Cf. Mason J., supra note 3 at 271-2.
42 [1961] A.C. 388.
43 Supra nn. 39-41 and text.
44 Supra note 3 at 274.

The test, like that of Gibbs J., well fits a case such as the present where there is only one person (or at most two) who could foreseeably suffer the loss in question. But to cope with a case where there are a significant number of potential plaintiffs the test would have to be rephrased so that "specific individual" became "the members of a specific and limited class of individuals". The difficulties of such a test, arising from the difficulty of defining "specific and limited class" on the one hand, and "general class" on the other, have already been noted. The term "general class" is not open to the criticism directed above at "unascertained class", but it is extremely difficult to define.

Stephen J. favoured a flexible approach but thought[45] that Lord Denning's unrestricted appeal to policy was too creative of uncertainty to stand as the sole test of when purely economic loss ought to be recoverable. Appeal to policy should, in his Honour's view, result in a decision not resting directly on assessment of the policy issues but indirectly by way of the mediation of "some definition of rights and duties". His Honour's objection to the approach of Lawton L.J. in *Spartan Steel* was twofold. Firstly,[46] it is too narrow, and secondly[47] it is likely to give effect to quite irrelevant and fortuitous factors. It is certainly desirable to have a reason for allowing or denying recovery of purely economic loss which looks to the nature of the loss itself and to the policy issues to which it gives rise rather than to its relationship with some other loss.

His Honour was in search of an intermediate position between the narrow one of requiring physical damage to the person or property of the plaintiff as a pre-condition of recovery for purely economic loss, and the very wide one which would result from not requiring any proximity between the economic loss and either material damage or the defendant's act beyond that provided by foreseeability.[48] The extra control on which His Honour settles is a more elaborate formulation of that used by Edmund Davies L.J. in *Spartan Steel.*

> . . . it may be that no more specific proposition can be formulated than a need for insistence upon sufficient proximity between tortious act and compensable detriment. The articulation, through the cases, of circumstances which denote sufficient proximity will provide a body of precedent productive of the necessary certainty.[49]

45 Id. at 253-4. His Honour's discussion of the matter is worthy of particular attention.
46 Id. at 255.
47 Id. at 255-256.
48 Id. at 255, 258.

His Honour's preparedness to rely on precedent rather than on any definition of rights and duties to create the necessary certainty might lead one to think that Stephen J. is adopting the approach of Lord Denning which he had earlier rejected. Thus his Honour is prepared to adopt a criterion of sufficient proximity couched in terms of "what is fair and reasonable in the circumstances" informed by precedent when this develops.[50] His Honour also notes[51] that the emergence of "some general area of demarcation between what is and what is not a sufficient degree of proximity . . . neither can be, nor should it be, other than as a reflection of the piecemeal conclusions arrived at in precedent cases". Further, it is clear from Lord Denning's judgment in *Spartan Steel*[52] that one of the factors his Lordship took into account was the state of the relevant authorities.

Where Stephen J's test does differ from Lord Denning's approach is in the range of factors to which his Honour looked in determining whether there was sufficient proximity—not any policy consideration which might seem relevant but only the factual circumstances of the case interpreted in the light of the flood of litigation and excess liability arguments. But the question which the two approaches are designed to answer is the same—ought the loss to be recoverable.

His Honour proceeds to list the factors which in his opinion demonstrate a degree of proximity between the defendant's act and Caltex's loss sufficient to give rise to liability in the defendant to compensate Caltex for its economic loss. The proximity for which his Honour looks is not primarily casual. Only the fifth of the factors which his Honour lists[53] concerns casual proximity, and it shows the difficulty of casual proximity tests. The loss, his Honour argues, was not indirect —due to adverse effects on collateral commercial arrangements—but direct—the result of having to employ alternative means of transport. But suppose Caltex had for some time been unable to arrange alternative transport and had consequently defaulted on contracts for the supply of petrol. The resulting loss to Caltex would seem, on the basis of Stephen J's criterion, to be so indirect as to be irrecoverable. But why should it be? There is no greater danger of runaway liability in *this* case because the loss is indirect. Admittedly, one might want to say that those who had contracted with Caltex should not recover

49 Id. at 260.
50 Ibid.
51 Id. at 260-1.
52 See especially his Lordship's "fifth consideration", supra note 2 at 39.
53 Supra note 3 at 262.

their loss but this could be done consistently with allowing Caltex to recover. Under the tests of Gibbs J. and Mason J., Caltex would probably not be denied recovery in this type of situation.

Another factor mentioned by his Honour[54] was whether Decca knew that their act would injure Caltex in precisely the way it did. This consideration seems to lay down a rule as to foresight of manner and extent of injury different from that which applies to cases of physical injury.[55] This requirement narrows the scope of recovery for purely conomic loss by narrowing the definition of 'foreseeable'. It has already been remarked that having different meanings of 'foreseeable' for different types of loss is not particularly desirable.

Stephen J's final comments on the issue consist of an explanation of why he has not dealt with the matter on the basis of the criterion of efficient loss distribution[56]—namely because fault allocation and loss distribution operate on such different theoretical bases that legislative action would be required to allow a court to decide cases according to the dictates of economic efficiency. Two minor comments might be respectfully made. Firstly, it has already been noted that the fear of unreasonably wide liability is based to some extent on loss spreading arguments. Secondly, in a case like the present in which both parties are commercial entities likely to be insured against the risks involved, calculations of efficiency based on the respective ability of the parties to bear the loss, as opposed to allocation of the loss on the basis of fault, might well yield no very clear result.

Jacobs J. adopts a rather different line of reasoning from any of his brethren. His Honour argues[57] that it is wrong to concentrate on whether the damage suffered was physical or economic. What is relevant are the circumstances of the loss. In many cases economic loss to A arises out of a breach by B of a duty owed to C, and in these cases it is the normal inability of A to recover for the breach of a duty owed to C, that is, the circumstances of the loss, rather than the economic nature of the loss which is the basis of the rule as to non-recovery of purely economic loss. Thus Caltex could not recover its loss on the basis that as a result of a breach by Decca of its duty to A.O.R. not to damage its pipeline, A.O.R. had failed to deliver petrol to Caltex as provided by the contract between Caltex and

54 Id. at 263.
55 See J. G. Fleming, *Law of Torts,* 4th ed. (1971) 186 et esq.
56 Supra note 3 at 265.
57 Id. at 278-279.

A.O.R. Simple loss of the benefit of a contract with a third party is not a legally compensable loss. On the other hand,

> If the loss arises from the physical effect of an act or omission on the person or property of the plaintiff and that physical effect is one which was foreseeable and that foreseeability gives rise to duty in the defendant to take care to avoid that physical effect, it is no answer to the plaintiff's claim for damages that his loss was pecuniary or economic.[58]

In this case Caltex's loss did arise, in his Honour's opinion,[59] from the physical effect of the loss of the petroleum products. The defendant owed a duty of care to Caltex because property of Caltex—crude oil at the refinery and products thereof—was in such physical propinquity to the place where the defendant's acts had their physical effect—the place where the dredge went in its operations—that a physical effect—"immobilisation through the pipeline of the crude oil and the products thereof"—on the property of Caltex was foreseeable as a result of such acts or omissions.

It is submitted with respect that his Honour's reasoning presents considerable difficulties. Firstly, the distinction between pecuniary damage and physical effects is obscure. It is true that loss suffered because an alternative means of transport has to be arranged has physical aspects—the trucks, the products carried, even the loss of the products from the pipeline. Loss occasioned, for example, by mere closure of the terminal would lack these aspects. But it is difficult to see how *these* physical aspects significantly alter the legal complexion of the loss.[60] Also it is difficult to understand why, if immobilisation of A's property can amount to a physical effect, immobilisation of A's labour, as in Blackburn J's example in *Cattle v Stockton Waterworks,* cannot also be so treated. And yet his Honour specifically argues that the only loss suffered by the mineworker would be loss of the benefit of a contract with a third party.[61]

Secondly, the word "arises" in his Honour's test seems to ignore the very question in issue by not defining how causally proximate the loss needs to be to the physical effect in order to limit recovery sufficiently to avoid unreasonably wide liability and multiplicity of litigation.

58 Ibid.
59 Id. at 284.
60 The distinction is equally difficult to grasp in the illustration concerning the ship in tow—Id. at 280.
61 Ibid.

Thirdly, the reasoning leads Jacobs J. to place on a number of cases interpretations which, it is submitted, are unsatisfactory. For example, his Honour argues[62] that certain time charter cases did not turn on questions of title but on the proximity of the plaintiff's property to the physical act.[63] Again, in referring to comments of Lord Penzance in *Simpson and Company v Thomson*[64] his Honour draws a distinction between "economic or pecuniary losses" and losses not of a kind "which gave rise to a duty to take care to avoid the risk of physical injury to person or property". The two phrases seem, with respect, to be synonymous in any relevant sense.

Fourthly, his Honour at one point[65] illustrates the meaning of 'physical effect' by saying that there would be no relevant duty of care and so no liability for loss when neither person nor property of the plaintiff was in physical propinquity to the place where the act or omission had its physical effect. Thus it would seem, in his Honour's opinion, that even though property of the plaintiff may not be damaged provided it is physically close to property owned by a third party which is damaged by the defendant's act, the plaintiff can recover loss which can be categorized as a result of a physical effect on the defendant's act.[66] Proximity of this degree would seem to be of such little relevance as to attract, *a fortiori,* the criticism of Stephen J.[67] directed at the fortuitous results produced by tests based on a nexus with damage to the property of the plaintiff. His Honour refers in this context to *Morrison Steamship Company Limited v Greystoke Castle (Cargo Owners)*[68] and in particular to Lord Roche's famous *dictum.*[69] Jacobs J. argues that the case supports both his contention that foreseeable physical effect short of physical injury is compensable, and his rule that there will be a duty to avoid loss resulting from such effects when the person or property of the plaintiff is in physical propinquity to the place where the defendant's act has its physical effect. It is, with respect, difficult to agree. To call immobilisation of goods in a damaged vehicle a physical effect seems like assertion, not argument. Further, the operative factor in such a case is not the physical pro-

62 Id. at 280-281.
63 See Atiyah, supra note 11 at 249-250.
64 (1877) 3 App. Cas. 279.
65 Supra note 3 at 281-282.
66 This is similar to the test propounded by Widgery, J., and criticized by Gibbs, J., id. at 243-244.
67 Id. at 255.
68 [1947] A.C. 265.
69 Supra note 3 at 280.

pinquity as such of the goods to the damaged vehicle, but the fact that they are being carried on it. The relationship between the plaintiff's property and the defendant's act needs to be more carefully defined, by giving much more specific meaning to 'physical propinquity', if his Honour's test is to give any great guidance in deciding whether any particular loss ought to be recoverable. This may be no easier than defining causal proximity, a task which Jacobs J. seeks to avoid.[70]

The major objection to Jacobs J's reasoning is that it introduces a new concept—physical effect—without clearly defining that concept or explaining either why it could be said that the plaintiff in this case had suffered a physical effect or what relationship the new concept bears to concepts already in use—physical and economic damage.

Finally, moving to Murphy J., his Honour did not accept "the contention that economic loss not connected with physical damage to the plaintiff's property is not recoverable".[71] His Honour's general reason for this conclusion is that "persons causing damage by a breach of duty should be liable for all the loss unless there are acceptable reasons of public policy for limiting recovery".[72] His Honour then seeks to counter a number of the policy arguments advanced against recovery of purely economic loss.

His Honour argues that multiple actions can be avoided by easily developed procedures for representative actions and joinder of actions. It is respectfully submitted that there would be difficulties in implementing this proposal. Although there will always be a body of facts common to all actions for recovery of purely economic loss caused by the same acts of a single defendant, there may well be differences between the factual circumstances in which particular plaintiffs find themselves which, though small, may be significant enough to lead to different outcomes not only on the issue of measure of damages but also on the issue of liability. Furthermore, this area of the law is at present so little developed that the proper limits of recovery for purely economic loss are far from clear, and it will for some time be difficult to predict with any degree of confidence whether particular plaintiffs will be able to recover their purely economic loss or not.

These considerations can be reinforced by reference to the present law relating to joint actions. As far as representative actions are concerned, the Rules of the Supreme Court of New South Wales, for

70 Id. at 283.
71 Id. at 286.
72 Id. at 285.

example, provide[73] for such actions "where numerous persons have the same interest in any proceedings". In *Smith v Cardiff Corporation*[74] Evershed M.R. interpreted the requirement of identity of interest as meaning that "all the members of the alleged class have a common interest, that all have a common grievance, and that the relief is in its nature beneficial to them all". In *Markt & Co. Limited v Knight Steamship Company Limited*[75] a group of cargo owners sued their shipper for loss of their cargo when the ship was seized because it was allegedly carrying contraband of war. Vaughan Williams L.J. held[76] that there could be no representative action because the relations between the shipper and each cargo owner were regulated by a separate contract and that therefore, "all sorts of facts and all sorts of exceptions may defeat the right of individual shippers". Similarly Fletcher Moulton L.J. said,[77]

> The proper domain of a representative action is where there are like rights against a common fund, or where a class of people have a community of interest in some subject-matter. Here there is nothing of the kind. The defendants have made separate contracts which may or may not be identical in form with different persons.

Fletcher Moulton L.J. also considered that where numerous persons claim damages they do not have a common interest in obtaining relief which will benefit them all since none has any interest in the relief sought by the others. His Lordship said,[78]

> The relief sought is damages. Damages are personal only. To my mind no representative action can lie where the sole relief sought is damages, because they have to be proved separately in the case of each plaintiff, and therefore the possibility of representation ceases.

It is submitted that these comments are, *mutatis mutandis,* relevant to the present discussion.

As a joinder of parties, the Rules[79] allows such joinder if "some common question of law or fact" is involved and all rights to relief "arise

73 Part 8, rule 13.
74 [1954] 1 K.B. 210, 221.
75 [1910] 2 K.B. 1021. See further N. J. Williams, "Consumer Class Actions in Canada—Some Proposals for Reform", (1975) 13 *Osgoode Hall L.J.* 1 at 30-39; and generally (1976) 89 H.L.R. 1318 et seq.
76 Id. at 1029-1030.
77 Id. at 1040.
78 Id. at 1040-1041.
79 Part 8, rule 2.

out of the same transaction or series of transactions", or when the Court gives leave to join. However, the Court has a discretion[80] to order separate trials where joinder "may embarrass or delay trial of the proceedings or is otherwise inconvenient". These provisions are wider in scope than the provisions concerning representative actions.[81] This is partly because the joinder rules do not create a new and single cause of action in the way that the representation rules do.[82] On the other hand, this may mean that in the area under consideration the uncertainty of the law and the potential differences in fact situations could make joint proceedings impracticably complex.

His Honour then seeks to answer the objection to recovery of purely economic loss that the damages may be beyond the capacity of the defendant to pay. As his Honour says, this is no reason why the loss should be left with the victim. On the other hand, a judgment which cannot be executed does nothing to shift the burden from the victim. Also his Honour's comment only points up the fact that the interests of the plaintiff and the defendant conflict, but it gives no guidance as to how that conflict should be resolved.

CONCLUSION

From a practical point of view, perhaps the most that can safely be said to have been decided in *Caltex* is that the mere fact that the only loss suffered by the plaintiff was purely economic loss which is not truly or immediately consequential upon physical damage to the person or property of the plaintiff will not preclude recovery of that loss. It might also be safe to say that the *S.C.M. v. Whittall* test of causal proximity to physical damage is not law in Australia, although it must be remembered that Gibbs J. reaffirmed that rule and went no further than creating an exception to deal with the present case.

Four strands of reasoning supporting the decision in favour of Caltex are found in the judgments.

1. Jacobs J. based his decision on a process of looking at the circumstances of the loss to see whether, whatever its nature, it was a result of a physical effect on the property of the plaintiff. It is regrettable that the emphasis in his Honour's judgment is on

80 Part 8, rule 6.

81 Markt, supra note 75 at 1030 per Vaughan Williams, L.J.; 1037-1039 per Fletcher Moulton, L.J., and 1043 et seq. per Buckley, L.J.

82 See K. F. O'Leary and A. E. Hogan, *Principles of Practice and Procedure* (1976) at 55.

finding physical effects rather than on evaluating all the circumstances. It is respectfully submitted that it would be difficult to apply his Honour's reasoning with any degree of confidence.

2. A duty of care approach was adopted by Gibbs J. and Mason J. It limits the scope of recovery for purely economic loss by requiring, in effect, that the plaintiff be a member of a specifically foreseen and limited class. There are difficulties in defining "specific and limited class" and this will have to be done from case to case.
3. Stephen J. opted for a remoteness of damage test. His Honour was quite explicit about the policy orientation of this test and the need to wait for a body of precedent to develop in order to fill the test out. The difficulties of directness tests were, of course, a major catalyst for the decision in *The Wagon Mound*, but not all commentators[83] have been convinced that the difficulties are as great as many think. At any rate his Honour made it clear that proximity is to be decided not only, or even primarily, by reference to technical causation but by reference to all the circumstances of the case interpreted in the light of community standards.
4. Murphy J's approach involved a direct assessment of public policy arguments without the mediation of any proposition about rights and duties.

The last three approaches involve an assessment of all the circumstances of the case in order to decide if the test is satisfied.[84] A degree of certainty lacking in approach 4 is introduced in approaches 2 and 3 by the interposition between consideration of particular facts and policies and the decision of a proposition about rights and duties which gives effect to the main policy arguments affecting scope of recovery for purely economic loss and limits the number of policy issues taken into account. But some degree of flexibility will always be desirable in deciding the proper limits of recovery for purely economic loss in the same way that it has been found desirable to rest the modern law of negligence on the open textured concept of objective reasonable foreseeability, a concept which is directly tied to community standards.

It remains to be seen whether approaches 2 and 3 will produce different results in particular cases. If they do it will probably be more because of differing judicial assessments of the facts and issues

83 J. G. Fleming, supra note 55 at 182.
84 Supra note 3, Gibbs, J. at 245; Stephen, J. at 261-2; Mason, J. at 275.

in the case than because of the content of the tests themselves. The duty of care approach offers a greater promise of certainty than does the remoteness approach which attracts by its flexibility. Both tests have their difficulties but both offer a desirable degree of certainty lacking in Murphy J's test. Perhaps only time will tell which is more satisfactory.