Liability for Pure Economic Loss: Yes, But Why?

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This article discusses five distinct categories of claim for pure economic loss in negligence: misrepresentation, relational loss, defective buildings, discretionary public benefits, and the performance of services. It concentrates on a criticism of recent decisions of the Supreme Court of Canada, with brief and less critical reference to comparable decisions of the High Court of Australia. The article also sheds some light on the general question of how a court might best decide whether or not to recognise a novel duty of care.

THE purpose of this paper is to describe critically the way in which the courts have analysed claims for pure economic loss in negligence.[1] The main focus will be upon recent decisions of the Supreme Court of Canada[2] and to a lesser

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1. A pure economic loss is a financial loss that is not causally connected to personal injury or property damage suffered by the same plaintiff. As will become apparent below, this definition includes a number of distinct categories of claims that do not much resemble one another.
2. In particular, the following Canadian decisions will be considered: *Hercules Management Ltd v Ernst & Young* [1997] 2 SCR 165, 146 DLR (4th) 577; *Canadian National Railway v Norsk Pacific Steamship Co* [1992] 1 SCR 1021, 91 DLR (4th) 289; *Bow Valley Husky (Bermuda) Ltd v St John Shipbuilding Ltd* [1997] 3 SCR 1210, 153 DLR (4th) 289; *Winnipeg Condominium Corporation No 36 v Bird Construction Co* [1995] 1 SCR 85, 121 DLR (4th) 193. Hereafter citations to these cases are to the Supreme Court Reports (SCR) and not the Dominion Law Reports (DLR).

extent comparable recent decisions of the Australian High Court.[3] I will argue that the Canadian courts have seldom given meaningful attention to what ought to be the fundamental question in economic loss cases: the justification for recognition of a duty of care in the first place. Instead, Canada has a well developed set of rules to govern the recovery of pure economic loss and a virtual absence of any rationale to support them. On the whole, most of the High Court judgments cannot be subjected to the same criticism. One notable exception is the decision in *Bryan v Maloney*.[4]

There are two different sorts of criticism that may be made of the economic loss case law as it has developed over the past 35 years.[5] The first is the failure of the courts to acknowledge that within the general description of pure economic loss claims there are to be found very different types of cases raising issues that have little or nothing to do with one another. There has been a tendency in the courts to generalise from one type of case to another as if they posed substantially the same issues.[6] Save at the highest level of generality, this is not helpful. The reasons why an auditor might be held liable to a 'non-privy' investor tell us little about why a ship captain ought to be held liable to a railroad company unable to cross a damaged public bridge. Neither of these cases will shed much light on the question of whether a non-privy builder, let alone a local authority, ought to bear the cost of repairing defective house foundations.

The Supreme Court of Canada has explicitly abandoned this tendency to over-generalise. Instead, the court now recognises five distinct categories of claim, each to be analysed separately. They are:[7]

1. Negligent Misrepresentation
2. Relational Economic Loss

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3. The only Australian decision to be given detailed discussion is *Hill v Van Erp* (1997) 142 ALR 687. There is no comparable recent decision of the Supreme Court of Canada. In addition, the following Australian decisions will be briefly considered: *Pyrenees Shire Council v Day* (1998) 151 ALR 147; *Romeo v Conservation Commission of the Northern Territory* (1998) 151 ALR 263; *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 142 ALR 750; and *Bryan v Maloney* (1995) 128 ALR 163.
4. Ibid.
5. The decision in *Hedley Byrne & Co v Heller & Partners Ltd* [1963] 2 All ER 575 (HL) is the usual point of departure for this topic, although the rule precluding recovery for relational loss is much older: see *Cattle v Stockton Waterworks Co* [1874-1880] All ER 220; *Simpson v Thomson* (1877) 3 App Cas 279 (HL); *Anthony v Slaid* (1846) 52 Mass 290 (Sup Jd Ct).
6. A good example from the cases under discussion is the judgment of McLachlin J in *Norsk* supra n 2, 1134-1166.
7. I have re-ordered the categories to correspond to the order in which they are addressed below. The idea was first introduced in *Norsk* supra n 2 by La Forest J, citing B Feldthusen 'Economic Loss in the Supreme Court of Canada: Yesterday and Tomorrow' (1991) 17 CBLJ 356, 357-358. The distinct categories were adopted by the Full Court in *Winnipeg Condominium* supra n 2, 96-97 and affirmed in *D'Amato v Badger* [1996] 2 SCR 1071, 1082-1083, 137 DLR (4th) 129.

3. Negligent Supply of Shoddy Goods or Structures[8]
4. Independent Liability of a Statutory Public Authority
5. Negligent Performance of a Service.[9]

This categorisation was a helpful development and one that ought to be adopted elsewhere. This article adopts this classification and deals with each category in the order given above.

The second criticism of the economic loss case law is more central to this article. It concerns the failure of the courts to articulate the substantial differences between claims for economic loss and claims for personal injury and property damage. At the risk of contradicting the comments above concerning the differences amongst the categories of economic loss, there are also a few important observations that apply generally in economic loss cases, although differently from type to type.

Many economic losses are not like physical damage at all. They do not constitute social losses, but merely transfers of wealth. One commercial party's loss is often another's gain. Not only is this foreseeable but, depending on the circumstances, it may be admirable. When tangible property is destroyed, something of social value is damaged permanently. In contrast, when the electrical power supply to one grocery store is cut, most of the shoppers will either shop at a competitor's store or defer shopping until the power is restored. The store without power suffers a pure economic loss, but much of that is offset by its competitor's gain. The public loss is much less than the private loss. Allowing recovery would promote over-deterrence of useful social activity. This does not necessarily suggest that there should be no recovery, but that the case for recovery is not the same case as it would be in physical damage situations.[10]

Victims of accident-caused personal injury and property damage cannot efficiently enter into antecedent contractual allocations of loss with the perpetrators. Tort law is needed, in effect, to make these bargains for them. In contrast, many economic losses not only can be, but in fact have been, allocated by contract.

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8. For present purposes, this is meant to include the potential liability of both product manufacturers and builders, in respect of both dangerous and non-dangerous defective goods or structures. It is not unlikely that the law in most jurisdictions will continue to distinguish dangerous and non-dangerous defects.
9. This category will be considered with particular reference to *Hill* supra n 3, because no case of this sort has been recently considered in the Canadian Supreme Court. Cf *BDC Ltd v Hofstrand Farms Ltd* [1986] 1 SCR 228, 26 DLR (4th) 1.
10. Elsewhere, it has been argued that it is not feasible for the common law to develop rules of recovery that depend on identification of true social loss: see B Feldthusen & J Palmer 'Economic Loss and the Supreme Court of Canada: An Economic Critique of *Norsk Steamship* and *Bird Construction*' (1995) 74 Can Bar Rev 427.

Where contractual allocations are possible, and a fortiori when they have already been effected, very different considerations apply. Sometimes the courts dismiss these considerations peremptorily. Of more concern, there is sometimes no indication in the judgments that the courts are aware that these concerns exist. A good example to be discussed more fully below arises in the case of liability for defective structures. This a situation where the risk has been allocated by contract. Both the Canadian and Australian courts have re-allocated the risk through tort, without any apparent appreciation that they were doing so.

There is one difference between claims for physical damage and claims for economic loss that is well recognised in the case law. This is the potential for economic loss claims to expose the defendant to 'liability in an indeterminate amount for an indeterminate time to an indeterminate class'.[11] Physical damage tends to be self-limiting. Save in catastrophic cases, one negligent act usually causes a limited number of accidents. Financial interdependency in the modern world is such that a single negligent act usually may cause widespread economic loss. The case where a contractor severs the power supply to an entire industrial estate is a good example. When the economic loss is effected by word, rather than by deed, as with negligently prepared corporate audits published and distributed to the investing public at large, the potential indeterminacy problem is increased.

This is, however, a contingent potential, frequently present in misrepresentation and relational loss cases, and rarely in the other categories. What seems to have happened, at least in Canada, is that the absence of potentially indeterminate liability has become the justification for the recognition of a duty of care. In other words, if a claim for economic loss does not pose a risk of indeterminate liability, the Canadian courts may be content to allow it, subject to the 'double foreseeability' requirements of paradigmatic physical damage negligence law.[12] I shall attempt to illustrate below that the differences between physical loss and economic loss, other than those relating to indeterminacy, have faded into the background, if they are considered at all.

Although the sample of Supreme Court and High Court decisions considered in this article is far too small to support sweeping conclusions, it does suggest that this tendency is more pronounced in Canada than Australia. Naturally, one wonders why this should be so. One logical place to look is at the different manner in which

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11. *Ultramares Corporation v Touche* (1931) 255 NY 170, quoted by Lord Pearce in *Hedley Byrne* supra n 5, 616.
12. By the paradigmatic negligence case, I mean a case of a direct act inflicting physical damage. By double foreseeability requirements, I mean the standard requirement for duty in the paradigmatic case derived from *Donoghue v Stephenson* [1932] AC 562, 580 — namely, that the defendant should have foreseen some harm to a foreseeable plaintiff.

the two appellate courts approach the question of new duties of care. The Supreme Court of Canada[13] adheres to the *Anns* approach whereas the High Court of Australia does not. The two-step *Anns* approach was outlined by Lord Wilberforce as follows:

> The position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First, one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise.[14]

One problem with the *Anns* approach is that it creates a presumption of duty. Given the private and social costs of civil litigation, it seems odd that there should be any such presumption. Of more serious concern is the fact that in Canada the foundation for this prima facie duty has frequently been based on nothing more than the concept of 'foreseeability'.

Lord Wilberforce spoke of 'proximity'. The usefulness of that term depends entirely on how it is defined. The Canadian approach has been strikingly superficial.[15] As often as not, the courts have simply treated the terms 'foreseeability' and 'proximity' as synonymous. To make matters worse, they have then given the second branch of the *Anns* test short shrift. One of the few serious attempts to infuse the concept of proximity with some content was made by La Forest J in *Norsk,*[16] a relational loss case. This was undermined by the looser use of the term in the same case by McLachlin J. As I will discuss below, La Forest J also made a modest step to expand the definition of proximity in misrepresentation in *Hercules*.[17] Despite these efforts, and a recent tendency to take step two of the *Anns* approach seriously, Canadian law is roughly committed to recognising a

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13. See *Hercules* supra n 2, 184-185 where La Forest J states that it is well established in Canada that *Anns* is used to determine if a duty of care exists and then refers to 6 cases that have subsequently affirmed the authority of *Anns v London Borough of Merton* [1977] 2 All ER 492.
14. *Anns* ibid, 498.
15. See RW Kostal 'Currents in the Counter-Reformation: Illegality and Duty of Care in Canada and Australia' (1995) 3 Tort L Rev 100, 104 where the author discusses the divergence between Canadian and Australian proximity analysis.
16. Supra n 2, 1107-1123.
17. Supra n 2, 186-191.

prima facie duty of care based on foreseeable harm to a foreseeable plaintiff. Double foreseeability may be a sound basis for duty in cases of direct acts causing physical harm. It provides no justification whatsoever for duty in cases of pure economic loss. Proceeding unreflectively as if it did has accounted for the failure to articulate a meaningful basis for duty of care in the economic loss jurisprudence.

The real difference between Canadian and Australian duty analysis derives less from the *Anns* approach per se and more from the serious attention that the Australian courts and writers have paid to the concept of proximity. In Australia, there has been a longstanding debate about the centrality and meaning of proximity in negligence analysis, a debate that continues in the High Court today.[18] This debate is too complicated to be considered properly here. Many believe that proximity is little more than a descriptive label that may in some cases disguise rather than illuminate the true reason for recognising a duty of care. Nevertheless, the debate itself has exposed this possible weakness and encouraged some judges to articulate the basis of their decisions more precisely. Whatever shortcomings the proximity approach may have exhibited in Australia, it seems to have taken the Australian courts further towards a full and explicit analysis of principle and policy than it has in Canada.[19]

Why the Canadian courts continue to be relatively uninterested in the duty question remains a mystery. It would be simplistic to use adherence to the *Anns* approach to account entirely for the differences between Canadian and Australian duty analysis. Both the *Anns* methodology and the Australian proximity approach may be infused with whatever content the courts wish, depending on the definition of 'proximity'. To get it right, the courts must take seriously the differences between economic loss and physical damage, and they must then address those differences. Whether they do so under the rubric of proximity, policy or otherwise is of little moment.

NEGLIGENT MISREPRESENTATION

There are three basic issues that may arise in the law of negligent misrepresentation. The first is whether the defendant owes a duty of care. If so, the second is to whom, and the third is in respect of what losses, does that duty extend? All three questions are relevant to the very justification of a duty of care in speech

18. Eg *Hill* supra n 3, 698-701; *Esanda* supra n 3, 766-769; *Pyrenees* supra n 3, 168-169, 211-216; *Romeo* supra n 3, 282, 298.

19. For a discussion in the context of economic loss, see K H Vaggelas, 'Proximity, Economic Loss and the High Court of Australia' (1997) 5 Tort L Rev 127; S Yeo, 'Rethinking Proximity: A Paper Tiger? (1997) 5 Tort L Rev 174, 175-176.

extending recovery for economic loss. Regrettably, the recent Supreme Court of Canada decision in *Hercules*[20] suggests otherwise.

Whether the defendant ought to owe any duty to anyone was the issue that dominated discussion in *Hedley Byrne*.[21] The issue was whether or not the defendant bank, which supplied a negligently prepared credit reference to the plaintiff's bank 'without responsibility', could be held liable for the financial losses suffered in reliance. There were no questions about 'to whom?' or 'for what?' The case was decided on the analytical assumptions that the representation was made directly by the defendant to the plaintiff in respect of a particular advertising contract. The only real question of law was whether the credit reference attracted any duty of care at all. It is worth recalling that although the House of Lords outlined when such a duty may arise, it held that no duty did arise in *Hedley Byrne* itself because of the explicit denial of responsibility.

There are three different ways in which to describe the basis of the duty of care in speech recognised in *Hedley Byrne*. One is to say that a duty arises whenever the parties are in a 'special relationship' with one another — a description that is neither more nor less enlightening than one based on proximity. Another is to hold that the duty rests in foreseeable or known reasonable reliance by the plaintiff on the defendant's information or advice. This is probably the most commonly endorsed approach.[22] It certainly received a boost in *Hercules*. The third is to ask whether one could infer that the defendant had assumed responsibility for the statement. It will be argued below that the court's focus on reliance in *Hercules* was misguided and that the case would have been resolved in a more satisfactory manner had the court considered instead whether the defendant had assumed responsibility for its advice.[23]

The precise basis for recognising a duty in speech has received relatively little judicial attention. It often matters little which approach the court employs.

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20. Supra n 2.
21. Supra n 5.
22. To the extent that the Australian High Court in *San Sebastian Pty Ltd v Minister Administering Environmental Planning and Assessment Act* (1986) 68 ALR 161 suggested that the defendant must intend to induce reliance, this is more consistent with the assumption of responsibility approach than with the foreseeable or known reliance approach. See also *Esanda* supra n 3.
23. The author has argued in support of the voluntary assumption of responsibility approach for 20 years with little or no success in Canada. See, generally, B Feldthusen *Economic Negligence* 3rd edn (Toronto: Carswell, 1994) 40-62. There appears to be more judicial support for voluntary assumption of responsibility in Australia than Canada: see eg *Pyrenees* supra n 3, Brennan CJ 156, McHugh J 174; *Esanda* supra n 3, 766-767 where Toohey and Gaudron JJ discuss and explain the concept; the concept is adopted by McHugh J 773-780 and Gummow J 803. See also the discussion of *Hill* supra n 3; infra pp 113-120. Cf *Bryan* supra n 3, 170, 172, 185-186.

The three approaches are like windows looking in on the same room. The view is usually the same. In addition, the very question at issue in *Hedley Byrne* seldom arises. So many important misrepresentation cases involve information or advice provided by the defendant to a third party pursuant to a contract between them. This is always so in the familiar audit or accounting cases. There is, therefore, no question that the defendant assumed some responsibility by contract to someone who reasonably relied on careful service. Judicial focus in such cases moves quickly, perhaps too quickly, to the further questions — to whom (in addition to the contracting party) and for what purpose does the duty extend?

The Supreme Court of Canada dealt with all three questions in *Hercules*.[24] The court's unanimous decision was neither groundbreaking nor controversial. The facts were straightforward. The defendants were accountants who were hired by two corporations to prepare audited financial statements as required by statute. The plaintiffs, shareholders, claimed that the audits were negligently prepared. They claimed to have suffered two different types of loss in reliance. First, they claimed to have suffered loss on additional investments they were induced to make on the basis of the accounts. Secondly, they claimed their existing shareholdings had been devalued.[25]

The facts in *Hercules* were similar to those in the leading English decision on point, *Caparo Industries plc v Dickman*.[26] So too was the result. In both cases the courts refused to recognise a duty of care and the plaintiffs' claims were denied.[27] In both *Hercules* and *Caparo*, the courts restricted the ambit of the duty to losses suffered in the context of the purpose for which the audits were prepared. In both cases that purpose, as defined by statute, was to assist the shareholders collectively in overseeing management. It was not to assist shareholders or investors in making their personal investment decisions.[28] Interestingly, one striking difference between the cases does exist. In *Caparo,* the House of Lords rejected the prima facie duty approach in *Anns,* whereas in *Hercules* the Supreme Court of Canada confirmed its commitment and applied it.

It is difficult to quarrel with the results in *Caparo* and *Hercules.* The purpose test adopted to circumscribe liability is a clear and effective one that has worked

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24. Supra n 2.
25. There were two prongs to this claim: first, that they would have extracted their investment sooner with accurate information; secondly, that they would have overseen corporate management more carefully.
26. [1990] 1 All ER 568.
27. The facts in *Hercules* were also similar to those in the leading Australian High Court decision on point: *Esanda* supra n 3. It too dismissed the plaintiff's claim, but with a somewhat different methodology.
28. *Hercules* supra n 2, 203-211; *Caparo* supra n 26, Lord Bridge 576, Lord Oliver 589.

well since its introduction as the 'end and aim' rule some 70 years ago in *Glanzer v Shepard.*[29] However, the reasons that the court gave in *Hercules* are somewhat discomforting.

La Forest J delivered the judgment of the court. He expressly stated that it would be an error to create a pocket of negligent misrepresentation cases in which the duty question was determined differently than in other negligence cases.[30] Thus he began with a search for proximity, as required by the *Anns* methodology to which Canada subscribes.[31] As noted earlier, at least in the context of economic loss, proximity has been treated unreflectively as more or less synonymous with foreseeability. [32] In misrepresentation, however, an appellate court articulating the law must consider and address specific issues such as the unique difficulties posed by negligence in speech, and posed by economic loss instead of personal injury. These are the very specifics that make the existence of a duty controversial in the first place. The typical Canadian search for 'proximity' does little to advance this enterprise.[33]

In something of a breakthrough for Canadian courts, La Forest J did propose a new issue-specific definition of proximity, as it applies to negligent misrepresentation. He said:

> To my mind, proximity can be seen to inhere between a defendant-representor and a plaintiff-representee when two criteria relating to reliance may be said to exist on the facts: (a) the defendant ought reasonably to foresee that the plaintiff will rely on his or her representation, and (b) reliance by the plaintiff would, in the particular circumstances of the case, be reasonable. To use the term employed by my colleague, Iacobucci J in *Cognos*[34] ..., the plaintiff and the defendant can be said to be in a 'special relationship' whenever these two factors inhere.[35]

La Forest J then went on to observe that the courts in England, including the House of Lords in *Caparo,* typically require in addition —

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29. (1922) 233 NY 236.
30. *Hercules* supra n 2, 186.
31. Ibid, La Forest J 186 said: 'The first branch of the *Anns/Kamloops* test demands an inquiry into whether there is a sufficiently close relationship between the plaintiff and the defendant that in the reasonable contemplation of the latter, carelessness on its part may cause damage to the former. The existence of such a relationship — which has come to be known as a relationship of "neighbourhood" or "proximity" — distinguishes those circumstances in which the defendant owes a prima facie duty of care to the plaintiff from those where no such duty exists.'
32. Supra pp 86-88.
33. La Forest J's judgment was not insensitive to these difficulties. He said: 'In order to render "proximity" a useful tool in defining when a duty of care exists in negligent misrepresentation cases, therefore, it is necessary to infuse that term with some meaning.' See *Hercules* supra n 2, 187.
34. *R v Cognos* [1993] 1 SCR 87, 110.
35. *Hercules* supra n 2, 188.

> (a) that the defendant know the identity of either the plaintiff or the class of plaintiffs who will rely on the statement, and (b) that the reliance losses claimed by the plaintiff stem from the particular transaction in respect of which the statement at issue was made.[36]

However, according to La Forest J, these were considerations better dealt with at stage two of the *Anns* analysis, as reasons to limit the duty of care on policy grounds, specifically practical concerns about potentially indeterminate liability.[37]

In effect, this was not quite as innocuous a holding as may first appear. *Hercules* actually stands for the following propositions:

1. As a matter of 'basic fairness' or 'simple justice', a defendant who supplies information or advice under contract ought to be held liable, in addition to its contractual responsibilities, to anyone else who foreseeably and reasonably relies on the information or advice.[38]
2. However, if practical considerations, notably the problem of potential indeterminate liability, persist, it is necessary to curtail perfect justice by limiting liability to losses suffered by persons using the information for the purpose for which it was rendered.

The second proposition, standing alone, is unexceptional. The first proposition, whether or not adopted as the basis of a prima facie duty of care, as required under the *Anns* approach, is surely unsupported and unsupportable.

Despite La Forest J's crafting of a new definition of proximity for misrepresentation, his de facto test for duty of care remains foreseeability. With professional services rendered under contract, reliance will always be reasonable. La Forest J admitted as much.[39] Certainly this poses a practical problem. But that is not all. What is 'fair' or 'just' about holding that a party who supplies professional services under contract owes a duty of care to anyone else who might foreseeably rely on the information or advice?

Holding one party liable to another is expensive and stigmatising. The law ought to have a good reason for doing so. What is missing from *Hercules* is any reference to that reason. Foreseeable harm to a foreseeable plaintiff may provide a sufficient justification for duty in the paradigmatic case of directly caused physical

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36. Ibid, 190.
37. Concern about 'liability in an indeterminate amount for an indeterminate time to an indeterminate class' (*Ultramares Corporation* supra n 11) has figured heavily in economic loss case law, echoed by La Forest J in *Hercules* supra n 2, 192. It has been particularly prominent in the misrepresentation field. There, the risk of indeterminate exposure comes not only from the economic nature of the loss, but also from the indeterminate audience to whom words may be foreseeably communicated.
38. *Hercules* supra n 2, 215.
39. Ibid, 200-201.

injury. La Forest J himself readily and correctly admitted that foreseeability alone provides no justification for liability in the case of misrepresentation. His response was to add a requirement of foreseeable, reasonable reliance. That is responsive to the indirect nature of the harm, but not responsive to the unique problems with speech and financial loss. Reliance on professional advice is almost always reasonable. Reasonable reliance reduces to foreseeability.

Obviously, reasonable reliance is an important concept in the negligent misrepresentation analysis. As La Forest J observed, reliance in fact is a necessary element of causation in negligent misrepresentation. That provides no justification for duty. The absence of reasonable reliance is a good reason to reject a duty of care. That is why La Forest J added the condition to his proximity analysis. None of this makes the presence of reasonable reliance a sufficient reason to recognise a duty. All reasonable reliance indicates is that the defendant is a reliable expert. It tells us nothing about why the plaintiff, a stranger to the contract, should be able to appropriate the service for free. Reasonable reliance asks the wrong question. We should not allow information or advice to be unilaterally appropriated.

True, the defendant may be able to protect itself from liability by disclaiming responsibility to third parties. This proves the error of basing a duty on reasonable reliance. Often it will be entirely reasonable to rely for business purposes on professional information, notwithstanding a disclaimer. It remains reasonable to expect that reputable information providers will have performed their professional services to their clients with due care.[40] The disclamatory language means that the defendant cannot be held liable to third parties in negligence, *notwithstanding* their reasonable reliance. This suggests that reasonable reliance could not have been the foundation of the duty in the first place.

Consider instead whether in *Hercules* it would not have been better to ask whether the court could infer that the defendants had voluntarily assumed responsibility for the information or advice.[41] Of course, the defendants in *Hercules* did assume responsibility by contract to their corporate clients. That does not tell us whether they ought to owe a duty to these investor plaintiffs. To answer that question, the court should enquire further. For whom, and for what did the defendants assume responsibility? These are the correct questions. Professional information is a commodity. The provider can dispose of it voluntarily.[42] The law of negligent misrepresentation can, in addition to the law of contract, define how

40. Feldthusen supra n 23, 52-62.
41. This is entirely consistent with the language in the speeches in *Hedley Byrne* supra n 5, and with the decision itself.
42. Of course, as in the law of contract, we use objective indicators to determine whether the provider has done so. Many a contract has been formed despite the offeror's subjective intention to the contrary.

and when this may be done. The court ought to ask for whom and for what, because no one should be obliged to provide valuable professional services to persons other than those to whom they wish to do so, and for purposes other than those they contemplated. Assuming responsibility towards a person for a particular transaction *is* the justification for owing that person a duty in respect of those losses. Recognising no more extensive a duty than that is the 'fair' and 'just' approach.

La Forest J did ask for whom and for what did the defendants provide the information in *Hercules*. But he quite deliberately asked those questions at step two of the *Anns* analysis, for the purpose of discovering whether it was necessary to limit or negative a prima facie duty based on foreseeable, reasonable reliance. My argument is that these questions go to the very justification of a duty of care in speech. In a jurisdiction that employs the *Anns* methodology, they are proximity questions to be considered at step one. They are not merely the contingent questions of practicality, raised to limit potentially indeterminate liability. They are core questions of justification. Lord Bridge made the same point in *Caparo* when he said:

> To hold the maker of the statement to be under a duty of care in respect of the accuracy of the statement to all and sundry for any purpose for which they may choose to rely on it is *not only* to subject him, in the classic words of Cardozo CJ to 'liability in an indeterminate amount for an indeterminate time to an indeterminate class';[43] *it is also* to confer on the world at large a quite unwarranted entitlement to appropriate for their own purposes the benefit of the expert knowledge or professional expertise attributed to the maker of the statement.[44]

It so happens in cases like *Hercules* and *Caparo* that once the court determines for whom and for what the information was tendered, it simultaneously resolves the practical concerns that might otherwise arise by limiting the class of potential plaintiffs and the losses they may claim. One can imagine, however, a case in which the defendant tendered advice to the general public for the very purpose of inducing an unbounded amount of investment capital — in other words, an open-ended assumption of responsibility. Such a case would truly test the *Hercules* two-step approach. Would the court exonerate the defendant who properly owed a duty founded in justice and fairness to protect it from indeterminate, and perhaps ruinous, liability?

For present purposes it is unnecessary to attempt to resolve that question. The presence of potentially indeterminate liability may be a legitimate reason to limit or negative a duty of care that might otherwise appear fair and just. On the other

43. *Ultramares Corporation* supra n 11, 444.
44. *Caparo* supra n 26, 576 (emphasis added).

hand, the absence of potentially indeterminate liability does not constitute a fair and just reason to recognise the duty in the first place. In effect, this is what the court held in *Hercules*.

Frequently, it will not matter whether the court employs the *Hercules* approach or takes more seriously the need to articulate a principled case for the duty of care. The result was the same in *Caparo* and *Hercules*. The authority of *Hercules* will be tested in a situation where:

1. the defendant clearly did not assume responsibility to the plaintiff, or in respect of the transaction in which the loss occurs;[45]
2. the plaintiff reasonably relied on the advice as having been prepared with due care; and
3. the class of foreseeable and reasonably reliant plaintiffs is limited, so that liability would not pose practical concerns of indeterminate loss.

Based on the argument above, given point 1, there is no justification for recognising a duty of care. However, the decision in *Hercules* would seem to suggest that regardless of 1, based on 2 and 3, the defendant owes a duty of care.

Speaking more generally, what *Hercules* indicates is that the Supreme Court of Canada has yet to accept the significance of the differences between claims for personal injury and claims for pure economic loss. These differences pertain to the very different justifications for liability, as much or more than they pertain to the contingent problem of potentially indeterminate liability. It is as if the Supreme Court were determined to force-fit commercial tort into a mould designed to deal with personal injury. As illustrated below, this is a problem that manifests itself in other areas of economic loss and not just misrepresentation.

The High Court's decision in *Esanda*[46] is to the same effect as *Hercules*, but there the similarity ends. The plaintiff was a financier who allegedly advanced credit to various companies in reliance upon a negligently prepared corporate audit of the guarantor corporation. The main issue in the High Court was whether it was sufficient to plead that such reliance was reasonably foreseeable in the circumstances. The court held that it was not. In effect, not one of the five justices accepted the implicit holding in *Hercules* that: '[A]s a matter of "basic fairness" or "simple justice" a defendant who supplies information or advice under contract ought to be held liable, in addition to its contractual responsibilities, to anyone else who foreseeably and reasonably relies on the information or advice.'[47] Instead,

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45. See eg *Gordon v Moen and Captain W Nunsford Ltd* [1971] NZLR 526 (SC); *Beebe v Robb* (1977) 81 DLR (3d) 349 (BCSC).
46. Supra n 3.
47. Supra p 93.

six justices gave detailed consideration to the elements necessary to found a duty of care in speech culminating in financial loss.

As noted above, there are three relevant questions. The first is whether the defendant owes any duty of care at all. If so, the second is, to whom? and the third is, in respect of what losses does that duty extend? Brennan CJ addressed only the second and third questions. He applied what might be called the 'end and aim' rule[48] and held the defendant ought reasonably to have known to whom the information would be supplied and for what type of purpose. Significantly, he did not indicate that the purpose of these enquiries was to control potentially indeterminate liability. Strikingly little attention was paid to the matter of potentially indeterminate liability by any of the justices.[49] At least four of the justices paid detailed and explicit attention to the full range of policy concerns unique to negligence in speech and economic loss.[50] Perhaps significantly, the more the justices considered these unique policy issues, the more they seemed to be attracted to voluntary assumption of responsibility as the test of duty.[51] At least two, Toohey and Gaudron JJ, elaborated on the meaning of reliance in this context in a manner suggesting reliance upon the defendant having assumed responsibility to care for the plaintiff's interests.[52] Australian proximity analysis may have its limitations, but it certainly permits of a deeper and richer analysis of duty than is to be found in the relatively empty words of the Supreme Court in *Hercules*.

RELATIONAL LOSS

The Supreme Court of Canada's most recent decision dealing with pure economic loss is *Bow Valley Husky (Bermuda) Ltd v St John Shipbuilding Ltd.*[53] This was the third relational economic loss case to have been decided by the Supreme Court this decade. The first was *Canadian National Railway v Norsk Pacific Steamship Company.*[54] It will be helpful to discuss first *Norsk* and then *Bow Valley Husky*.[55]

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48. See supra pp 91-92.
49. Only Dawson J made much of it, and that was not his exclusive concern: *Esanda* supra n 3, 759.
50. Ibid, Toohey and Gaudron JJ 766-767, McHugh J 781-788, Gummow J 797-798.
51. Ibid, Toohey and Gaudron JJ 766-767 discuss and explain the concept; McHugh J 780 adopts it, as does Gummow J 803. See supra n 23.
52. Ibid, 767. See also Dawson J 760-762.
53. Supra n 2.
54. Ibid.
55. The other was *D'Amato v Badger* supra n 7. A party who was employed by a company in which he held a 50% ownership interest suffered a personal injury. The company was not permitted to recover its relational loss. The difference between McLachlin J's and

Relational economic loss occurs when the defendant damages property owned by a third party and the plaintiff thereby suffers economic loss because of some relationship that exists between the plaintiff and the third party. When that relationship is contractual, the courts speak of contractual relational loss. Every bit as much as in misrepresentation, relational loss claims raise the spectre of potentially indeterminate liability. As in misrepresentation, the concern with this practical problem has sometimes diverted the courts from the logically prior and independent question of whether there ought to be a duty of care at all.

Prior to *Hedley Byrne,*[56] there existed a longstanding and firm exclusionary rule precluding recovery for relational loss, subject to one or two strictly defined exceptions. Subsequently, although the Canadian courts continued to recognise that the foreseeability tests alone could not limit the ambit of liability effectively, many became uncomfortable with the rigidity of an outright exclusionary rule. The relational claims that were litigated always seemed to raise a sympathetic note. The period after *Hedley Byrne* until very recently might be described as one characterised by the judicial search for some limiting formula less restrictive than an outright exclusionary rule. I would suggest that the Australian High Court's most thorough consideration of the issue in *Caltex Oil (Australia) Pty Ltd v The Dredge 'Willemstad'* [57] is a perfect example of the same tendency. With the greatest respect, I would also suggest that the *Caltex* decision illustrates the futility of the enterprise.[58]

The plaintiff Caltex delivered its oil by contract to the other plaintiff AOR, which refined the oil and delivered it back to Caltex by an underwater pipeline owned by AOR. The risk of damage to the oil rested with AOR under the contract. The defendants negligently damaged the pipeline and disrupted the oil flow. The defendants were held liable to AOR for the physical damage to the pipeline and the oil and economic loss consequent thereon. Caltex sought successfully to recover the purely economic loss of the cost of arranging alternative transport for its oil while the pipeline was under repair.

The facts and outcome in *Caltex* are similar to the first and most controversial relational loss case considered by the Supreme Court of Canada, *Norsk.*[59] The

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La Forest J's approaches in *Norsk* was noted, but was said to be irrelevant in this case. This was a forerunner of the judgment in *Bow Valley Husky*. It is difficult to accept that the relationship between the victim and his own company was less a joint venture than that between CNR and the federal government in *Norsk*.

56. Supra n 5.
57. (1976) 11 ALR 227.
58. This argument will be developed in the criticism of McLachlin J's judgment in *Norsk,* which is substantially similar to all the judgments in *Caltex*.
59. Supra n 2.

judgments in *Caltex* are also similar to some of the other Supreme Court decisions under discussion in this article. There was little discussion of why the defendants ought to be held liable. It was more or less taken for granted that the defendants ought to be liable for the foreseeable harm they caused, unless there was some compelling reason to hold otherwise. The *Caltex* judgments foreshadowed the *Anns* approach, as applied by Canadian courts.

The justices did identify the important practical concern of controlling potentially indeterminate liability. Mason J controlled the ambit of liability by insisting that the defendant foresee harm to a specific individual.[60] Gibbs J adopted a similar rule stressing knowledge rather than foreseeability.[61] Jacobs J required that the plaintiff's property be in 'physical propinquity' to the place where the physical damage had occurred.[62] Stephen J relied on sufficient proximity.[63] There are elements of all these judgments in McLachlin J's majority judgment in *Norsk*.

In *Norsk,* the defendant damaged a government-owned railway bridge, and admitted liability for the cost of repairing the bridge. CNR was the principal user of the bridge under contract with the owner. It sued, essentially for the cost of re-routing its trains. Recovery was allowed in a peculiar 3-3-1 decision. Stevenson J stood alone. He held that the defendant should be liable because it could have reasonably foreseen, and actually did foresee, that a specific individual, as distinct from a general class of persons, would suffer financial loss as a consequence of the negligent conduct. Limiting liability to a specific individual meant that there was no danger of indeterminate liability. Stevenson J relied on the judgment of Mason J in *Caltex*. He spoke only of how to control indeterminate liability. He said nothing to justify the imposition of liability in the first place. All six of the other justices in *Norsk* rejected what they called his 'notorious plaintiff' test. One of the reasons why La Forest J rejected it was because it focused exclusively and arbitrarily on controlling the ambit of liability.[64]

La Forest J spoke for the three justices who would have denied liability. He addressed openly, and rejected explicitly, the various judgments in *Caltex.* McLachlin J gave the judgment of the three justices who agreed with Stevenson J

60. *Caltex* supra n 57, 275.
61. Ibid, 245.
62. Ibid, 284
63. Ibid, 260-1.
64. In *Norsk* supra n 2, 1111 La Forest J remarked: 'In the context of an accident, this criterion has thus no link with fault or with a lack of care; surely no one is suggesting tort law should strive to protect bridges with high profile users more than bridges used by anonymous users, or that defendants who damage bridges with high profile users are more guilty than others. Its sole function is to distinguish one plaintiff from another and thus 'solve' the indeterminacy problem, a function that could be as effectively performed by a rule based on the colour of CN's trains.'

in the result. Her repudiation of the known plaintiff test was somewhat ironic. Some would argue that it is difficult to explain her decision on any other basis. Certainly, her judgment resembles most closely the approach taken in *Caltex*, although she referred to it only briefly.

At the risk of over-simplification, McLachlin J imposed liability because of the close degree of proximity between the parties or, more specifically, because they were in a joint relationship with one another. Her judgment has been criticised for three reasons: first, because it provided no certain test to guide lower courts; secondly, because it made the potential scope of recovery dangerously wide; and thirdly, because it provided no compelling justification for allowing recovery in *Norsk* itself.

The *Bow Valley Husky* case arose from a fire aboard an offshore oil rig that put the rig out of service for several months. The rig owner sued for damage to property and consequential losses. The two other plaintiffs were oil explorers who had neither a proprietary nor possessory interest in the rig, but had contracted for exploration services to be performed by the rig owner. The rig caught fire due to a combination of the failure of the manufacturer to warn the rig owner about the inflammatory propensity of some of the rig's wiring and the failure of the owner to use the wiring in the manner specified by the manufacturer. The Supreme Court allowed the property owner's claim, reduced by its contributory negligence, but denied the claims of the two relational users.[65]

On the issue of relational loss in *Bow Valley Husky*, the Supreme Court addressed effectively the first two concerns arising from *Norsk*, namely the vague and impractically wide ambit of liability. Significantly, McLachlin J, with whom La Forest J concurred, gave the judgment of the court on these points. The following principles, as summarised by McLachlin J, were adopted by the full Supreme Court:

> (1) Relational economic loss is recoverable only in special circumstances where the appropriate conditions are met;[66] (2) these circumstances can be defined by reference to categories, which will make the law generally predictable; (3) the categories are not closed. La Forest J identified the categories of recovery of relational economic loss defined to date as: (1) cases where the claimant has a possessory or proprietary interest in the damaged property; (2) general average cases; and (3) cases where the relationship between the claimant and property owner constitutes a joint venture.[67]

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65. For more details see B Feldthusen 'Dynamic Change to Maritime Law — Gracious Retreat on Relational Economic Loss' (1998) 6 Tort L Rev 164.
66. Lest there be any lingering doubt, Iacobucci J for the majority referred to this as the 'general exclusionary rule': *Bow Valley Husky* supra n 2, 1272.
67. *Bow Valley Husky* ibid, 1241-1242.

The court also appeared to admit of a possible exception for 'transferred loss', that is, where the entire risk of the property damage has been allocated by contract by the owner to the plaintiff. Inexplicably, the court seemed to see this as a different type of loss rather than as an exceptional type of relational loss.[68]

In addition, by endorsing the fairly tight definition of 'joint venture' that had been employed in the court below, the court in *Bow Valley Husky* has refused by implication to follow the open-ended definition of joint venture used by McLachlin J in *Norsk.* Canadian law regarding the recovery of relational economic loss, except for admitting to possible recovery for transferred loss, now resembles the restrictive approach taken in England. For reasons explained more fully elsewhere, the decision in *Bow Valley Husky* is to be applauded, and to be much preferred over the uncertain ambit of liability encouraged by McLachlin J in *Norsk.*[69] The present enquiry, however, has less to do with the practicality of the judgments and more to do with the basic question of justifying a duty of care in the first place.

In terms of judicial methodology, and the attention it pays to the core issue of whether or not a duty ought to exist, *Norsk* is one of the best Canadian tort decisions recently rendered by the Supreme Court. Unlike *Hercules* or *Caltex*, a good deal of the judicial discussion in *Norsk* was devoted to a frank and detailed exchange between McLachlin and La Forest JJ about the case for and against liability, quite apart from practical concerns with indeterminate liability. One would like to think that this overt policy debate had contributed significantly to the subsequent development of the law in *Bow Valley Husky.*

Leaving aside the potential for indeterminate exposure, relational loss situations usually resemble most closely basic claims for physical damage. These paradigmatic negligence cases are governed by the double foreseeability (harm and plaintiff) test for duty of care. Typically, the defendant's negligent act is actionable by the immediate victim of personal injury or property damage without controversy. The immediate victim's claim for consequential economic loss is routinely honoured. At first glance, then, it is difficult to understand that there would be any concern with liability for relational loss, except a practical concern with potentially indeterminate liability. It is not apparent why an act obviously negligent to one party ought not be negligent to another or why, if one sort of economic loss is routinely recoverable, the other ought not to be. As we shall see with *Bow Valley Husky,* it appears to make perfect sense to recognise a prima facie duty, but to restrict it for practical reasons. In Canada this means imposing a restriction at step two of the *Anns* test.

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68. Ibid, 1246-1247.
69. See Feldthusen & Palmer supra n 10, 427.

Challenging the very basis of duty to a relational claimant may require challenging the very basis of duty in the paradigmatic physical damage case. For example, McLachlin J justified prima facie liability in *Norsk* because the defendant had been at fault in damaging the bridge. Fault, without more, is a problematic basis for relational liability for several reasons. Negligence is inadvertent carelessness. This is not the sort of fault that ought to attract moral outrage or retribution. There may be a systematic tendency to misidentify fault in civil litigation.[70] Fault seems a strange consideration in what is usually a claim between two or more insurance companies, one seeking to hold the other responsible on the basis of no-fault vicarious liability.[71] Admittedly, these reasons also apply in cases of physical harm. That does not invalidate them, but it does make them a hard sell.

There are, however, a number of special features of relational loss that justify a departure from basic negligence law. First, consider deterrence. The tortfeasor will already have been held liable to the victim of physical damage. Thus, as La Forest J noted in *Norsk*, it is not clear that additional liability to relational claimants will actually lead to more prudent behaviour by potential defendants.[72] Take *Norsk* itself. Marine collisions are astronomically expensive, even when liability is limited to victims of physical harm. The accident in *Norsk* occurred in the face of this significant potential liability for physical damage. Would the captain have been more careful had he known that he faced additional potential liability for relational loss?

Moreover, many pure economic losses are qualitatively different from physical damage. They represent not social loss, as occurs when property is damaged or destroyed, but private loss when wealth is transferred from one party to another with nothing being lost overall. The plaintiff's loss will often be a competitor's gain. To hold the defendant liable for transfer losses as if they were true losses will over-deter useful conduct. It is not practicable to develop legal rules to distinguish true loss from transfers.[73] Accurate deterrence signals may be better accomplished by precluding recovery for most relational claims than by allowing it.[74]

As for compensation, no rational person, let alone commercial enterprise, would rely on negligence law alone. The typical relational claimant can and will

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70. N Siebrasse 'Economic Analysis of Economic Loss in the Supreme Court of Canada: Fault, Deterrence and Channelling of Losses in *CNR v Norsk Pacific Steamship Co*' (1994) 20 Queen's LJ 1.
71. *Norsk* supra n 2, La Forest J 1115.
72. Ibid, 1051-1052.
73. The only general category of case which appears to have done so is the so-called transferred loss category, sometimes recognised as an exception to the exclusionary rule. See supra n 66.
74. Feldthusen & Palmer supra n 10.

have allocated the risk either by self- or commercial insurance, or perhaps by channelling the risk back to the victim of physical harm. As McLachlin J observed, this is an indictment of all negligence law and not merely relational loss. Indeed, it is a line of argument that has led many civilised nations to jettison negligence law, in whole or in part, as a response to personal injury claims.[75] It suffices to rely on it here merely as an argument against further extending the ambit of tort liability.

The case against liability for relational loss in *Norsk* was as much a principled case as it was a purely pragmatic one. Yet when the Supreme Court came to address the question in *Bow Valley Husky,* attention to the basis of liability again took a back seat to purely pragmatic concerns. In this respect, the decision in *Bow Valley Husky* closely resembles the decision in *Hercules* upon which the court relied.

The *Bow Valley Husky* case was different from the typical relational loss case in one critical respect. The negligence recognised between the rig owner and the defendant was not based on a direct act causing physical harm. It was based on a breach of the manufacturer's duty to warn that one of its products which had been installed on the rig by the builder, a heat-tracing system called Thermaclad, was inflammable.[76] What was strikingly absent from the judicial reasons was an explanation of why the defendant owed the relational claimants (as opposed to the rig owner) a duty of warning, let alone any other duty of care.[77]

The critical part of the decision began with a rather loose definition of proximity. McLachlin J, speaking for the court, said:

> Proximity exists on a given set of facts if the defendant may be said to be under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs.... On the facts of this case, I agree with the Court of Appeal that a prima facie duty of care arises. Indeed, the duty to warn raised against the defendants is the correlative of the duty to disclose financial facts raised against the auditors in *Hercules.*[78]

Whereas in *Hercules* the proximity test was modified, albeit imperfectly, here it was reduced to basic foreseeability:

> Where a duty to warn is alleged, the issue is not reliance (there being nothing to rely upon), but whether the defendants ought reasonably to have foreseen that the

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75. For an analysis of how little personal injury is actually compensated by tort, see B Feldthusen 'If This Is Torts, Negligence Must Be Dead' in K Cooper-Stephenson & E Gibson (eds) *Tort Theory* (North York: Captus UP, 1993) 394.
76. On the sole issue to produce a difference of opinion amongst the 6 justices, the majority held that the shipbuilder who had installed the Thermaclad had excluded liability for breach of its duty to warn by the terms of its contract with the owner.
77. See W Spicer 'Who Do You Warn? The Supreme Court of Canada Widens the Net' (1998) 5 Professional Liability and Discipline 298.
78. *Bow Valley Husky* supra n 2, 1248.

> plaintiffs might suffer loss as a result of use of the product about which the warning should have been made. I have already found that the duty to warn extended to [the rig owner]. The question is, however, whether it extended as far as [the relational claimants]. The facts establish that this was the case. The defendants knew of the existence of the plaintiffs and others like them and knew or ought to have known that they stood to lose money if the drilling rig was shut down.[79]

The failure to consider *why* the defendant should owe a duty to warn the relational claimants is as striking and as objectionable here as was the failure to consider why the auditors ought to owe a duty to the private investors in *Hercules*. Once again, a prima facie duty to warn the relational claimants was recognised on a simple foreseeability test.[80] The court then moved to step two:

> The next question is whether this prima facie duty of care is negatived by policy considerations. In my view, it is. The most serious problem is that seized on by the Court of Appeal — the problem of indeterminate liability.[81]

A manufacturer's duty to warn of known dangers associated with its products is premised on safety concerns.[82] The premise of the duty ought to control its ambit. Thus, the duty ought to extend to those persons who are in a position to respond to the warning and hence able to reduce the safety risk. Usually, this will be the owner who has responsibility for repairs. It might be another party — a charterer or other user as, for example, in *Rivtow Marine Ltd v Washington Ironworks*.[83] Similarly, the damages recoverable ought to relate to the original purpose of the duty. The plaintiff should be able to recover economic loss associated with the cost of repairing the defect to remove the safety risk.[84]

In *Bow Valley Husky*, no doubt inadvertently, the Supreme Court held that a manufacturer has a duty to warn any foreseeable (known?) party who has relational interests to the product in question. This is so regardless of whether either the relational plaintiffs or their economic interests have any connection whatsoever with the safety-based rationale that stands behind the duty to warn. Ironically, were the manufacturer to discover a non-dangerous shortcoming in the product, something that merely made the product less effective than the user expected, the law of tort would not require the manufacturer to warn the owner. According to *Bow Valley Husky*, this is precisely the type of interest that the manufacturer must protect on behalf of the more remote relational claimants.

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79. Ibid, 1248-1249.
80. In fact, the language suggests an actual knowledge test, previously discredited in *Norsk*.
81. *Bow Valley Husky* supra n 2, 1249.
82. *Lambert v Lastoplex Chemicals Co Ltd* [1972] SCR 569, 574, 25 DLR (3d) 121.
83. [1974] SCR 1189, 40 DLR (3d) 530 (SCC).
84. Ibid, 1219.

As in *Hercules*, it would appear that the Supreme Court did not recognise any essential differences between economic loss and directly caused physical damage. Nor did it see any need to justify liability. It seems doubtful that such a duty can be justified any more than it could be justified in *Norsk*. The question-begging concepts of foreseeability and proximity do not provide the justification. The absence of a reason justifying liability, not the presence of potentially indeterminate liability, was the better reason to deny liability in *Bow Valley Husky*.

DANGEROUS DEFECTS

In *Winnipeg Condominium Corporation No 36 v Bird Construction Company*,[85] the Supreme Court held that a builder could be held liable in negligence to a non-privy subsequent purchaser for the cost of repairing a dangerous construction defect. Specifically, the defect was falling cladding. This posed a risk to third parties including pedestrians passing below. The court restricted its analysis to the case of *dangerous* construction (and, one assumes, manufacturing) defects. It left the issue of shoddy products and structures for another day. In *Bryan v Maloney*,[86] the Australian High Court took the further step of extending the duty recognised in *Winnipeg Condominium* to non-dangerous defects.

As an aside, the outcome in *Winnipeg Condominium* might reasonably be regarded as but one step in a continuing saga of doctrinal tennis played between the Canadian courts and the House of Lords. In *Rivtow*,[87] the majority of the Supreme Court held that a remote manufacturer owed no duty of care to the user of a dangerously defective crane. The claim for repair costs was to be governed by the law of contract. There was a powerful dissent by Laskin J, on which the court relied heavily in *Winnipeg Condominium*. The *Rivtow* dissent was quoted with approval by Lord Wilberforce in *Anns*.[88] In *Anns*, the House did effectively impose a duty on the builder to take responsibility for repairing dangerous defects. In an embarrassing show of colonial kow-towing, many Canadian courts, arguably with the tacit approval of the Supreme Court, followed *Anns*, not *Rivtow*. *Anns* itself was then overruled in *Murphy v Brentwood District Council*,[89] where some of the Law Lords spoke approvingly of the majority judgment in *Rivtow*. Finally, the Supreme Court both affirmed its commitment to the *Anns* methodology and adopted the particular holding in *Anns* regarding the builder's duty.

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85. Supra n 2.
86. Supra n 3.
87. *Rivtow* supra n 83, Ritchie J 1210-1211.
88. Supra n 13, 505.
89. [1990] 3 WLR 414, 430-431, 455.

Earlier, the Supreme Court was criticised for having failed in both *Hercules* and *Bow Valley Husky* to articulate a principled reason for recognising a duty of care. Nevertheless, it was suggested that the court had reached the correct result in both cases. The situation in *Winnipeg Condominium* was exactly the opposite. The court spoke at length about the safety rationale that was said to justify the duty of care.[90] It is doubtful whether the decision does, in fact, increase the safety incentives from what they would have been without liability. Nevertheless, for present purposes, *Winnipeg Condominium* is a better decision than *Hercules* or *Bow Valley Husky*. By taking the justification exercise seriously, the court made reasoned criticism possible. This, in the long run, is a more important contribution to the common law process than any particular outcome.

There exists in cases of this type a chain of contractual relations.[91] This stretches from the defendant (the builder and initial vendor) to the initial purchaser; then runs from the initial purchaser to the subsequent purchaser or purchasers, and eventually ends with the plaintiff. One can be certain in high stake commercial contracts that the risk of having to repair dangerous building defects has been anticipated by the parties and allocated by them in their contracts. If, as the Supreme Court quite reasonably supposed, the builder is generally the best cost-avoider, then there is every reason to suppose that the parties have allocated this risk by contract to the builder. In other words, we should assume that the parties themselves have constructed the best set of incentives to prevent avoidable defects — incentives that should promote safety. If the parties have left the risk with the buyer, one assumes that the parties concluded that the buyer was better equipped to bear the risk. In the commercial real estate market there is no reason to suppose that the parties require the assistance of the courts to make their bargains.[92] There are no obvious externalities here.[93] In contrast, physical damage to third parties is, and should be, governed by basic negligence law. Tort law is required, for example, to allocate the cost of personal injury to pedestrians who cannot possibly allocate the risk by contract with the vehicle owner. This is the crucial difference between

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90. Perhaps this was because there was no issue of potentially indeterminate liability.
91. For a proper development of this argument, expressed only briefly above, see B Feldthusen '*Winnipeg Condominium Corporation No 36 v Bird Construction Co Ltd*: Who Needs Contract Anymore?' (1995) 25 Can Bus LJ 143; Feldthusen & Palmer supra n 10. See also J Palmer '*Bird*: A Confusion Between Property Rules and Liability Rules' (1995) Tort L Rev 240.
92. The difference in the non-commercial market is raised in *Bryan* supra n 3, and discussed infra p 107.
93. If the court were dealing with a suit between the builder and the first purchaser, and the parties had allocated the risk of repairing dangerous defects to the purchaser, surely the court would respect this and not re-allocate the risk by tort law. There is no reason to resolve this differently just because subsequent purchasers join the contractual chain.

personal injury and the type of pure economic loss that manifested itself in this case.

The result in *Winnipeg Condominium* was very unfair to those parties who had allocated the risk differently by contract. Any builder who did not warrant the cost of repair was paid less than any builder who did. Both are now liable. Prospectively, this is of no great moment. If it is correct to say that the court may have allocated the risk inefficiently by tort, the parties will simply reallocate it by contract. What the case does illustrate, however, in common with *Hercules* and *Bow Valley Husky*, is that the Supreme Court has not yet fully taken into account the differences between economic loss and physical damage.

Subsequent to the decision in *Winnipeg Condominium*, the Australian High Court decided *Bryan v Maloney*.[94] There too a builder was held liable to a remote purchaser for the cost of remedying construction defects. However, the decision differed from *Winnipeg Condominium* in at least two respects. First, the parties were residential builders and home owners, not major commercial concerns. Secondly, liability was imposed for the cost of repairing non-dangerous defects. Brennan J, dissenting, held that the issue should be resolved exclusively by the law of contract.

With residential premises, a judicially created warranty of quality running to subsequent purchasers might be justified on a consumer protection basis. It was at least plausible that the risk of construction defect was not considered, or considered fully and fairly, and allocated by the various parties in the contractual chain, as must have been the case in *Winnipeg Condominium*. However, in *Bryan* there was no indication in the judgments themselves to support any overt consumer protection rationale. The closest the majority came to discussing this was to observe that the contracts did not preclude an action in negligence. Given the state of the law in Australia prior to *Bryan,* this is not surprising. One assumes caveat emptor was the default option.

The imposition of liability for the cost of repairing non-dangerous defects is problematic in several respects. For one thing, litigation is of little use as a consumer protection tool — the stakes are too small. For another, it requires the court to examine the original contractual terms, including price, to determine whether there was a 'defect' at all. At a low enough price, a sub-standard foundation (other than one which is dangerous) may be a bargain. Do we really want our courts regulating price/quality claims in this manner in consumer and commercial property markets?

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94. Supra n 3. See also IND Wallace 'The *Murphy* Saga in Australia: *Bryan* in Difficulties?' (1997) 113 LQR 355.

Moreover, the safety rationale that drove the court in *Winnipeg Condominium* was by definition absent in *Bryan*. This raises the further question: if not for safety reasons, why should there be liability? The judgments in *Bryan* shed little light on the basic justification of duty question. The joint judgment of Mason CJ, Deane and Gaudron JJ resembles the Canadian judgments in *Hercules* and *Bow Valley Husky*. When the justices speak of the builder having assumed responsibility to the reliant plaintiff, a remote subsequent purchaser, they reduce these terms to little more than foreseeability simpliciter, as was the case in *Hercules*.[95] Their judgment concentrates on the absence of a reason to deny a duty, including the absence of any concern with potentially indeterminate loss, not on any positive reason to impose liability.[96] As in *Norsk,* the term 'proximity' was invoked with insufficient substance to render it meaningful. As in *Winnipeg Condominium*, the majority showed no appreciation of the differences between economic loss and physical damage.[97]

NEGLIGENCE IN CONFERRING DISCRETIONARY PUBLIC BENEFITS

The next topic to consider is the negligence liability of statutory authorities for the failure to confer, or to confer reasonably, discretionary public benefits.[98] Consider the familiar example of the municipal council that either fails to inspect, or fails to inspect carefully, residential building construction. At issue is the owner's claim to compensation for the cost of repair, or diminution in value, attributable to a defect that ought to have been discovered. The example is a useful one because it requires further consideration of the law of misrepresentation and the law governing builder liability for defective structures. It also raises in

95. *Bryan* supra n 3, Mason CJ, Deane, Gaudron JJ, 170. Contrast the dissenting view of Brennan J 184 and 190-191.

96. Ibid, Mason CJ, Deane, Gaudron JJ 169.

97. Toohey J, who also relied on the policy reasons adopted by the Supreme Court in *Winnipeg Condominium*, questioned whether damage of this sort was truly economic loss at all. Labels aside, there is some legitimacy in this question because logic suggests that the cost of repairing the house should be treated the same way in law whether or not the house actually collapses. Undoubtedly either risk could have been, and probably was, allocated by contract. Perhaps the better answer is that there ought not to be recovery even if the house had collapsed. See *Murphy v Brentwood District Council* supra n 89, Lord Bridge 440, Lord Jauncey 456.

98. Some of this analysis is contained in an article that considers more fully the matter of public authority immunity: B Feldthusen 'Failure to Confer Discretionary Public Benefits: The Case for Complete Negligence Immunity' (1997) 5 Tort L Rev 17.

pure form the matter of justification for the duty of care; there is no potential indeterminacy argument typically associated with this sort of case.

The analysis will deal only with statutory powers, not duties. It considers only liability in negligence, not intentional torts, and not liability under statute.[99] It deals only with direct liability, not vicarious liability for torts committed by employees in the course of public employment. At issue is the failure to confer a public benefit, not the infliction of fresh harm. No attempt is made to consider fully the case for public authority immunity. Instead, I want to pursue the themes developed above — namely, (i) that the courts have failed to grasp fully the significance of the distinction between economic and physical damage, and (ii) that they have failed to articulate a justification for recognising a duty of care. I will not concentrate on any particular judicial decision because I am not aware of any that has approached the question in precisely this way.

Earlier, I suggested that there was no compelling justification for holding a builder liable to a subsequent purchaser for the cost of repairing a dangerously defective structure. This was because the risk of having to incur such costs had already been allocated between the parties, directly or indirectly, through a chain of contractual obligations. This is irrelevant to the question of whether the public authority ought to owe a completely independent duty of care to the owner. It may seem unfair that the builder might not be liable for defective work, whereas the public authority could be liable for failure to detect it.[100] However, under the analysis presented above, the builder would be exonerated because it had, in effect, already 'paid' by selling at a lower price in return for having the owner assume the risk. This sheds no light on whether the public authority ought to be held liable for breaching an entirely different duty of care.

Typically, in the cases which have held public authorities to a duty of care in these circumstances, the main justification has been the implicit, if not explicit, belief that the case was one where a private defendant would have been held liable as a matter of course. To use the *Anns* methodology, the prima facie case for duty was constructed on the private party negligence analogy. Thus, the issue became a step two question of whether the public authority's exercise of discretion ought

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99. The Canadian position is that statutes do not create torts by implication and hence one need not search for any fictional legislative intent. Instead, statutory provisions may be adopted by common law courts as useful foundations for the elements of the common law action, particularly duty and standard. See *Saskatchewan Wheat Pool v Canada* [1983] 1 SCR 205, 143 DLR (3d) 9.

100. This was the main reason why the House of Lords refused to hold the authority liable in *Murphy* supra n 89, Lord Keith 423, Lord Bridge 439, Lord Oliver 443.

to be immunised for policy reasons — separation of powers and institutional competence being the two most prominent. Putting the case for immunity aside, I want to criticise the justification for duty based on the private party analogy.

Building inspection is a valuable service. Ordinarily, one would not expect a private party to hand it out to home owners as a gift. Typically, such a service would be provided by contract. The contract would specify the nature of the service to be provided and the price for which it would be sold. Alternatively, it might be provided by an assumption of responsibility in tort, and analysed either as a form of negligent misrepresentation or as a closely related negligent performance of a service. A realistic and challenging example might arise in a situation where a purchaser contracted with a building inspector for a structural report when buying the premises. Assume, not unreasonably, that later, when selling the premises, the original first purchaser showed the report to the new buyer. As discussed above, other things being equal, the new buyer could foreseeably and reasonably rely on the report.[101] There is no indeterminacy problem. Nevertheless, it is not clear that the defendant inspector assumed responsibility to subsequent purchasers.[102]

The public authority inspection example is not so difficult. Assume the authority has adopted an inspection program, and the allegation is that the inspection was done negligently. Moreover, assume away the question of immunity by conceding that the negligence in question was operational negligence. For example, assume the authority had adopted a specific ten-step inspection program and the municipal employee had failed to perform eight of the steps. To hold the defendant liable would be to support its exercise of discretion, not to second guess it. Certainly, the authority has assumed a responsibility to conduct a ten-step inspection program. Any purchaser aware of the policy at the time of purchase could foreseeably and reasonably rely on the program been carried out with due care.[103] But it remains to consider for whose benefit and for what purpose the municipality adopted the program. The answer is surely that it adopted the program to benefit the entire public by promoting safe construction.[104] It did not undertake individual responsibility to protect individual home buyers from economic loss.[105]

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101. Supra p 93.
102. See *Williams v Polgar* (1974) 125 NW (2d) 149 (Mich SC); cf *Beebe v Robb* supra n 45.
103. Typically this is not the case, so even the element of reliance is lacking.
104. This is not to say this distinction is always easily drawn: see eg *Pyrenees* supra n 3, Brennan CJ 158 distinguishing general public benefits from those intended to benefit a particular class.
105. Contrast a situation where a municipal employee represented to a prospective buyer that the home in question had been given a careful 10-step inspection. Other things being equal, this transaction-specific representation would be actionable by a private party analogy using basic *Hedley Byrne* principles.

A comparison with *Hercules* or *Caparo* is instructive. The auditors did assume a responsibility to perform a careful audit. Investors foreseeably and reasonably relied on their having done so. But the auditors assumed no responsibility to shareholders or others for private investment decisions. The home owners' claims should fail for precisely the same reason that the plaintiff's claims failed in *Caparo*[106] and should have failed in *Hercules,* a reason that has nothing to do with indeterminate liability.

The more provocative question is whether the courts ought to impose upon public authorities unique liability in negligence,[107] that is, liability in situations where the private party negligence analogy breaks down. For example, take the typical case where the unique aspects have been overlooked. Should public authorities be held liable to home owners who have not relied on any undertakings? The only overt theory of this type of which I am aware is the so-called general reliance justification, perhaps originating in the judgment of Mason J in *Sutherland Shire Council v Heyman.*[108] This later found favour in the Australian High Court in the judgment of Dawson J in *Hill v Van Erp,*[109] but it appears to have been rejected by three of the five justices in *Pyrenees Shire Council v Day.*[110] Like any attempt to justify the courts imposing unique liability rules on public authorities, the general reliance approach brings the separation of powers question squarely to the forefront. In effect, the doctrine enables the judiciary to require a public authority to provide with any service it offers a guarantee that the service has been performed with due care, backed by a right to sue for damages.[111] In Canada, this would probably be considered inappropriate on a separation of powers basis, but the Australian position may be different. It is also unwise in that more comprehensive

106. In *Murphy* supra n 89, Lord Keith 429, the public purpose of the programme, as opposed to a private undertaking, was considered.

107. There are unique liability rules governing misfeasance in public office. Unique liability rules based on the failure to treat citizens equally have also been considered: see *Stovin v Wise* [1996] 3 All ER 801, 832; D Cohen & JC Smith 'Entitlement and the Body Politic: Rethinking Negligence in Public Law' (1986) 64 Can Bar Rev 1, 16; J Sopinka 'The Liability of Public Authorities: Drawing the Line' (1993) 1 Tort L Rev 123, 124-128.

108. (1985) 60 ALR 1, 31. See also *Invercargill City Council v Hamlin* [1996] 2 WLR 367. General reliance was considered in *Stovin v Wise* ibid, and criticised by Kirby J in *Romeo* supra n 3, 294.

109. Supra n 3, 706.

110. Supra n 3, Brennan CJ 155, Gummow J 188-191, Kirby J 209-210; contra Toohey J 169, McHugh J 176-177. This case deals with liability for fire damage in the context of a serious risk to public safety and hence does not fall precisely within the category of case under discussion here. The result might have been different had this been a building inspection case: see eg Brennan CJ 158.

111. Quite apart from imposing liability, there are problems in the courts requiring a standard of reasonable care simpliciter: see Feldthusen supra n 98.

cover can be provided more efficiently if a public compensation scheme is set up. That is a topic for another article. For now, it suffices to say that if we abandon the false private party negligence analysis, the courts will be required to address the justification for a unique duty of care more thoughtfully than they have done in the past. It was no accident that all five judgments in *Pyrenees* considered the basis of duty thoroughly. None of the justices saw the case as a straightforward application of private party negligence principles.[112]

Interestingly, the very distinction between unique public authorities duties and duties derived by private party analogy also runs through the various judgments in the High Court's decision in *Romeo v Conservation Commission of the Northern Territory*.[113] That case involved an action in negligence brought by a teenager who was left paraplegic after falling over a cliff at a coastal reserve whilst he was drunk. At one time there had been in Australia a unique principle of common law governing the liability of public authorities to entrants on premises over which they had the power of management and control.[114] Subsequently, the High Court simplified the common law of occupiers liability in *Australian Safeway Stores v Zaluzna*.[115] One of the issues in *Romeo* was whether the special public authority principle had survived *Zaluzna*. In the end, it was unnecessary for the court to come to grips with that question. The distinction between the unique public authority principle, if it exists, and private occupiers liability law was not great.[116] It appears that the actual decision in *Romeo* turned on whether the authority was required to fence the cliff. The majority thought not, regardless of their individual views on the survival of the unique rule for public authorities.

Romeo is not a gratuitous economic benefit case, so it falls outside the class of cases that I was describing above.[117] Nevertheless, it suggests some similarly provocative questions. Is a statutory authority charged with managing and controlling public lands always in the same position as a private occupier? If not, how can its liability best be controlled — by unique public duty, special standard, or immunity?[118] The facts in *Romeo* were sufficiently favourable to the defendant that it was unnecessary to resolve these issues. The issues will occur again.

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112. *Pyrenees* supra n 3, especially McHugh J 174, 178-179.
113. Supra n 3.
114. *Romeo* supra n 3, eg Brennan CJ 269-271, Kirby J 296, discussing *Aiken v Kingborough Corp* (1939) 62 CLR 179, 209-210.
115. (1987) 162 CLR 479, 487.
116. *Romeo* supra n 3, Hayne J 307.
117. A point noted by Hayne J ibid.
118. Elements of all three run through the various judgments, although no one saw this as a case where immunity came into play on the facts. The unique duty is emphasised in the judgment of Brennan J and the special standard is noted: see ibid, Kirby J 301.

NEGLIGENT PERFORMANCE OF A SERVICE

In *Hill v Van Erp,* by a majority of five to one, the Australian High Court held a solicitor liable to a frustrated beneficiary of a will whose gift had failed because of the solicitor's negligence.[119] The testator had intended to convey a share in a house to her friend. However, the solicitor allowed the friend's husband to witness the gift, which therefore failed by virtue of section 15(1) of the Succession Act 1981 (Qld). There is no comparable decision of the Supreme Court of Canada, although there is every reason to suppose that it would reach the same conclusion as did the Australian court.[120] Similar decisions were rendered in California as long as 40 years ago,[121] and the same result has obtained in New Zealand,[122] in the English High Court (Chancery Division)[123] and the House of Lords.[124]

There is a case to be made for treating claims by frustrated beneficiaries as a unique category. The situation usually comes about because of succession law. Unique solicitor responsibilities are involved. The plaintiff is claiming damages for the loss of a gift. A narrow definition of the category is one response to the concern that liability opens up a new and possibly undesirable expansion of tort liability for economic loss.[125] The better view is that the frustrated beneficiary line of authority is but a particular variant of a broader category of cases in which the defendant's negligent performance of a service causes direct economic injury to the plaintiff.[126] Indeed, I would go further and suggest that these service cases are themselves but a minor variation of the misrepresentation cases derived from *Hedley Byrne.*[127]

Consider the famous decision of a New York court in *Glanzer v Shepard,*[128] quoted with approval in *Hedley Byrne.*[129] A public weigher contracted with the

119. *Hill* supra n 3. Although *Hill* is discussed here in more detail than any of the other High Court cases, no claim is made to have done a comprehensive case comment. It is discussed here only in the limited context of this article.
120. The foreign decisions, including the decisions of the lower Canadian courts to the same effect, are cited in *Hill* supra n 3, Gaudron J 713.
121. *Biakanja v Irving* (1958) 320 P (2d) 16.
122. *Gartfield v Sheffield, Young & Ellis* [1983] NZLR 37.
123. See *Ross v Caunters* [1979] 3 All E R 580 in which the court rejected an earlier Canadian decision, *Whittingham v Crease* (1978) 88 DLR (3d) 353, where the court had strained to fit its decision within the misrepresentation-reliance line of authority.
124. *White v Jones* [1995] 2 AC 207.
125. In *Hill* supra n 3, Gummow J 694 attempted to restrict the holding to the particular situation. Brennan CJ may have been similarly inclined. However, McHugh J, dissenting, expressed concerns that it would not be possible to do so.
126. Numerous similar decisions, not dealing with frustrated beneficiaries, are discussed in Feldthusen supra n 23, 131-171.
127. Supra n 5.
128. Supra n 29.
129. Supra n 5.

vendor to weigh a commodity. The purchaser, with whom there was no privity, suffered loss when he paid on the basis of a weight negligently overstated by the weigher. The weigher was held liable to the purchaser for negligence in the very 'end and aim' of the transaction. Note the striking similarities between *Glanzer* and *Hill v Van Erp*. In both cases the defendant failed to do what he or she was hired to do. In both cases the resulting injury was experienced by someone other than the party who had contracted for the service. In both cases the plaintiff's interest in the contract was contemplated by the contracting parties. In neither case was the contracting party in a position to enforce the plaintiff's claim on his or her behalf. There was no obvious other vehicle with which to sanction the negligence. The vendor, like the residual beneficiaries, was the innocent, but undeserving, recipient of a windfall benefit.

How then ought *Glanzer* to be categorised — as a misrepresentation case or as a services case? It ought not to matter. In misrepresentation the defendant may be held liable for the negligent performance of a service that involves many tasks but finds its ultimate expression by statement or representation. The negligent auditor cases discussed earlier provide a good example. Typically, the negligence occurs in the performance of the underlying service, not in the representation itself. There is nothing special about services performed by word which explains *why* a duty ought to be recognised in the first place. It should not surprise us that a defendant might similarly be held liable for the negligent performance of a service that injures the plaintiff directly, instead of injuring the plaintiff indirectly through the plaintiff's reliance on the published word. Arguably, such actions should be less problematic than actions in misrepresentation. For one thing, it is not necessary to prove reasonable, foreseeable or actual reliance.[130] For another, potentially indeterminate liability is less likely when the injury is not effected by the published word. The 'end and aim' rule in *Glanzer* works equally well in misrepresentation cases and those involving other professional services.

Much of the opposition to conceptualising the services action as a variant of misrepresentation law is based on the distinction between misrepresentation cases in which the plaintiff's injury is suffered as a result of reliance on the defendant's conduct (misrepresentation: the so-called *Hedley Byrne* principle) and those, such as *Hill v Van Erp*, where the injury is suffered directly. This is an important distinction for some purposes, but not one that extends to the very basis of the duty of care. Earlier, I argued that reliance was not and could not be the foundation of a duty of care in misrepresentation law. I suggested instead an approach based on

130. In *Hill* supra n 3, 705 Dawson J points out that the 'element of reliance may be unhelpful as an indication of a relationship of proximity in cases of economic loss which do not involve misstatement'.

the defendant's voluntary assumption of responsibility.[131] Here I want to argue that precisely the same principle, voluntary assumption of responsibility, can justify the recognition of a duty of care in both misrepresentation and in cases such as *Hill v Van Erp*.[132]

'Assumption of responsibility' is not a 'bright line test' capable of rigid application. It is, like some conceptions of proximity in Australian law, an approach to the duty question. Unlike the open-ended proximity approach, however, it is a directed approach with a rational, specific and relevant (if somewhat elusive) target. The search for an assumption of responsibility is directly related to the purpose of the exercise. In a case like *Hill v Van Erp*, the purpose of the duty enquiry is to determine whether, and if so when, someone who has not paid for a valuable professional service ought, in fairness and justice, to be entitled to sue when the service is performed negligently. It is rational, relevant and edifying to say that the defendant should owe a duty of care because she voluntarily assumed legal responsibility to perform with due care the very service in question.

To employ this guided approach, the court must first discover whether this was a situation in which liability to anyone ought to attach. I would call this an assumption of *legal* responsibility.[133] This is not difficult in *Hill v Van Erp*. We are not dealing, for example, with a gratuitous favour performed on a social occasion without an expectation that legal consequences might attach. The defendant was retained by the testator in professional circumstances to draft a valid will.

Next, consider what responsibility the defendant assumed. If a professional person is entitled to decide whether or not to provide services, that can only be meaningful if it is an informed decision. The professional is entitled to know what services are sought. This conveys to the professional both the nature and the size of the risk assumed. In *Hill v Van Erp* the 'end and aim' of the retainer was to enable the testator to make the gift. The solicitor assumed responsibility to make possible the very transaction that her negligence thwarted. Absent compelling reasons to the contrary, it is surely just to hold her liable for failing to effect the very transaction for which she was hired. Should more be required?

If more be required, note that the retainer was more specific. The solicitor assumed responsibility to make the gift *to the plaintiff*. The plaintiff's interests were not, as were the shareholders' interests in *Hercules*[134] or the financier's in

131. Supra pp 94-95.
132. In support of this line of argument, consider Ockham's razor: terms, concepts and assumptions must not be multiplied beyond necessity.
133. Here I would disagree with Lord Browne-Wilkinson in *White v Jones* supra n 124, and therefore agree with Gummow J's observations on this point in *Hill* supra n 3, 742.
134. Supra n 2.

Esanda,[135] only coincidental and additional to the very purpose of the transaction for which the defendant assumed responsibility. The heart of the transaction for which responsibility was assumed was the gift to the plaintiff. It makes no sense to describe a transaction of testamentary gift without also referring to a beneficiary. The damage that the solicitor knew or ought to have known would result from her negligence was the loss of this very gift to this very plaintiff.

What is missing is the failure of the solicitor to have assumed responsibility *to the plaintiff* to pass a testamentary gift to her. The solicitor made no undertaking directly to the plaintiff, nor did the plaintiff reasonably rely on her to draw the will properly.[136] The question is whether a transaction-specific assumption of responsibility, particularly a transaction which cannot be described coherently without reference to the plaintiff, provides sufficient justification for a duty of care. Or must the defendant, in addition, assume responsibility, directly or through reliance, to the plaintiff? The need for such additional requirement has been asserted by fiat.[137] I fail to see the need for it.[138]

In practical terms, an additional requirement that the defendant assume responsibility *to the plaintiff* does not further inform the defendant about the nature and degree of the risk assumed. In relational terms, the plaintiff is no Mrs Palsgraf, the notorious unforeseeable plaintiff.[139] The defendant's relationship with the plaintiff can be derived from the transaction for which she assumed responsibility.[140] The plaintiff's interests are an inseparable part of the 'end and

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135. Supra n 3.

136. As suggested above, this is an important element in negligent misrepresentation, but not the foundation of duty of care.

137. See eg J Murphy 'Expectation Losses, Negligent Omissions and the Tortious Duty of Care' (1996) 55 CLJ 43, 49-50, cited with approval by Gummow J in *Hill* supra n 3, 742 n 300. Gummow J also referred to an article by Professor Peter Cane, but Cane's criticism was directed to a different point which relates to the need to assume legal responsibility, rather than responsibility to the plaintiff: see P Cane 'Contract, Tort and the Lloyd's Debacle' in FD Rose (ed) *Consensus ad Idem* (London: Sweet & Maxwell, 1996) 96, 108. See supra n 133.

138. Cf *Ministry of Housing & Local Government v Sharp* [1970] 1 All E R 1009. In that case there was a statutory obligation (although not what a Canadian court would consider a statutory *tort* obligation — see supra n 99) related to reporting information about land title. There was no antecedent relationship between the plaintiff and the negligent clerk. However, the 'end and aim' of the statutory obligation was to protect persons in the position of the plaintiff. The same debates about whether reliance was required to found liability, and if not, what else, appear in the decision.

139. *Palsgraf v Long Island Railway Co* (1928) 248 NY 339, 162 NE 99. In this classic decision Cardozo J (Andrews J dissenting) articulates that as a matter of relational theory (quite apart from practical concerns) no duty is owed to an unforeseeable plaintiff, even for a foreseeable type of harm.

140. This is not to suggest either a foreseeable plaintiff test, or a 'known' plaintiff test as criticised supra p 16. The suggestion is to derive the relationship from the transaction

aim' of the service which the defendant undertook. The defendant has assumed responsibility *for* the plaintiff. There is no reason why the defendant must also assume responsibility *to* the plaintiff. *Hill v Van Erp* is a case in which the defendant assumed responsibility to pass a certain gift to the plaintiff. This, in the absence of compelling reasons to the contrary, ought to justify the recognition of a duty of care.

Where do the justices in *Hill v Van Erp* stand on the assumption of responsibility approach? This is a difficult question for several reasons. No single reason, rule, test or principle determined the issue for any one of the majority justices. Almost all the relevant issues are canvassed throughly by each justice. However, none of the justices employs the same methodology or framework of approach. The arguments for and against recognition of a duty appear in no particular order, and often the reasons for judgment go back and forth between the possible pros and cons. It might be advantageous for readers if the High Court were to adopt a common approach — a variation on the *Anns*[141] approach perhaps — whereby the case for and then the case against the recognition of a new duty was articulated. That said, all the arguments received full consideration in the High Court. The High Court cannot be criticised, unlike the Supreme Court of Canada, for failing to consider the very justification for duty before moving to consider reasons to negative it.

Obviously, McHugh J, dissenting, would not have accepted the argument for duty based on assumption of responsibility. His judgment proceeded on a de facto presumption against liability for economic loss unless a valid case could be made to support such a duty. This is a more appropriate point of departure than a presumption of duty based on foreseeability alone. As noted earlier, the foreseeability presumption is manifest in many Canadian decisions. A case could be made that such a foreseeability presumption, unarticulated, runs through all the other reasons for judgment in *Hill v Van Erp.* That McHugh J's judgment differs in both point of departure and result may suggest that it matters a great deal where and how one begins the duty of care enquiry.

McHugh J listed nine specific reasons for imposing a duty given by the other members of the court and found them wanting.[142] Essentially, he held that to find for the plaintiff involves 'too great a departure from accepted doctrine and must inevitably extend the frontiers of legal liability'.[143] If transaction-specific

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undertaken. It should not matter, for example, if the solicitor knew the name of the beneficiary, or if the beneficiaries consisted of a class of persons whose precise identities could not be determined until death.

141. See supra p 88.

142. *Hill* supra n 3, 727-731.

143. Ibid, 729.

assumption of responsibility were adopted as the basis of the duty of care, there would be no departure from accepted doctrine. The dramatic departure that concerned McHugh J actually occurred in 1963 — in *Hedley Byrne.* That it took the High Court 35 years to apply *Hedley Byrne* to the frustrated beneficiary case suggests that the extension of the frontiers will be gradual.

A claim could be made that assumption of responsibility in the transaction-specific sense defined above did form the basis for recognition of duty in all the majority judgments.[144] True, Brennan CJ, who accepts assumption of responsibility as the basis of duty in misrepresentation, rejected it outright in *Hill v Van Erp* because 'there is no anterior relationship between the solicitor and intended beneficiary'.[145] However, the basis for his recognition of the duty of care is entirely consistent with assumption of responsibility as explained above.[146] Dawson J recognised terminological problems with assumption of responsibility, but appears to have adopted exactly the approach suggested above as at least one basis for his decision,[147] as did Toohey J.[148] Gaudron J preferred to found the solicitor's duty in the concept of 'control' — control over the testamentary wishes of her client.[149] Arguably, this is a less precise way of stating that the solicitor ought to be held liable for failing to perform the task she undertook. Gummow J stated that he disagreed with any 'notion of "assumption of responsibility" by reference to the performance of services and without identification of those to whom or for whose benefit they are performed' .[150] Obviously, *Hill v Van Erp* was not such a case. He seemed to prefer 'a relationship equivalent to contract' test for duty, an approach that again reveals itself as entirely consistent with the transaction-specific notion of assumption of responsibility recommended above.[151]

Despite establishing what might be described as a prima facie case for duty of care based on the solicitor's assumption of responsibility, there may exist reasons to negative or limit the duty. Numerous such arguments were considered and rejected in *Hill v Van Erp.* Three somewhat related objections are particularly interesting. The first is the objection that the plaintiff was not claiming in respect of a true loss, but merely claiming to have been deprived of a gift. McHugh J disagreed with the other justices as to whether this pure expectation of gift

144. See Yeo supra n 19, 175-176.
145. *Hill* supra n 3, 695.
146. Ibid, 690: 'The undertaking of a specialist task pursuant to a contract between A and B may be the occasion that gives rise to a duty of care owed to C'; and see also ibid 694.
147. Ibid, 703-6.
148. Ibid, 709.
149. Ibid, 716.
150. Ibid, 742.
151. Ibid, 743-4.

constituted a loss recognised by tort law.[152] Gaudron J reached the unsupported and unconvincing conclusion that the loss of the gift was the loss of a 'precise legal right'.[153] As Brennan CJ pointed out, this was the novel question before the court.[154] None of the justices in *Hill v Van Erp* came to grips with this question or related their holding to the law regarding the rights of mere donees in other contexts.

Secondly, only McHugh J observed that depriving the beneficiary of her gift does not cause a commensurate social loss; it merely transfers wealth from the intended beneficiary to the residual beneficiary who receives an unintended windfall. Accordingly, he argued, potential liability over-deters useful behaviour and raises the cost of legal services unnecessarily.[155] There is certainly merit in this argument. It might be determinative if the law's only concern were to deter negligent will drafting per se. It is not, however, valid if the primary goal is to encourage people to honour their undertakings, including their contractual commitments.[156] This has general social value beyond the loss in any particular case.

Another reason why liability might be denied was little discussed by any of the justices. It concerns the policy behind section 15(1) of the Succession Act 1981 (Qld). If gifts witnessed by spouses are suspect, perhaps because of the possibility of undue influence, why are they any less suspect in tort than in succession law? Technical arguments aside, the effect of the judgment in *Hill v Van Erp* is to achieve precisely what the legislation forbids. Perhaps these gifts ought not to be suspect at all, and the legislation amended accordingly.[157]

In summary, little is to be gained from parsing phrases. Terms like 'proximity' or 'assumption of responsibility' are useful only insofar as they direct legal actors' attention to a common range of rational and relevant considerations. It seems to me that all of the majority justices in *Hill v Van Erp* find a duty for much the same reason: the solicitor was negligent in the very task she contracted to perform, the specific task of allowing the testator to make a gift to the plaintiff. The only true objection to describing this as a duty based on an assumption of responsibility revealed in *Hill v Van Erp* is terminological. It may be that the expression

152. Ibid, 726-727.
153. Ibid, 715-716.
154. Ibid, 692.
155. Ibid, 728. On the distinction between social losses and transfers in this context, see Feldthusen & Palmer supra n 10. The authors reject this approach as generally determinative on the duty issue because the distinction is too difficult to draw.
156. This may have been recognised by several of the justices in *Hill* supra n 3. See eg the comments about general reliance by Dawson J 706, and about the general importance of a reliable property transfer regime by Gummow J 736.
157. See *Hill* ibid, McHugh J 729.

'assumption of responsibility' is so deeply, if inaccurately, entwined with the notion of reliance in misrepresentation law, that it can no longer be given any different meaning despite the advantages of doing so. That being the case, perhaps the phrase 'equivalent to contract' can be developed to do the job.[158] Regardless, the basic argument for imposing a duty in *Hill v Van Erp* is the same as it was in *Hedley Byrne*. It can, should be, and no doubt will be extended to other negligent performance of services cases. Reliance need have nothing to do with it.

CONCLUSION

Economic loss cases differ from one another, and they differ also from physical damage cases. In each of the five categories of economic loss claim to have emerged, there is required a unique justification for liability, a different justification in each category, and a very different justification from that which exists for physical harm. The Supreme Court of Canada has devoted little attention to the question of justification, and hence has showed little appreciation of the different issues that arise with economic loss. The High Court of Australia seems to have taken the justification issue more seriously in comparable decisions. Significantly, the one decision where it did not, *Bryan v Maloney,*[159] is the one most open to criticism.[160]

158. Ibid, 743-744: This was employed by Gummow J who noted that the approach originated in *Nocton v Lord Ashburton* [1914] AC 932, 972, and was relied upon by Lord Devlin in *Hedley Byrne* supra n 5, 529-530. This phrase is more precise and better directed than the amorphous concept of control adopted by Gaudron J.

159. *Bryan* supra n 3.

160. Wallace supra n 94.