An Analysis of Pure Economic Loss

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PURE ECONOMIC LOSS

Pure economic loss is financial loss, independent of damage to property or people.[1] From a building and construction perspective, it arises 'where damage consists of a defect in the structure, itself arising from inadequate design or building, so that the value of the structure is diminished and it may require remediation.'[2] It involves some inherent defect[3] as opposed to physical damage caused by an external source.[4] Traditionally, the distinction has been important, with the basis for claims for economic loss being far more restricted than those for physical damage.[5] It was not until 1976 that any 'exclusionary rule' precluding recovery for pure economic loss was rejected by the High Court.[6] However, conversely, there is no 'inclusionary rule' entitling recovery.[7] Whilst, despite its critics,[8] the distinction is still used, it is arguably today, used more as a suitable starting point than as a decisive factor[9], the High Court having shifted its focus to an examination of the nature of the relationship between the parties.[10]

PERRE V APAND

Perre v Apand,[11] whilst not a building case, gave the High Court another opportunity to clarify the law with respect to liability to claims for pure economic loss, an issue of direct concern to the building and construction industry.[12] However, seven separate judgements later and some twenty-four years since Stephen J's promise in *Caltex* of future clarification,[13] the law pertaining to recovery for pure economic loss and its effect on *Bryan* and other pre-*Perre* decisions requires further consideration.[14] It has been argued, given the variety of approaches offered by their Honours, the lower courts will be able to use *Perre* to justify any decision they reach,[15] placing significant doubt on the extent one can rely on the lower State court's pre-*Perre* decisions.[16]

In *Perre* there was universal recognition that the law in this area is developing, and unanimous concern for the dual policy considerations — not to impose an indeterminate duty of care,[17] nor interfere with socially acceptable and legitimate commercial conduct.[18] Their Honours all recognised that whilst reasonable foreseeability of loss was a necessary factor, it was without more, insufficient to create a duty of care for pure economic loss.[19] There was also commonality in their elucidation of the 'other factors' which they indicated required consideration.[20]

The Approaches

Despite purportedly divergent views as to the correct approach and supposed variations on theme it is perhaps possible to condense their Honours' myriad of formulations into four basic approaches:[21]

The Incremental Approach

The incremental approach advocated by McHugh, Hayne and Callinan JJ,[22] involves a cautious and gradual development of the law, evolving on a case by case basis in which the policies and reasoning of previous decisions are applied as legal rules, engendering some degree of predictability.[23] McHugh J identified the legal principles which in his opinion should be applied in determining whether a duty of care exists in cases concerning claims for pure economic loss.[24] They include: the existence of an established category, the reasonable foreseeability of the economic loss suffered, an examination of the principles applied in analogous cases, the ascertainability of the class affected, economic efficiency in the allocation of risk, the autonomy of the individual, indeterminacy of liability, the plaintiff's vulnerability of risk (of which reliance and assumption of responsibility is a part), and most importantly, the defendant's knowledge of the risk and its magnitude.[25]

The difficulty with this approach is that its growth is dependent upon the progress

made in previous cases and both the speed and willingness of the courts to progress to the next level.[26] The risk with this retrospective analysis is that judgements will not be progressive.[27] Gummow J rejected the approach claiming it was 'haphazard' and indiscriminate to create a coherent set of legal principles.[28] Kirby J in *Crimmins* described it as an absence of approach.[29]

The 'compendious approach' articulated by Callinan J[30], is a variation on the incremental theme.[31] Rather than examining the relevance of each principle in turn, it involves cramming together all the pertinent principles extracted from previous High Court decisions into a single multifaceted question, from which attempts are then made to extract appropriate factors. This complexity potentially causes confusion and results in a lack of appreciation of the relationship between each principle and the facts presented.[32]

The Legally Recognised Rights Approach

The legally recognised rights approach advocated by Gaudron J identified a new category of recovery for pure economic loss arising from an impairment or loss of a legal right.[33] The defendant's influence and the plaintiff's dependence were the two main elements.[34] However, difficulties in defining such a broad, yet vague concept creates potential for indeterminate liability.[35] The approach was not widely supported by the other judges and Gaudron J herself appeared to have abandoned it in *Crimmins*, preferring to focus on the concepts of 'vulnerability', 'knowledge' and 'control', analogous to Glesson CJ's approach in *Perre*.[36]

The Salient Features Approach

The salient features approach advocated by Glesson CJ and Gummow J, involves an examination of the plaintiff's protected interest and a subsequent assessment of whether on the salient features of the case a finding of a duty of a care is justified.[37] Glesson CJ recognised the need to place sensible limits on the circumstances where a duty of care for pure economic loss might arise. He indicated the importance of proximity, reliance, knowledge, vulnerability and control affecting an ascertainable class, as factors in establishing the existence of the requisite duty.[38]

Glesson CJ and Gummow J rejected the incremental approach, claiming its 'temporal defect' would impede the emergence of the salient features approach.[39] The major concern with the 'salient features' approach is that it will inhibit predictability.[40] However, the benefit of this approach is that it involves a consideration of both the plaintiff and defendant in the duty analysis, whereas previously the focus was limited to foreseeability and the defendant's conduct.[41] It also has the flexibility to allow progressive judgements and disclosure of policy considerations.[42]

The Three-Stage Caparo Approach

Kirby J adopted the English, three-stage *Caparo* approach of reasonable foreseeability, proximity and the policy considerations of whether it was 'fair, just and reasonable' in the circumstances of the case to impose a duty of care.[43] This involved an examination of the vulnerability, ascertainability and autonomy of the effected class, as well as allowance for legitimate commercial conduct.[44]

The other judges rejected this approach.[45] McHugh and Hayne JJ argued that the second and third stages were far too obscure, requiring elucidation and therefore the approach lacks predictability.[46] However, Kirby J refuted this assertion indicating that its utility is dependent 'upon the level of abstraction with which it is viewed' and that its appeal is its ability to focus the court's attention on the relevant enquiries.[47] In *Crimmins* Kirby J once again indicated his unwavering support for this approach, in the face of continuing criticism by his associates.[48]

Finding the Common Ground

Arguably, the differences in their Honours' approaches are 'more apparent than real … more a matter of semantics than of substance.'[49] On closer examination it appears the apparently different opinions as to the correct approach reduce to 'differences in terminology or expression rather than real differences about what considerations are relevant to deciding whether a duty is owed.'[50]

On this interpretation, it has been suggested that the salient features approach finds favour.[51] That despite, McHugh J's apparent aversion for Kirby J's three-stage approach, in preference for his own 'five point plan'[52] there does not appear to be any

substantial practical difference between either approach and the salient features approach.[53] Furthermore, despite, their apparent universal rejection for Kirby J's approach, all the judges acknowledged and considered policy issues, however, unlike Kirby J did not apply a separate test.[54] Kirby J himself referred to the need for a 'cautious and incremental'[55] approach. In addition, Gaudron J having supported the legally recognised rights approach in *Perre*, abandoned it in the subsequent High Court decision of *Crimmins* appearing to support the salient features approach.[56] However, given her recent retreat in *Boland*, her position remains unclear.[57]

Another interpretation suggests majority support for the incremental approach.[58] Whether or not this or any other approach is in fact the favoured approach or a convenient manipulation of interpretation appears to be largely irrelevant.

Despite their supposedly differing approaches in *Perre*, their Honours all agree to a large extent on the relevant factors requiring consideration. Since none of the *Perre* approaches determine how these factors are to be interpreted and applied, a consideration and an engagement in a long[59] elusive search for a single approach (which may not be found,)[60] is a waste of time, being neither helpful nor necessary.[61] It has been suggested that it would have been more helpful for the Court to have directly turned to a consideration of the relevant factors than get bogged down in over 100 pages of judgement as to the correct approach to be applied, their differences arguably, 'more apparent than real.'[62]

A lot of this confusion and apparent indeterminacy[63] would be eliminated if the members of the High Court collaborated and compromised, rather than consistently used their own individual terminology, upon which a closer examination reveals more a semantic than any real difference, only serving to create an unnecessary state of confusion.[64] It is time for the High Court to close 'Pandora's box'[65], and enable the law to climb out of its 'juristic black hole'[66], by delivering a clear, coherent and authoritative statement of the factors to be considered in determining when a duty of care for pure economic loss will arise.[67] The post-*Perre* decisions indicate the continuing confusion in this area.[68] The indications thus far provided are insufficient and too unpredictable, there being no indication as to how they should be applied, interpreted or weighed

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against each other. Until the court does this, costly, uncertain and timely litigation will ensue,[69] a situation which ironically their Honours assert they are attempting to avoid, thus far without success. Further opportunities for the High Court to address this issue are perhaps not too far away, when hopefully the promises of the past will come to fruition.[70]

Some Other Suggestions

Given the apparent uncertainty and confusion as to whether there is in fact a majority consensus on the approach to determine when a duty of care for pure economic loss will arise, nor any indication that one if ever will be forthcoming in the near future,[71] the challenge for those at the coalface and academics has been to postulate on the appropriate analysis of *Perre*.

Feldthusen asserts the predictability and certainty of the utilisation of an exclusionary rule. Whilst an exclusionary rule, is undesirable[72] and in a "perfect world" would not occur, he claims no other alternative thus far proposed has proved adequate.[73]

Tesvic, predicts that the salient features approach will ultimately receive universal acceptance. However, he admits the lack of open consensus by the High Court creates confusion, highlighting the need for their explicit agreement on the issue.[74]

Cane, suggests a structured approach to the issue involving four considerations:

1. Were the parties in competition?
2. Should the defendant have foreseen that the plaintiff may suffer economic loss as a result of its behaviour?;
3. Was the loss suffered too remote?;
4. Could the plaintiff have protected itself?[75]

This approach is also likely to lack predictability given that it requires value judgements to be made to make a determination.

The two-stage Canadian approach has also been suggested as a way of clarifying the law with respect to claims for pure economic loss.[76] It necessitates a two-stage inquiry to determine whether:

1. a prima facie duty of care is owed;[77] and
2. if it is, whether there are any reasons of policy to negate or limit that duty.[78]

The checklist offered by this approach, whilst supported by case law and academia, is only purported to be a sketchy outline, the detail to be elucidated in time as further precedent develops.[79] Arguably, therefore, until this body of precedent develops over the course of time, this proposal like the 'salient features' approach lacks predictability at least in the interim.

The flow chart approach purports to offer a rational and logical basis[80] for identifying when a duty of care in the case of pure economic loss will arise.[81] A series of four interconnected flow charts suggests a structured approach for determining whether a duty of care exists for pure economic loss.[82] The two considerations involved are:

1. to establish fault;[83] and
2. to determine whether there is any public benefit argument to exclude liability.[84]

The Analysis

Despite their being no unanimity in approach taken,[85] several approaches produced the same outcome,[86] suggesting that there is in reality very little difference between them.[87] The real difference appears to be when these 'other factors' (in addition to reasonable foreseeability) will be applied[88] and in the ascertainability of the effected class[89], thus indicating the importance of the indeterminacy and other policy issues in this area.[90]

Reasonable Foreseeability

Reasonable foreseeability remains as the universal criterion of tort law.[91] However, it alone is insufficient to establish a duty of care for pure economic loss.[92] The vital consideration, without which no duty of care will arise is whether it is reasonable that a person in the defendant's position could reasonably have foreseen that their behaviour could cause the particular plaintiff or the plaintiff as a member of an ascertainable class, to suffer economic loss.[93]

Policy Considerations

All members of the High Court foresaw the importance of a thorough consideration of policy issues. An appreciation of the dynamics of community values is essential to

an understanding of a need to maintain flexibility in the law so that it remains adaptable and applicable to the relevant community values of the time. Judgements will ultimately modify to reflect these social changes.[94] It is perhaps this failure to appreciate the need for flexibility that has resulted in the demand for predictability, a desire which is possibly unachievable.[95] Their Honours were particularly concerned with the issues of indeterminacy of liability[96] and respecting the autonomy of the individual,[97] in imposing limitations on the duty of care in pure economic loss cases.[98]

Indeterminacy

Their Honours unanimously indicated the need for caution in ensuring the duty of care imposed for pure economic loss was not indeterminate in terms of the amount, time and class affected.[99] However, it was on this very issue that the majority and minority differed in their application to the facts in *Perre*.[100] This concern for indeterminacy has pervaded the law for some time.[101] This does not mean that there cannot be an extensive number of claimants, rather the class affected, however large, has to be capable of being ascertained,[102] possibly at the time the negligent act was committed.[103]

Autonomy of the Individual and Competitive and Legitimate Commercial Conduct

Their Honours unanimously concurred in the need to not unreasonably interfere in the ability for parties to conduct and organise their own interests.[104] The very nature of a competitive market economy inevitably involves the advancement of one party's interest over another.[105] Such legitimate behaviour is condoned by society.[106] Hence a recognition of this need for autonomy in business relations is imperative.[107] In circumstances where a party is 'legitimately protecting or pursuing his or her social or business interests' liability is unlikely to arise.[108]

The Other Relevant Factors

Perre offers some, albeit limited assistance in determining claims for pure economic loss. Between them the judges, each from their individual perspectives, indicated a need to consider a range of factors in determining liability, some of which include: the reasonable foreseeability of the loss to an 'ascertained class'[109]; the closeness of the relationship between the parties;[110] the claimant's vulnerability and reliance;[111] the degree of control exercised by one party over the other;[112] the defendant's knowledge of the risk, its magnitude and the possible people who may be affected by the defendant's actions; and the potential interference with legitimate social and commercial conduct.[113] There was no indication that the factors listed and considered in *Perre* would be the only applicable factors for all time and that no others should be proposed, indicating the court's willingness to be progressive.[114]

The relevant factors[115] overlap internally and with the policy considerations outlined above. They include:

1. The Plaintiff's Vulnerability

Vulnerability has arguably replaced proximity as the common theme in pure economic loss cases.[116] It is now only one of the many factors requiring consideration.[117] "Reliance and assumption of responsibility" are now viewed as simply evidentiary indicators of the broader criterion of vulnerability.[118] The plaintiffs' vulnerability and inability to protect themselves from the risk imposed on them as a result of the defendants' conduct is arguably now viewed as a vital, if not a necessary factor for success of recovery for pure economic loss.[119]

This raises the issue of what, if anything, will be deemed to be sufficient protection. Self-insurance was deemed to be an irrelevant consideration.[120] A Plaintiff will be vulnerable in circumstances where they have no way of appreciating that the risk exists[121] or they are ill-equipped to recognise its presence.[122] The protection afforded to residential owners of buildings pursuant to the *Home Building Act 1989 (NSW)*[123] may operate to limit claims for pure economic loss where the claimant has a claim under this or similar legislation.[124] The statutory warranties cannot be excluded.[125] However, it is a defence to such a claim, where the work is performed contrary to advice, on the owner's instructions and this advice is confirmed in writing by the person who performed the work.[126]

It is possible that the New South Wales Court of Appeal decision in *Woollahra*[127] and similar cases, may be unaltered by *Perre*. In this case the original owner supervised and controlled the quality and content of the building work performed by the

builder. Secondly, there was no evidence of reliance on the builder by the purchasers who relied instead on the council issuing a certificate of compliance. Thirdly, the defects were not latent and were reasonably discoverable by inspection. Lastly, the negligence of the council was an intervening act which severed the causal chain.[128] In circumstances such as these the claimant's vulnerability is doubtful.

In an unreported, controversial and arguably unconvincing decision by Dutney J in the Supreme Court of Queensland earlier this year,[129] it was held that a builder was 'vulnerable' to a manufacturer of goods which turned out to be defective, because he did not have an opportunity to test the capability of the goods and therefore was reliant on the manufacturer. This was despite the fact that the builder had secured express contractual warranties and indemnities and therefore from a commercial perspective could hardly be viewed as vulnerable. It was also arguable that the class of persons affected was indeterminate. Despite its controversy, the case highlights the possible important extensions to the principles in this area as a result of *Perre,* as well as the need for clarity.[130]

2. The Defendant's Control or Influence

The defendant's control or influence, although expressly referred to by many of the judges[131] may also be considered as an aspect of the broader concept of vulnerability.[132]

3. The Defendant's Knowledge

The defendant's knowledge (actual or constructive), was viewed as an essential criteria in determining liability for pure economic loss.[133] McHugh and Hayne JJ[134] indicated that constructive knowledge should only be used in those cases involving first tier plaintiffs, and that in all other circumstances actual knowledge was deemed to be necessary.[135] Whether the defendant knows (or reasonably foresees) that their conduct could cause the particular plaintiff or the plaintiff as a member of an ascertainable class, to suffer economic loss is a vital consideration.[136] The inclusion of the latter has substantially broadened the range of potential third party claimants,[137] in both the commercial and residential building areas.[138]

Pre-*Perre* cases excluded pure economic claims involving commercial premises,[139] as it was perceived that those involved were deemed to be able to look after their own interests and could protect themselves,[140] by seeking professional expert advice and seeking protection through insurance policies and contractual terms.[141] The difficulty is that there are many shades of grey.[142] Such claims have been given potential by the *Perre* decision, unless the court views such parties as having sufficient experience and knowledge to protect themselves. However, given the recent indications of the post-*Perre* decisions such as in *Johnson Tiles*, this appears unlikely.[143] Hence the comfort, building and construction clients, their insurers and legal practitioners, once drew from decisions such as *Fangrove*, have been thrown into serious doubt.[144]

Critics argue the knowledge criteria is both ineffectual and arbitrary in limiting liability.[145] In some cases there will perhaps be little difference between the loss the defendant knows could result from their actions and the loss that they should reasonably foresee. Why should the latter be less deserving of punishment than the former?[146] Such an issue was canvassed in the *McMullin* case.[147]

4. The Defendant's Behaviour

Since fault remains a basis for negligence, the nature of the defendant's behaviour is a relevant consideration.[148] If the defendant's behaviour offends community standards, is unlawful, deliberate, reckless, grossly careless or is not a legitimate pursuit or protection of the defendant's own interests, this will be a pertinent factor in determining whether a duty of care is owed.[149] Defects in commercial or residential developments which breach minimum standard safety requirements should be recoverable and it should not be possible to evade compliance by contractual exclusions.[150]

Critics suggest that this factor requires further clarification before it is included as a criteria, as an assessment of the defendant's culpability as a factor in determining their liability, essentially equates to the imposition of punishment in the absence of protection afforded by punitive damages.[151]

5. Proximity

Proximity whilst no longer the benchmark of a duty of care in pure economic loss cases, remains as a factor requiring

consideration.[152] Not only is the parties "physical propinquity"[153] relevant but also their "commercial propinquity."[154]

6. Precedent or Analogous Case

The existence of an authoritative precedent will be a necessary consideration.[155] This factor may involve a consideration of the application of the pre-*Perre* decisions.

7. Directness of Loss — First-tier or Primary Victims

McHugh and Hayne JJ emphasised the importance of allowing recovery to those primary victims, who were directly affected as a result of the defendant's conduct.[156] Recovery for these victims they indicated should be easier than those of secondary victims, whose loss was as a result of a 'ripple effect' which flowed from the primary victim's loss.[157] They indicated that whilst constructive knowledge could be used to identify primary victims, only actual knowledge would be sufficient to extend liability to a secondary victim.[158] The other judges avoided this issue, hence leaving the application of this factor on the reliance of these obiter comments uncertain and open for judicial discretion.[159] This issue was further agitated in the decision of Wilcox J in *McMullin v ICI Australia Operations Pty Ltd*[160], who having the same misgivings of McHugh and Hayne JJ, held that ICI did not owe a duty of care to certain categories of claimants.[161]

8. Regulation of the Parties Relationship (Self-imposed or Legal)

It is necessary to examine how the parties have agreed to regulate their own relationships, for example through contract. It is also necessary to examine the effect of established legal rules on the relationship, for example, the legal principle of caveator emptor.[162] A duty of care should not be imposed in circumstances which would disturb these general legal rules or in circumstances where the parties have through their own contract intentionally limited their liability.[163]

The Full Court of the Federal Court in *Johnson Tiles Pty Ltd v Esso Australia Ltd*[164] upheld the decision of Merkel J[165] in refusing to strike out the Plaintiff's claim for pure economic loss resulting from the interruption of gas supply. Esso argued no tortious duty arose in circumstances where the supply of gas to its users was regulated by contract and the regulatory regime in place. They claimed that a tortious duty would undermine the contractual relationship. Under the express terms of the Gas Sales Agreement by which Esso and BHP sold gas to Gascor who then onsold it to the public, Esso and BHP had an express contractual exclusion that they would not be liable for any economic loss suffered which may result from Gascor's negligent failure to supply gas.[166]

Merkel J whilst recognising that the law concerning the basis for claims for pure economic loss was still evolving in Australia,[167] held that whilst the contract between Esso and BHP with Gascor was a relevant consideration in deciding the issue it was not determinative and certainly there was no Australian authority to support it.[168] In fact obiter dicta comments made by Mason CJ, Deane and Gaudron JJ in *Bryan*,[169] the judgements of Windeyer J and Toohey J in *Voli v Inglewood Shire Council*[170], Dawson J in *Hill v Van Erp*[171], Glesson CJ and McHugh J in *Perre*[172] and Wilcox J in *McMullin v ICI Australia*[173] undermined this argument.[174]

9. Existing Duty of Care

It is important to consider whether the defendant already has an existing duty of care to avoid economic loss causing conduct.[175] If the defendant already owes a duty and the negligent conduct is performed within the scope of that duty the defendant is unlikely to be able to escape liability.[176]

Despite this apparent agreement on the factors to be applied, the exercise for those at the coalface in advising clients, in extracting and evaluating their importance and then applying them to the particular facts presented, remains a difficult, subjective and unpredictable exercise.[177] Those at the coalface are possibly left in no better position than when proximity was in vogue.[178]

The effect of *Perre* for those involved in the building and construction industry is equally uncertain. Arguably, some of the factors will be relatively easy to prove given the nature of the parties' relationships. However, the real concern is that the class of third party claimants has been significantly expanded,[179] despite the restraints of policy,[180] making it extremely difficult, if not impossible, to exclude liability to these

potential claimants.[181] However, this does not mean attempts cannot be made to foreshadow potential claimants and invitations extended to them to become clients.[182] In spite of this, the very best endeavours by diligent practitioners to precisely define the scope of works might not avert a finding of liability where the work is not performed defectively.[183]

References

1. Clayton Utz, 'Recovery of damages for pure economic loss' *Construction Issues* 4 (Paper included in Construction Claims Course Materials for 2000) 16.9; Jane Swanton, 'Liability in Negligence for 'Pure' Economic Loss', (2000) 14(2) *Commercial Law Quarterly*, 7; Bruce Feldthusen, 'Pure Economic Loss in the High Court of Australia: Reinventing the Square Wheel?' (2000) March *Tort Law Review* 33, 44; Stephen Warne, 'Legal professional liability Part 1' (2000) 8 *TLJ* 283, 3.

2. *de Pasquale Bros Pty Ltd v Cavanagh Biggs & Partners Pty Ltd* (2000) 16 BCL 116 ('*de Pasquale*'). Gavin Bell, 'Defects - Issues outside contract' (Paper presented at The University of New South Wales, Faculty of Law, Continuing Legal Education, Building and Construction Seminar, Sydney, 13 October 2000) 2.

3. For example, a latent defect. Marcus J. A. Hodge, 'Constructing a Liability: Bryan v Maloney' (2000) 7(1) *E Law* 1, 5.

4. For example, physical damage to the structure as a result of work performed on a neighbouring building, as in *de Pasquale Bros*, above n 2, 2. Cf *Bryan v Maloney* (1995) 182 CLR 609, ('*Bryan*'), 623 (Mason CJ, Deane and Gaudron JJ) which arguably adopts a more lenient approach than was taken in *Council of the Shire of Sutherland v Heyman* (1984-84) 157 CLR 424 ('*Heyman*'), 504-5 (Deane J); Bell, above n 2, 3. *Fangrove Pty Ltd v Tod Group Holdings Pty Ltd* [1999] 2 Qd R 236, ('*Fangrove*') 617 (de Jersey, CJ with whom McPherson, JA and Chesterman J agreed); Jennifer McVeigh, 'Defects - Liability To Purchasers Of Commercial Premises Resolved? - Operation Of Bryan v Maloney Limited' 65 *ACLN* 55.

5. *Heyman*, above n 4, 502-3 (Deane J); Jane Swanton and Barbara McDonald, 'Liability in negligence for pure economic loss' (2000) 74 *ALJ* 17; Bell, above n 2, 1-2, 3; Swanton, above n 1, 7; Doug Jones, 'High Court on Pure Economic Loss - Unanimous in its Differences' (Paper included in Construction Claims Course Materials for 2000) 70 *ACLN* 25.

6. *Caltex Oil (Australia) Pty Ltd v Dredge 'Willemstad'* (1976) 136 CLR 529 ('*Caltex*') was a case of relational economic loss (i.e. where the plaintiff, who has some relationship with a third party suffers financial loss as a result of the damage the negligent party has caused to a third party or the third party's property). However, prior to this decision, exceptions to the rule had already started to develop, for example, for negligent mis-statement. See *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 ('*Hedley Byrne*'). For others see Feldthusen's article, above n 1. Dr. Max Spry, 'Perre v Apand Pty Ltd: liability in negligence for "pure" economic loss' (2000) 20 *The Queensland Lawyer* 191; Swanton and McDonald, above n 5, 17; Clayton Utz, above n 1, 16.9, 16.12; Swanton, above n 1, 7. Cf. Feldthusen, above n 1, 39, 45, 46 who advocates a restrictive exclusionary rule for relational economic loss claims for reasons of certainty and predicability.

7. Clayton Utz, above n 1, 16.9, 16.12.

8. See Joseph Tesvic, '*Perre v Apand Pty Ltd* - Coherent Negligence Law for the New Millennium' (June 2000) 22(2) *Sydney Law Review* 29, 13 who suggests that there may be a covert 'judicial bias' against pure economic loss claims in the use of the 'floodgate' argument to exclude recovery, given there is arguably no quantitative difference between vast physical and economic loss cases. Hodge, above n 3, 4-6, to whom the distinction is 'counter-productive and lacks probative logic'. Hodge also questions how *Bryan* can be a case concerning pure economic loss when the 'foundations have failed and caused ... damage to the structure.' He queries why if a building is not damaged why it requires rectification; *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373, at 83 (Lord Denning), described it as an 'impossible distinction'; Even Halsbury's has difficulty explaining it. See Butterworths, Halsbury's Laws of Australia [300-45] vol 34 p547,101. Feldthusen is also critical of the High Court for failing to recognise the pure economic loss and rational economic loss distinction in *Perre v Apand* (1999) 198 CLR 180; (1999) 164 ALR 606; 73 ALJR 1190 ('*Perre*'). See Feldthusen, above n 1, 37, 45.

9. See *Bryan*, above n 4, 623 (Mason CJ, Deane and Gaudron JJ) who described the distinction as 'an essentially technical one' which is 'now,...arguably inapplicable' and at 736 (Brennan J) who saw the utility of the distinction as being more of an indication 'that something more was required.' Similarly in *Murphy v Brentwood District Council* [1991] 1 AC 398, 487 (Lord Oliver) cited in *Perre*, above n 8, [73] (McHugh J). See also *Perre*, above n 8, [423] (Callinan J) who points out similarities between physical and economic loss cases. Hodge, above n 3, 4, 6; Warne, above n 1, 4. See also Feldthusen, above n 1, 39 - where in *Hedley Byrne* the distinction was not a central concern; Swanton, above n 1, 8-9.

10. Adrian Baron, 'The "Mystery" of Negligence and Economic Loss: When *is* a Duty of Care Owed?' (2000) 19 *Aust Bar Rev* 167, 2-3; Geoff Hancock and Adrian Baron, 'Pure economic loss: the implications of *Perre's case*' (2000) February *Law Institute Journal* 80.

11. *Perre*, above n 8.

12. Jones, above n 5, 25.

13. *Caltex*, above n 6, 576 (Stephen J citing Barwick CJ); Bell, above n 2,21; Rashda Rana, 'Negligence and Pure Economic Loss: The Dance of the Seven Veils' (Paper included in Construction Claims Course Materials for 2000) 68 *ACLN* 50, 54.

14. See Jones, above n 5, 26 refers to it as 'a mess'. Bell, above n 2, 21-22; Rana, above n 13, 50, 54; Swanton and McDonald, above n 5, 17.

15. Bell, above n 2, 21-22; Rana, above n 13, 50 indicates the risk that *Perre* will become 'all things to all people.'

16. Some of these involved members of the building and construction industry. For example, *CBD Investments Pty Ltd v Ace Ceramics Pty Ltd*, (1995) Aust Torts Reports 81-359 ('*CBD Investments*') involving a claim for pure economic loss by a builder against a tile manufacturer for defective tiles installed by an independent party; *Bryan*, above n 4; *Woollahra Municipal Council v Sved* (1996) 40 NSWLR 101 ('*Woollahra*'); *Zumpano v Montagnese* [1997] 2 VR 525 ('*Zumpano*'); *Fangrove*, above n 4; *de Pasqulae*, above n 2. The applicability of the principles derived from these cases in light of the *Perre* decision remains unclear. Bell, above n 2, 21-22; Rana, above n 13, 50; David Rodighiero, 'Perre v Apand Muddies The Waters For Manufacturers' (2000) July *Carter Newell Constructive Notes Construction Team Newsletter* 1.

17. See section on Indeterminacy below. Jones, above n 5, 25-27; Rana, above n 13, 51; Swanton and McDonald, above n 5, 20.

18. Rana, above n 13, 51; Bell, above n 2, 17; Swanton and McDonald, above n 5, 20.

19. *Perre*, above n 8, 1202 (McHugh J); Bell, above n 2, 17; Jones, above n 5, 25; Swanton and McDonald, above n 5, 18-19; Clayton Utz, n 1, 16.10.

20. Dr. Des Butler, 'Once More into the Mire, Dear Friends: Determining the Existence of a Duty of Care in Negligence' (2000) *NLR* 3, [44].

21. Butler, above n 20, [43].

22. *Perre*, above n 8, 1206 (McHugh J); 1256 (Hayne J); 1269 (Callinan J). Butler, above n 20, [24], [25], [32], [43], Baron, above n 10, 12-13, Bell, above n 2, 19; Rana, above n 13, 54. Cf. Tesvic, above n 8, 9 who classifies Hayne and Callinan JJ as advocates of the 'salient features' approach yet recognises that they are perhaps covert incrementalists, whereas McHugh J is deemed to be an overt supporter.

23. *Perre*, above n 8, 629-642; 1206 (McHugh J). McHugh J reaffirmed his preference for this approach in *Crimmins v Stevedoring Industry Finance Committee* [1999] HCA 59; 74 ALJR 1; 167 ALR 1, delivered on 10 November 1999, ('*Crimmins*'), 71-79; 15-16; 19. He refers to a 'checklist' of policy factors. Butler, above n 20, [22], [23], [43]; Hancock and Baron, above n 10, 82, 84; Baron, above n 10, 12; Swanton and McDonald, above n 5, 19; Tesvic, above n 8, 9-10; Simon Fitzpatrick, 'Torts or tort? The imperial expansion of defamation' (2000) 8 *TLJ* 263, 11, 17.

24. *Perre*, above n 8, 625 (McHugh J). In attempting to lay down some general coherent legal principles involving claims for pure economic loss, McHugh J has been described as the 'solicitor's friend'. Bell, above n 2, 19; James Edelman, 'Judicial discretion in Australia' (2000) 19 *Aust Bar Rev* 285, 10.

25. *Perre*, above n 8, 632 (McHugh J); Bell, above n 2, 19; Jones, above n 5, 26-27; Rana, above n 13, 52; Tesvic, above n 8, 10; Hancock and Baron, above n 10, 82, 84; Clayton Utz, above n 1, 16.10.

26. Butler, above n 20, [43].

27. See Tesvic, above n 8, 10. However, McHugh J's willingness to examine the policy of past decisions does not necessarily equate with a desire to apply those policies to the case at hand. This reflection can be equally viewed as the gaining of wisdom rather than as a lack of progression. See *Perre*, above n 8, [105] (McHugh J). Hancock and Baron, above n 10, 82.

28. *Perre*, above n 8, (Gummow J). See Swanton and McDonald, above n 5, 20 suggest that despite Gummow J's criticism of the incremental approach that there is in practice little difference between it and his own 'salient features' approach. Baron, above n 10, 12; Hancock and Baron, above n 10, 82. Cf Warne, above n 1, 4, 7.

29. *Crimmins*, above n 23, [47]. Warne, above n 1, 4.

30. *Perre*, above n 8, (Callinan J). Butler, above n 20, [35]-[42], [43].

31. Butler, above n 20, [43]; Hancock and Baron, above n 10, 83.

32. Butler, above n 20, [43].

33. *Perre*, above n 8, 1195 (Gaudron J). Which Gummow J appears to partially support. See *Perre*, above n 8, 660 (Gummow J); Bell, above n 2, 18-19; Rana, above n 13, 51; Butler, above n 20, [9]-[12], [43]; Baron, above n 10, 11.

34. Tesvic, above n 8, 9.

35. *Perre*, above n 8, 627; 1204 (McHugh J). Butler, above n 20, [19], [43]; Hancock and Baron, above n 10, 82; Jane Anderson, 'Economic Loss: The Latest Word' (2000) March *New Zealand Law Journal* 79; Baron, above n 10, 11. Cf. Tesvic, above n 8, 9 who claims the approach is certain yet rigid.

36. *Crimmins*, above n 23, 10-11 (Gaudron J). However, in *Boland v Yates Property Corporation Pty Ltd; Webster v Yates Property Corporation* [1999] HCA 64 (unreported, 9 December 1999) ('*Boland*') at [105]-[107] Gaudron J refers to the proximity approach. Hancock and Baron, above n 10, 82, 84 Baron, above n 10, 11.

37. *Perre*, above n 8, (Glesson CJ); 1228; 660-665 (Gummow J). Butler, above n 20, [6]-[8], [43]; Baron, above n 10, 12; Rana, above n 13, 52-53; Bell, above n 2, 18-19; Fitzpatrick, above n 23, 11, 17. See Tesvic, above n 8, 16 who suggests that Hayne and Callinan JJ arguably also support this approach.

38. *Perre*, above n 8, (Glesson CJ); Bell, above n 2, 21; Rana, above n 13, 51.

39. *Perre*, above n 8, 659 (Gummow J). Butler, above n 20, [7], [43]; Rana, above n 13, 51; Tesvic, above n 8, 6.

40. Butler, above n 20, [43]; Tesvic, above n 8, 7-8.

41. Butler, above n 20, [43].

42. Tesvic, above n 8,16.

43. *Perre*, above n 8, 676-690; 1240, 1242 (Kirby J). Tesvic, above n 8, 11; Fitzpatrick, above n 23, 11, 17.

44. *Perre*, above n 8, 676; 1240, 1242 (Kirby J); Bell, above n 2, 20; Rana, above n 13, 53;

Swanton and McDonald, above n 5, 19; Butler, above n 20, [13]-[17], [43]; Baron, above n 10, 12.

45. *Perre*, above n 8, 1193/652-653, (Glesson CJ), 659 (Gummow J), 697-698 (Hayne J), 716 (Callinan J), (Gaudron J). Baron, above n 10, 11; Jones, above n 5, 26, Tesvic, above n 8, 6,8; Hancock and Baron, above n 10, 81.

46. *Perre*, above n 8, 1202-3 (McHugh J); 1255 (Hayne J). Butler, above n 20, [18], [20]-[23], [32], [43]; Baron, above n 10, 12-13; Bell, above n 2, 19-21; Rana, above n 13, 53-54; Swanton and McDonald, above n 5, 19; Hancock and Baron, above n 10, 82, 83; Clayton Utz, above n 1, 16.11; Tesvic, above n 8, 11, describes the approach as being potentially 'empty' and 'ambiguous.'

47. *Perre*, above n 8, (Kirby J) asserted that McHugh J's approach was equally uncertain. Butler, above n 20, [13]-[17], [43]; Hancock and Baron, above n 10, 82, 83.

48. *Crimmins*, above n 23, [222]; 57, as he had done in previous decisions such as in *Pyreness Shire Council v Day* (1998) 192 CLR 330; *Romeo v Conservation Commission of Northern Territory* (1998) 192 CLR 431. Hancock and Baron, above n 10, 82, 84; Warne, above n 1, 6; Tesvic, above n 8, 11; Fitzpatrick, above n 23, 11, 17.

49. Swanton and McDonald, above n 5, 20, 22; Fitzpatrick, above n 23, 11, 17; Tesvic, above n 8, 312.

50. Swanton and McDonald, above n 5, 22; Anderson, above n 35, 79.

51. Academics differ as to their classification of Hayne and Callinan JJ's allegiance with either the incremental or salient features approaches. Butler, above n 20, [43] asserts Hayne and Callinan JJ support McHugh J's incremental approach whereas Hancock and Baron, above n 10, 83, Baron, above n 10, 13 and Tesvic, above n 8, 6, claim that both support the salient features approach of Glesson CJ and Gummow J. *Perre*, above n 8, Glesson CJ, 660 (Gummow J), 697-698 (Hayne J) and 716 (Callinan J).

52. *Perre*, above n 8, 1208, 1214 (McHugh J). Baron, above n 10, 12; Hancock and Baron, above n 10, 82, 83.

53. Hancock and Baron, above n 10, 83; Baron, above n 10, 13.

54. Jones, above n 5, 26, Swanton and McDonald, above n 5, 20.

55. *Perre*, above n 8, 676 (Kirby J); Bell, above n 2, 20; Rana, above n 13, 53; Swanton and McDonald, above n 5, 20.

56. Hancock and Baron, above n 10, 83.

57. Hancock and Baron, above n 10, 83; Baron, above n 10, 11.

58. See Warne, above n 1, 4, 7. *Perre*, above n 8, [9]-[10] (Glesson CJ), [28] (Gaudron J), [94] (McHugh J), [199] Gummow J, [333] Hayne J, [405] Callinan J. *Williams v The Minister, Aboriginal Land Rights Act 1983* [1999] NSWSC 843 (26 August 1999) ('*Williams*') 815 (Abadee J). Cf. Tesvic, above n 8, 17.

59. *Perre*, above n 8, (McHugh J) suggests the search for a single approach may be a long one. Butler, above n 20, [45].

60. *Perre*, above n 8, 613 (Gaudron J) and (Hayne J) suggest a single approach may never be found. Butler, above n 20, [45].

61. Feldthusen, above n 1, 43; Hancock and Baron, above n 10, 83; Butler, above n 20, [46]; Swanton and McDonald, above n 5, 22.

62. Feldthusen, above n 1, 43; Hancock and Baron, above n 10, 83; Butler, above n 20, [46]; Swanton and McDonald, above n 5, 22.

63. *Perre*, above n 8, 1205 (McHugh J). Swanton and McDonald, above n 5, 22.

64. Edelman, above n 24, 11; Swanton and McDonald, above n 5, 22. See further Justice John Doyle, 'Judgement Writing: Are There Needs for Change?' (1999) 73 *ALJ* 737 and Justice Bryan Beaumont, 'Contemporary Judgement Writing: The Problem Restated' (1999) 73 *ALJ* 743.

65. *Zumpano*, above n 16, 544 (Brooking, JA); Bell, above n 2, 9.

66. *Bryan*, above n 4, 643-44 (Brennan J). Bell, above n 2, 4-5.

67. Baron, above n 10, 18; Tesvic, above n 8, 17.

68. Tesvic, above n 8, 16-17 indicates that whilst some judges in his view accurately comprehend *Perre*, the majority show a considerable confusion in applying it. He cites *Papadopoulous v Hristoforidis* [1999] NSWSC 1017 (8 October 1999) (Wood J), *Law Institute of Victoria v Zanca & Tisher Liner* [1999] VSC 464 (24 November 1999) and *Beach Petroleum NL v Abbott Tout Russell Kennedy* [1999] NSWCA 408 (5 November 1999) as cases where the judges correctly interpreted *Perre*. *Bailey v Redebi Pty Ltd* [1999] NSWSC 918 (13 September 1999), *Hollis v Vabu Pty Ltd* [1999] NSWCA 334 (5 November 1999) and *Batten v CTMS Ltd* FCA 1576 (12 November 1999) are listed as cases which show a partial understanding of *Perre*. Whilst the *Tepko Pty Ltd v Water Board* [1999] NSWCA 40 (29 September 1999) ('*Tepko*'), 69 (Mason P and Fitzgerald AJA) and *Williams*, above n 58 (Abadee J) decisions are said to be seriously flawed.

69. Edelman, above n 24, 11.

70. See *Caltex*, above n 6, (Stephen J). *Tepko*, above n 68 was granted special leave to appeal on 10 March 2000. See Fitzpatrick, above n 23, 11, 17. See further the ongoing litigation in *Johnson Tiles Pty Ltd v Esso Australia Ltd* [2000] FCA 1572 (8 November 2000) ('*Johnson Tiles*') and *Mobil Fuel* cases. Peter Cane, 'The blight of economic loss: Is there life after *Perre v Apand*?' (2000) 8 *TLJ* 246, 14. *Crimmins*, above n 23, [73]-[78] (McHugh J) and [226] (Kirby J) emphasised the need for predicability and urged their fellow judges to limit the uncertainties associated with *Perre* to pure economic loss cases. Cf. *Perre*, above n 8, 613 (Gaudron J) and (Hayne J) who suggest a single approach may never be found. Butler, above n 20, [45] who suggests 'that the only approach of universal application (may) exist at such a level of abstraction as to draw the criticism that it lacks the content necessary to be of use to those resolving real life cases.' See Justice Keith Mason, 'Fault, causation and responsibility: Is tort law just an instrument of corrective justice?' (2000) 19 *Aust Bar Rev* 201, 2 and 1 citing *South Pacific*

Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd [1992] 2 NZLR 282, 294 (Cooke P) who indicates that whilst '[f]ormulae can help organise thinking … they cannot provide answers' which has to be 'determined by judicial judgement'.

71. *Perre*, above n 8, 613 (Gaudron J) and (Hayne J).

72. Baron, above n 10, 15.

73. Feldthusen, above n 1, 52.

74. Tesvic, above n 8, 16-17.

75. Cane, above n 70, 13.

76. Baron, above n 10, 15.

77. See approach outlined in full in Baron, above n 10, 15-17.

78. See approach outlined in full in Baron, above n 10, 17-18.

79. Baron, above n 10, 15.

80. *Perre*, above n 8, (Glesson CJ). David Abell, 'A Risk Manager's Approach to Establishing a Duty of Care in the Case of Pure Economic Loss: A Flow Chart Approach' (2000) 11(3) *ILJ* 216, 9.

81. Abell, above n 80, 9.

82. Abell, above n 80, 1.

83. See Abell, above n 80.

This involves asking a series of questions, with a 'positive' or 'negative' response directing the path to be followed and ultimately to a finding. The relevant questions to be asked and determined concerning this issue include:

1. Was the plaintiff's loss caused by the defendant's conduct?
2. Was the loss suffered by the plaintiff reasonably foreseeable?
3. Did the defendant have knowledge of the harm its conduct could cause the plaintiff?
   (a) Did the defendant actually know the consequences of the harm its conduct could cause the plaintiff?
   (b) Did the defendant have constructive knowledge of the consequences which its conduct could have had for the plaintiff?
4. Was the plaintiff vulnerable to loss as a result of the defendant's conduct?
   (a) Was the defendant aware or should it have been aware that the plaintiff was relying on the defendant's advice?
   (b) Was the plaintiff's loss a direct result of an activity undertaken by the defendant in a skilled capacity?
   (c) Was the defendant in control of the activity that gave rise to the plaintiff's loss?
   (d) Was the plaintiff aware of the defendant's activities and could it have taken action to minimise the risk of loss?

84. See Abell, above n 80. The relevant questions to be asked and determined concerning this issue:

1. Would be imposition of a duty of care impose an indeterminate liability on the defendant?
   (a) Is the plaintiff a member of a readily identifiable class, which is likely to suffer loss as a result as a result of the defendant's negligence?
   (b) Are the consequences of the defendant's negligence upon the plaintiff identifiable?
2. Would the imposition of a duty of care impose an unreasonable burden on the autonomy of the defendant?
   (a) Does the defendant's negligence involve either an illegal act or a material breach of a government regulation or statutory requirement?
   (b) Has the defendant's conduct giving rise to the claim for pure economic loss also resulted in property damage or personal injury to another party?

85. Although some suggest the differences are more apparent than real. See Swanton and McDonald, above n 5, 22.

86. Tesvic, above n 8, 12.

87. *Perre*, above n 8, 624 (McHugh J) admits this. Tesvic, above n 8, 12; Swanton and McDonald, above n 5, 20, 22; Anderson, above n 35, 79.

88. Tesvic, above n 8, 12-13.

89. *Perre*, above n 8, 618 (Gaudron J), 655 (Gummow J with whom Glesson CJ agreed), 688-689 (Kirby J) and 722 (Callinan J) held that both the Perres and their family companies were owed a duty. However, McHugh and Hayne JJ held that Apand only owed a duty of care to those Perres who owned the growing farm, not to those involved in the processing and storage facility who they indicated were not readily ascertainable. *Perre*, above n 8, 644 (McHugh J), 703 (Hayne J). Jones, above n 5, 27; Tesvic, above n 8, 12-13; Clayton Utz, above n 1, 16.10; Anderson, above n 35, 79, 80.

90. Tesvic, above n 8, 12-13.

91. Warne, above n 1, 6.

92. *Perre*, above n 8, 1202 (McHugh J); Bell, above n 2, 17; Jones, above n 5, 25; Swanton and McDonald, above n 5, 18-19; Clayton Utz, n 1, 16.10; Warne, above n 1, 6; See *McMullin v ICI Australia Operations Pty Ltd* [1999] FCA 1814 (delivered 23 December 1999) ('*McMullin*'), [31]-[35] (Wilcox J).

93. Warne, above n 1, 6.

94. Tesvic, above n 8, 7.

95. *Perre*, above n 8, 613 (Gaudron J) and (Hayne J).

96. Jones, above n 5, 25-27; Rana, above n 13, 51; Swanton and McDonald, above n 5, 20.

97. Rana, above n 13, 51; Bell, above n 2, 17; Swanton and McDonald, above n 5, 20.

98. Tesvic, above n 8, 16; Hancock and Baron, above n 10, 81; Rana, above n 13, 50-51.

99. *Perre*, above n 8, 611 (Glesson CJ), 615-618 (Gaudron J), 633 (McHugh J), 660-661 (Gummow J), 688 (Kirby J), 699 (Hayne J), 717-721 (Callinan J). See *Ultramares Corporation v Touche* (1931) 174 NE 441, 444 (Cardozo J): 'liability in an indeterminate amount, for an indeterminate time, to an indeterminate class.' Tesvic, above n 8, 4, 13, 14, 16; Clayton Utz, above n 1, 16.10-16.12; Fitzpatrick, above n 23, 11, 17; Warne, above n 1, 6.

100. See footnote n 89 above.

101. See for example, *Caltex*, above n 6, 568,591; *Heyman*, above n 4, 465; *San Sebastian*, above n 4, 353-354; *Bryan*, above n 4, 618; *Hill v Van Erp* (1997) 188 CLR 159, ('*Hill*'), 171, 179, 192, 216, 235. Tesvic, above n 8, 13.

102. *Perre*, above n 8, (McHugh J) and (Gaudron J). Jones, above n 5, 25-27; Rana, above n 13, 51; Swanton and McDonald, above n 5, 20; Tesvic, above n 8, 14; Hancock and Baron, above n 10, 82; Clayton Utz, above n 1, 16.9; Anderson, above n 35, 79; Warne, above n 1, 6.

103. The majority of the judges appear to support this timing issue, however, further clarification is desirable. *Perre*, above n 8, (Hayne J) queried whether identification after the event would be sufficient. However, he found it unnecessary on the facts of the case to determine the issue. Clayton Utz, above n 1, 16.10.

104. *Perre*, above n 8, (Glesson CJ), (Gaudron J), 635-636 (McHugh J), (Gummow J), 701-702 (Hayne J) and (Callinan J). Clayton Utz, above n 1, 16.11.

105. *Perre*, above n 8, 635-636 (McHugh J), 701-702 (Hayne J). Fitzpatrick, above n 23, 11, 17; Warne, above n 1, 6.

106. Clayton Utz, above n 1, 16.9; 16.11.

107. Hancock and Baron, above n 10, 81; Clayton Utz, above n 1, 16.9.

108. *Perre*, above n 8, (McHugh J). Hancock and Baron, above n 10, 82; Clayton Utz, above n 1, 16.9, 16.11.

109. *Perre*, above n 8, 1193 (Glesson CJ), 1197-1198 (Gaudron J), 1198-1199 (McHugh J), 1228 (Gummow J), 1257 (Hayne J) and 1270 (Callinan J). Swanton and McDonald, above n 5, 20.

110. *Perre*, above n 8, 1270 (Callinan J). Swanton and McDonald, above n 5, 21.

111. *Perre*, above n 8, 1193 (Glesson CJ), 1198 (Gaudron J), 1198, 1211-1214, 1217 (McHugh J), 1231 (Gummow J), 1248 (Kirby J) and 1271 (Callinan J). Swanton and McDonald, above n 5, 20-21. The existence of insurance was deemed as an irrelevant consideration. Jones, above n 5, 26.

112. *Perre*, above n 8, 1193 (Glesson CJ), 1197 (Gaudron J's referred to this as an impairment or loss of a legal right), 1204 (McHugh J rejected Gaudron J's formulation and saw the concept of 'control' as simply a further indication of the plaintiff's vulnerability), 1231 (Gummow J), and 1270 (Callinan J). Swanton and McDonald, above n 5, 21.

113. *Perre*, above n 8, 1258 (Hayne J indicated it was necessary to consider whether the defendant's conduct was deliberate and illegal). Swanton and McDonald, above n 5, 20. Jones, above n 5, 27.

114. *Perre*, above n 8, [105] (McHugh J) who indicated that '[I]n particular cases, other policies and principles may guide and even determine the outcome.' Hancock and Baron, above n 10, 82.

115. Referred to in *Perre*, above n 8, [203] (Gummow J) as 'salient features or by others as 'something more'; in *Bryan*, above n 4, 618-19 (Mason CJ, Deane and Gaudron JJ) as 'special' circumstances and in *Hill* above n 101 and *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 166 CLR 241, ('*Esanda*') as 'something more'. Warne, above n 1, 5, 8.

116. See *Perre*, above n 8, 611 (Glesson CJ), 624, 636-637 (McHugh J), 618 (Gaudron J), 664 (Gummow J), [330] (Hayne J) cf Kirby and Callinan JJ who still refer to 'proximity'; *Crimmins*, above n 23, [3] (Glesson CJ agreeing McHugh J), [43] (Gaudron J), [100], [104] per McHugh J, [233] (Kirby J); *Boland*, above n (Gaudron J). See Warne, above n 1, 4, 6, 7 and *Tesvic*, above n 8, 14-15 who trace the demise of proximity through the case law. Anderson, above n 35, 79; Butler, above n 20, [1],[47]; Baron, above n 10, 7; Hancock and Baron, above n 10, 80-81, 83, 84; Fitzpatrick, above n 23, 11,17; Mason, above n 70, 1, 7.

117. Hancock and Baron, above n 10, 80-81.

118. *Perre*, above n 8, 1213 (McHugh J). These terms had their limitations for example in legatee cases such as *White v Jones*. See Anderson, above n 35, 79; Hancock and Baron, above n 10, 83; Baron, above n 10, 12; Clayton Utz, above n 1, 16.11; Warne, above n 1, 7.

119. All their Honours cite its importance as an essential factor. See *Perre*, above n 8, 611 (Glesson CJ), 636 (McHugh J - refers to it as a prerequisite), 688 (Kirby J) all used the word 'vulnerability', whereas 618 (Gaudron J) referred to the plaintiffs' 'dependence', 664 (Gummow J) indicated that the plaintiffs' had 'no avenue to protect themselves', 718-719 (Callinan J) emphasised the plaintiffs' 'powerlessness' and 700-701 (Hayne J) referred to 'knowledge of special position'. Tesvic, above n 8, 16; Butler, above n 20, [44]; Anderson, above n 35, 79; Hancock and Baron, above n 10, 83; Swanton, above n 5, 8-9; Warne, above n 1, 7.

120. *Perre*, above n 8, 640 (McHugh J), (Gummow J). Anderson, above n 35, 79; Jones, above n 5, 26; Feldthusen, above n 1, 34, 50; Hancock and Baron, above n 10, 82.

121. For example, the presence of an invisible disease on a neighbouring property or the existence of a confidential document as in *Johnson Tiles*, see below footnotes n 164 and 165. Warne, above n 1, 7.

122. For example, the elderly, the handicapped or the unsophisticated and inexperienced purchaser who may not be in a position to understand the dynamic, commercial nature of the transaction. Bell, above n 2, 14-15; *Fangrove*, above n 4, 245 (Chesterman J); Baker & McKenzie, 'A Contractor's Liability to Subsequent Purchasers' (2000) April *Construction Law Update* 1, 2; Warne, above n 1, 7; See Tom Davie, *Annotated Home Building Act 1989 (NSW)* (2000) Prospect Media Pty Ltd, Sydney, 1 and following. It was these concerns which motivated the NSW Parliament to commission the Dodd Inquiry in 1993 and then on the basis of those recommendations developed the *Home Building Act* 1989 (NSW). See generally the Second Reading Speech to the Act extracted in Davie, from 313 and following and comments made by Minister Lo Po at 313, Mr Turner at 320, 321 and Mr Iemma 326.

123. See Part 2C Statutory Warranty

provisions in the NSW legislation and similar sections in protectionist legislation in other states. Part 2C applies to residential building work done or to be done under a contract entered into on or after 1 May 1997. Davie, above n 122, 67-69; Kim Lovegrove and Lex Borthwick, *A Guide to the Home Building Act 1989 (NSW)* (2000) CCH Australia Limited, Sydney 51-58.

124. *Zumpano*, above n 16, 542 (Brooking JA); Bell, above n 2, 11. *Perre*, above n 8, [120] McHugh J 'Where another body of law can effectively deal with economic loss, a court should be slow to use negligence law to impose a duty of care on a defendant.' See also *Hill*, above n 101, (Gummow J). Warne, above n 1, 7. Davie, above n 122, 76-77 makes this very observation in a *Bryan* type case. What the subsequent purchaser's position will be in circumstances where the primary claimant has enforced the statutory warranty but failed to perform rectification work remains unclear. Will they have a claim against the builder for negligence or be able to enforce the statutory warranties themselves? See Davie, above n 122, 76.

125. s18G *Home Building Act* 1989 (NSW). Cf. *Contracts (Rights of Third Parties) Act* 1999 (UK) which applies to all contracts entered into from 11 May 2000. Parties have the option to either adopt the Act and confer rights on third parties, or opt out by express exclusion. It is hoped by many in the building and constructions industry in the UK that this legislation will avoid the potential disastrous consequences of 'double damages' which may result if the broad approach advocated in *Alfred McAlpine Construction Ltd v Panatown Ltd* (The Times 15 August 2000) delivered 27 July 2000 ('*McAlpine*') is taken up. See further Dudley Solan, 'Alfred McAlpine wins long running battle in House of Lords' 16/08/2000 *Masons*, 1, 2; Dudley Solan, 'McAlpine wins "No Loss" argument but uncertainty of "Double Damages" remain' 17/08/2000 *Masons*, 1.

126. s18F *Home Building Act* 1989 (NSW). Hopefully, such comments made by McHugh J in *Perre* (see footnote 124) would mean that a claim in negligence would likewise be excluded.

127. See above n 16.

128. *Woollahra*, above n 16, 133 (Clarke JA); Bell, above n 2, 7-8.

129. 20 March 2000. Cited in Rodighiero, above n 16, 2. This case involved an application to strike out a builder's application for economic loss suffered as a result of defective goods supplied by a manufacturer.

130. Rodighiero, above n 16, 2. Such a decision indicates that pre-*Perre* decisions such as *CBD Investments*, above n 16 may be decided differently today.

131. *Perre*, n 8, [15] (Glesson CJ) and (Hayne J), referred to knowledge of an ascertained class; (Kirby J) discussed the defendant's knowledge of the plaintiff's vulnerability; [84-85] (McHugh J) referred to the defendant's knowledge of the risk to those in the plaintiff's position; [38] (Gaudron J), [216] (Gummow J) and [408] (Callinan J) indicated that the defendant knew of the risk they had assumed. Butler, above n 20, [44]; Swanton, above n 1, 8-9; Dr Des Butler, 'Media negligence in the information age: a new frontier for a new century?' (2000) 8 *TLJ* 159, 4.

132. *Perre*, above n 8, (McHugh J). Butler, above n 20, [44], [46]; Hancock and Baron, above n 10, 83. See discussion above of Plaintiffs' Vulnerability.

133. *Perre*, above n 8, (McHugh J); [10] (Glesson CJ). Hancock and Baron, above n 10, 81.

134. Who dissented from the majority in finding Apand only owed a duty of care to those Perres who owned the growing farm, not to those involved in the processing and storage facility who they indicated were not readily ascertainable. See footnote n 89 above. Warne, above n 1, 7.

135. They argue that actual knowledge is required in cases of second tier victims; *Perre*, above n 8, 632 (McHugh J); Bell, above n 2, 19; Rodighiero, above n 16, 2; Clayton Utz, above n 1, 16.11; Warne, above n 1, 6.

136. *Perre*, above n 8, 1193; 611 (Glesson CJ) — 'actual or that which a reasonable person would have had', 615 (Gaudron J), 661 (Gummow J), 717 (Callinan J), 640-641 (McHugh J), 695-696 (Hayne J) and 687 (Kirby J). If the plaintiff is a member of an unascertained class it is likely their claim will not be successful. Butler, above n 20, [44]; Feldthusen, above n 1, 46; Hancock and Baron, above n 10, 83; Baron, above n 10, 11; Swanton, above n 1, 8-9; Fitzpatrick, above n 23, 11, 17.

137. Hancock and Baron, above n 10, 83-84; Swanton, above n 1, 7, 8.

138. Swanton, above n 1, 9; Jones, above n 5; *Fangrove*, above n 4, may be decided differently as a result of *Perre*. Cf. However, as indicated previously all applicable principles elicited in pre-*Perre* decisions have been thrown into a state of uncertainty.

139. *Fangrove*, above n 4, 238 (de Jersey, CJ), 242 (McPherson, JA); Bell, above n 2, 12-13; Baker & McKenzie, above n 122, 2; McVeigh, above n 4, 55-56.

140. *Fangrove*, above n 4, 242 (McPherson, JA); 245 (Chesterman, J); Bell, above n 2, 14.

141. Baker & McKenzie, above n 122, 2; Bell, above n 2, 15.

142. See examples of difficulties outlined in *Zumpano*, above n 16, 528-537 (Brooking JA) and by Bell, above n 2, 9-10, 15-16.

143. Bell, above n 2, 21-22; Swanton, above n 1, 9; Jones, above n 5.

144. McVeigh, above n 4, 55.

145. Feldthusen, above n 1, 47.

146. Reasonable foreseeability in itself being insufficient for a duty of care to arise. Feldthusen, above n 1, 47.

147. See footnote n 160 below.

148. *Perre*, above n 8, [131] (McHugh J) and [171] (Gummow J). Mason, above n 70, 2; Abell, above n 80, 3.

149. *Perre*, above n 8, 616 (Gaudron J), 635-636 (McHugh J), 701-702 (Hayne J), 719 (Callinan J). Hancock and Baron, above n 10, 83; Baron, above n 10, 12-13; Swanton, above n 1, 8-9; Fitzpatrick, above n 1, 11, 17.

150. Professor Ian Duncan Wallace QC, 'Tort and Defective Buildings: A Suggested Rationale' (2000)

16 *Building and Construction Law* 7, 12.

151. Feldthusen, above n 1, 47.

152. *Perre*, above n 8, 611 (Glesson CJ), 637 (McHugh J); *Crimmins*, above n 23. Anderson, above n 35, 79; Butler, above n 20, [47]; Hancock and Baron, above n 10, 80-81; Baron, above n 10, 7, 11; Swanton and McDonald, above n 5, 19.

153. *Perre*, above n 8, (Glesson CJ), (Kirby J) and [423] (Callinan J). Butler, above n 20, [44]; Hancock and Baron, above n 10, 83; Swanton, above n 1, 8-9.

154. *Perre*, above n 8, [423] (Callinan J) - involvement in the same industry, in the same year and for a lengthy period. Butler, above n 20, [44]; Hancock and Baron, above n 10, 83; Swanton, above n 1, 8-9; Warne, above n 1, 7.

155. *Perre*, above n 8, (McHugh J); *Crimmins*, above n 23, 16 (McHugh J). Hancock and Baron, above n 10, 83; Baron, above n 10, 16, 17.

156. *Perre*, above n 8, 1209; [117] (McHugh J). Baron, above n 10, 17; Hancock and Baron, above n 10, 83; Swanton, above n 1, 8-9; Warne, above n 1, 7.

157. *Perre*, above n 8, (McHugh J); Rodighiero, above n 16, 2; Clayton Utz, above n 1, 16.11; Warne, above n 1, 7.

158. *Perre*, above n 8, 632 (McHugh J); Rodighiero, above n 16, 2; Clayton Utz, above n 1, 16.11; Bell, above n 2, 19. In an unreported decision of the Supreme Court of Queensland (23 March 2000) by Dutney J, the fact that the builder and manufacturer did not know each other at the time of sale avoided the presumption.

159. Warne, above n 1, 7, 12.

160. *McMullin*, above n 92.

161. See *McMullin*, above n 92, [31]-[35] Wilcox J indicated that whilst *Perre* had expanded the circumstances in which liability for pure economic loss would be imposed, reasonable foreseeability, without more, was not sufficient.

162. *Bryan*, above n 4, 640, 644 (Brennan J); *Hill*, above n 101, 180-1 (Dawson J). Baron, above n 10, 17.

163. *John Holland Constructions & Engineering Pty Ltd v Majorca Projects Pty Ltd* (1997) 13 BCL 235. Cf *White v Jones* [1995] 2 AC 207, 294 (Lord Nolan). Baron, above n 10, 17; Hancock and Baron, above n 10, 83.

164. [2000] FCA 1572 (8 November 2000) ('*Johnson Tiles Appeal*') (Beaumont, French an Finkelstein JJ)

165. *Johnson Tiles Pty Ltd v Esso Australia Ltd* [2000] FCA 212 (3 March 2000) ('*Johnson Tiles*').

166. *Johnson Tiles*, above n 165, [23] (Merkel J).

167. *Johnson Tiles*, above n 165, [39] (Merkel J citing Gaudron J in *Perre*).

168. *Johnson Tiles*, above n 165, [36]-[38], [40]-[41] (Merkel J).Merkel J rejected Esso's reliance on English authority (listed by Merkel J at [42] of the judgement) to support its assertions, indicating that Australia and the United Kingdom had in this area long ago "parted ways" and citing *Bryan* at 629 described the English position as resting 'upon a narrower view of the scope of the modern law of negligence and a more rigid compartmentalisation of contract and tort than is acceptable …[in Australia]'

169. 'In some circumstances, the existence of a contract will provide the occasion for, and constitute a factor favouring the recognition of, a relationship of proximity either between the parties to the contract or between one or both of those parties and a third person. In other circumstances, the contents of the contract may militate against a recognition of a relationship of proximity under the ordinary law of negligence or confine, or even exclude the existence of, a relevant duty of care.' *Johnson Tiles*, above n 165, [28]-[30] (Merkel J).

170. (1963) 110 CLR 74 ('*Voli*'), 85 (Windeyer J); *Johnson Tiles*, above n 165, [30]-[31] (Merkel J).

171. *Hill*, above n 101, 182-183 (Dawson J); *Johnson Tiles*, above n 165, [31]-[32] (Merkel J).

172. McHugh J commented that the law of negligence may be used to 'fill the gap' the law of contract may create from time to time and allow those vulnerable plaintiff's an opportunity to recover the economic loss suffered in circumstances in which they were unable to protect themselves. *Johnson Tiles*, above n 165, [33]-[34] (Merkel J).

173. See *McMullin*, n 92, 81 (Wilcox J); *Johnson Tiles*, above n 165, [35] (Merkel J).

174. *Johnson Tiles* above n 165, [29]-[32] (Merkel J).

175. For example, in circumstances in which the relationship between the plaintiff and defendant imposes a non-delegable duty, such as in employer-employee, principal — employees of independent contractors and hospital — patient type relationships. Baron, above n 10, 16; Hancock and Baron, above n 10, 83; Feldthusen, above n 1, 47.

176. *Perre*, above n 8, [147] (McHugh J). Warne, above n 1, 6.

177. Hancock and Baron, above n 10, 83; Clayton Utz, above n 1, 16.12.

178. Hancock and Baron, above n 10, 83; Butler, above n 20, [43]; Clayton Utz, above n 1, 16.12.

179. See *Johnson Tiles* above n 165, Merkel J who indicated that the class of potential claimants was so broad that the claim in issue could not be excluded. Hancock and Baron, above n 10, 83, 84.

180. Ie. The operation of the indeterminacy and autonomy of the individual policy limitations.

181. Hancock and Baron, above n 10, 84.

182. Hancock and Baron, above n 10, 84.

183. Hancock and Baron, above n 10, 84.