Introduction

"Relational economic loss" describes the loss flowing from negligent damage to the property of a third party, where the plaintiff is in a contractual or other relationship with that third party. [1] At first glance, the notable similarity between Canadian and Australian jurisprudence on relational economic loss is the lack of cohesiveness and certainty within its appellate courts. In *Caltex*[2] and *Norsk*[3] – both landmark cases delineating the principles in this area of law – a considerable diversity of reasoning within the majority judgements of both the High Court of Australia and the Supreme Court of Canada was evident. In examining the more recent judgements of *Perre*[4] and *Bow Valley*[5], this paper compares the judicial evolution of both countries in an area described as "the cutting edge of the law of torts."[6] It is suggested that *Perre* has not satisfactorily remedied the state of Australian law governing pure economic loss. Conversely, while the legal underpinnings of *Bow Valley* are contentious, on balance, it is argued that its uniform methodological approach promotes a far greater level of clarity and consistency in the law.

Legal Background

Traditionally, there has been no action in tort for purely economic loss – that is, loss not consequent upon personal injury or property damage to the plaintiff. This is known as the exclusionary rule, which before the landmark House of Lords decision in *Hedley Byrne* was subject only to very limited exceptions.[7] The exclusionary rule addresses the potential for economic loss claims to expose defendants to 'liability in an indeterminate amount for an indeterminate time to an indeterminate class.'[8] The need to avoid such "indeterminacy" remains a fundamental tenet of all decisions concerning relational economic loss. The rule also has an economic rationale, in that the plaintiff's loss in this type of case is generally offset by another party's gain.[9] Since this does not constitute a net economic loss to society, it is inefficient to provide damages for the losers without somehow taxing the gainers.[10]

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[1] See Bruce Feldthusen, "Liability for Pure Economic Loss: Yes, But Why?" (1999) 28 Western Australian Law Review 98
[2] Caltex Oil (Australia) Pty Ltd v The Dredge 'Willemstad' (1976) 11 ALR 227
[3] Canadian National Railway v Norsk Pacific Steamship Co [1992] 1 SCR 1021
[4] Perre v Apand Pty Ltd (1999) 73 ALJR 1190
[5] Bow Valley Husky (1997) 153 DLR (4th) 385
[6] Donald Gifford, "The New Wave: Collective Actions & Responsibilities," (2003) 5 University of Maryland Law Review 6
[7] see e.g Morrison Steamship Co v Greystoke Castle (Cargo Owners) [1947 AC 265
[8] Ultramares Corporation v Touche (1931) 255 NY 170 at 444 per Cardozo CJ
[9] e.g In *Caltex*, the loss sustained as a result of damage to the pipe subsequently benefited transport companies.
[10] For further discussion see Bruce Feldthusen and John Palmer, "The Economics of Relational Economic Loss: Another Look at *Norsk"* (1996) 20 University of Western Ontario Law Review 45

The Australian Approach

Caltex was the first case in which Australian courts found an exception to the exclusionary rule in a claim for relational economic loss. The decision has been subject to heavy criticism in other jurisdictions for its apparent failure to provide any clear *ratio* for determining when such a duty of care will be applicable.[11] Despite this lack of unanimity, subsequent Australian cases have provided little clarification as to the scope of potential liability for relational economic loss. The High Court in *Perre* was unanimous in finding in favour of the plaintiff, however the complexity of the case was heightened considerably by all seven justices handing down separate judgements. Commentators have strongly denounced this lack of uniformity, given that *Perre* was seen by many as an opportunity to clarify the uncertain state of the law. As Dietrich opined, "there is much to be said for… an emphasis within the judiciary on handing down concurring… judgements, at least in those cases in which all are agreed in the outcome."[12] McHugh J in *Perre* recognised the practical difficulties associated with the decision, stating "the effectiveness of the law as a social instrument is seriously diminished when legal practitioners believe they cannot confidently advise what the law is or how it applies to… diverse situations of everyday life.[13] However, he qualified this statement by acknowledging "the certainty achieved by *stare decisis* should not always trump the need for desirable change in the law."[14] With due respect to McHugh J's statements, the desirable state of the law was subject to extensive debate in *Caltex*. That case was thus the appropriate vehicle for methodological diversity. Conversely, most commentators – even members of the judiciary itself [15]– were in agreement that by the time of *Perre* the law was in desperate need of clarification.

Although there are clear divisions in the High Court as to the methodological questions to be asked in cases of relational economic loss, it has been suggested that this simply 'disguise[s] the broad similarity of reasoning underlying the judgments in *Perre*.'[16] Indeed, it is possible to conclude that most or all members of the High Court consider:

1. The test of foreseeability alone to be insufficient to establish a duty of care.
2. *Caltex* to be correctly decided and thus the starting point for the duty of care issue in relational economic loss.

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[11] see Candlewood Navigation Corp Ltd v Mitsui OSK Lines Ltd: The Mineral Transporter [1986] AC 1. 22-5.
[12] Joachim Dietrich, "Liability in Negligence for pure economic loss: The latest Chapter" (2000) 7 JCU Law Review 92
[13] Perre v Apand Pty Ltd (1999) 73 ALJR 1190 at 88 per McHugh J
[14] Perre v Apand Pty Ltd (1999) 73 ALJR 1190 at 92 per McHugh J
[15] Perre v Apand Pty Ltd (1999) 73 ALJR 1190 at 667 per Kirby J
[16] Joachim Dietrich, "Liability in Negligence for pure economic loss: The latest Chapter" (2000) 7 JCU Law Review 90

3. There must be an acknowledgement of policy considerations such as indeterminate liability and unreasonable infringements on the autonomy of the defendant.
4. Other factors – such as the vulnerability of the plaintiffs, commercial or physical propinquity and the defendant's identification of the plaintiff either individually or as a member of an ascertainable class – to be relevant considerations in determining whether a duty is owed.[17]
Despite the identification of these common factors, it appears the main shortcoming of the *Perre* judgement is the inability of its justices to draw them into a methodological approach to be applied in later cases. This was highlighted scathingly in *Metal Roofing*[18], where Bailey J described the present state of the law as "disgraceful."[19] Speaking of *Perre*, he criticised the lack of basic guiding principles to assist with resolution and predicted an area fraught with uncertainty for future litigants.

The Canadian approach

In contrasting the Australian position, Feldthusen asserted (prior to *Bow Valley*) that 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."[20] He describes the search for a unifying rule that can be applied to all cases concerning pure economic loss as a "futile enterprise".[21] It was this view that led him to categorise the different types of economic loss and formulate his own methodology in recognising a duty of care. The Supreme Court of Canada later adopted this approach[22], now recognising five distinct categories of pure economic loss – of which relational economic loss is one.

In *Norsk*, McLachlin J[23] flexibly applied the two-step test of liability formulated by Lord Wilberforce in *Anns*.[24] She referred to the first stage enquiry in terms of "doctrinal considerations", with policy or "pragmatic considerations"[25] being taken into account at the second stage. Although nominally, this involves one less step of analysis than propounded by Kirby J in *Perre*, in substance it is not dissimilar as the "first step requires a consideration of two factors – namely the foreseeability of the plaintiff and… a sufficiently proximate relationship

[17] this is a summary of the factors outlined in supra 12 p 90-91
[18] Metal Roofing & Cladding Pty Ltd v Eire Pty Ltd (1999) 9 NTLR 82
[19] Metal Roofing & Cladding Pty Ltd v Eire Pty Ltd (1999) 9 NTLR 82 at 24 per Bailey J
[20] Bruce Feldthusen, "Liability for Pure Economic Loss: Yes, But Why?" (1999) 28 Western Australian Law Review 85
[21] Bruce Feldthusen, "Liability for Pure Economic Loss: Yes, But Why?" (1999) 28 Western Australian Law Review 98
[22] see D'Amato v Badger [1996] 2 SCR 1071, 1082-1083.
[23] with L'Heureux-Dube and Cory JJ concurring.
[24] Anns v London Borough of Merton [1977] 2 All ER 492 at 498 per Lord Wilberforce.
[25] Canadian National Railway v Norsk Pacific Steamship Co [1992] 1 SCR 1021 at 246 per McLachlin J

between the defendant and plaintiff."[26] Put simply, McLachlin J imposed liability in *Norsk* because the parties[27] were in a 'joint venture' with one another. Her judgement was criticised primarily because this made the potential scope of recovery dangerously wide. *Bow Valley* addressed this issue by applying a very restrictive view of what constituted a 'joint venture' – namely that it must be a contractual relationship.[28] In ruling against recovery for the plaintiffs, the judgment indicates that Canadian law regarding relational economic loss now resembles the restrictive English approach.[29]

Regardless of how the merits of Canadian jurisprudence are viewed, the unanimity reached by the Supreme Court in *Bow Valley* at least provides clear guidelines as to how economic loss should be approached. Significantly, *Bow Valley* was achieved only five years after *Norsk* revealed considerable differences in approach within the court. *Bow Valley* demonstrates, in contrast to the divergent judgments of *Perre*, that it is possible to adopt a generally applicable methodology governing all negligence cases; whilst at the same time recognising that there may be different categories of pure economic loss for which different factors may be particularly relevant.[30] Feldthusen attributes the development of the law in *Bow Valley* to the judicial methodology of *Norsk*, which precipitated a "frank and detailed exchange between McLachlin and La Forest JJ about the case for and against liability, quite apart from practical concerns."[31]

Conclusion

The Canadian methodological approach provides legal practitioners and lower courts with far more guidance and direction than the current position of the High Court. Given the high cost of litigation, the lack of certainty in relational economic loss has made Australian courts virtually inaccessible. Although great respect must be given to the autonomy of individual judgements, when this undermines the very function of the court itself, a compromise must be made. While the doctrine of *stare decisis* remains central to our legal system, the High Court has a duty not only to decide the case at hand, but also to provide guidance for subsequent claims. As Dietrich remarks - "if the highest appellate court does not provide such guidance, where should it come from?"[32]

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[26] Joachim Dietrich, "Liability in Negligence for pure economic loss: The latest Chapter" (2000) 7 JCU Law Review 93
[27] That is, the plaintiff and the third party actually suffering the property damage
[28] These cases are often referred to as "contractual relational economic loss" cases.
[29] In Murphy v Brentwood District Council [1991] AC 398, the House of Lords indirectly confirmed that, if faced with a claim for economic loss consequent on damage to the property of a third party, it would apply the exclusionary rule precluding recovery.
[30] See Joachim Dietrich, "Liability in Negligence for pure economic loss: The latest Chapter" (2000) 7 JCU Law Review 94
[31] Bruce Feldthusen, "Pure Economic Loss in the High Court of Australia" (2000) 8(1) *Tort Law Review* 33-52
[32] Joachim Dietrich, "Liability in Negligence: The Latest Chapter" (2000) 7 JCU Law Review 94

the *Bow Valley* case differed from other relational loss cases in that it was based on a breach of the manufacturers duty to warn rather than direct damage to property.

Canadian courts have frequently applied a flexible analysis of this test[32] in determining whether to extend a duty of care in a given case.

[32] originally adopted in *Kamloops*

The recent case of Bow Valley (contractual relational economic loss) has seen Canada refine its methodological approach to ascertaining the existence of a duty of care in relational economic loss situations. In contrast, the separate judgements of Perre have confused this area of law in the High Court. While this methodological diversity may have been appropriate in Caltex – the first case in Australia to consider relational economic loss – the position needed to be clarified in Perre. This was achieved in Bow Valley and, consequently, the current position in Canada regarding relational economic loss is preferable. While it is more restrictive than the Australian position, it provides legal practitioners and lower courts with guidance and direction. Given the high cost of litigation, the current Australian position has made the courts virtually inaccessible. While respecting the autonomy of individual judges, as Dietrich persuasively remarked, "if the highest appellate court does not provide such guidance, where should it come from?"

* The New Wave: Collective Actions & Responsibilities

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