

---

2-15-2011

## What the United States Taught the Commonwealth About Pure Economic Loss: Time to Repay the Favor

Bruce Feldthusen

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/plr>



Part of the [Comparative and Foreign Law Commons](#), [International Law Commons](#), and the [Torts Commons](#)

---

### Recommended Citation

Bruce Feldthusen *What the United States Taught the Commonwealth About Pure Economic Loss: Time to Repay the Favor*, 38 Pepp. L. Rev. Iss. 2 (2011)

Available at: <https://digitalcommons.pepperdine.edu/plr/vol38/iss2/6>

This Symposium is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized editor of Pepperdine Digital Commons. For more information, please contact [Katrina.Gallardo@pepperdine.edu](mailto:Katrina.Gallardo@pepperdine.edu), [anna.speth@pepperdine.edu](mailto:anna.speth@pepperdine.edu), [linhgavin.do@pepperdine.edu](mailto:linhgavin.do@pepperdine.edu).

# What the United States Taught the Commonwealth About Pure Economic Loss: Time to Repay the Favor

Bruce Feldthusen\*

This paper deals with a discussion of the comparative treatment of the recovery of pure economic loss in negligence, a topic that has dominated my scholarship for more than thirty years.<sup>1</sup> My purpose is more to discuss how my research in this area has been informed by comparative study than to articulate the relevant rules and principles themselves. Some of the points of substance I will make will be contentious, and I will leave those debates to other publications and other times. I hope this makes today's topic more interesting.

Many American tort lawyers would not recognize “economic loss” as an organizing principle for tort law; or if they did, they might not restrict the topic to negligence law. In what I will loosely call the Commonwealth—England, Canada, Australia, and New Zealand—most lawyers would understand this subset of negligence law to include cases of the following types:<sup>2</sup>

1. Negligent misrepresentation brought, for example, where a non-privity third party sues for losses suffered from investments made in reliance on negligently prepared corporate financial statements.
2. Negligent performance of professional services where perhaps a frustrated beneficiary sues the solicitor who negligently drafted an impugned will.<sup>3</sup>
3. Relational economic loss brought by a plaintiff who suffers

---

\* Dean and Professor, University of Ottawa Faculty of Law.

1. See generally BRUCE FELDTUSEN, *ECONOMIC NEGLIGENCE* (Thomson, 5th ed. 2008) (chronicling the common law principles which govern the recovery of pure economic loss since its first edition published in 1984).

2. *Winnipeg Condo. Corp. No. 36 v. Bird Constr. Co.*, [1995] 1 S.C.R. 85, 96–97 (Can.).

3. This is actually a more robust category in the United States. If one ignores the controversial line of authority allowing frustrated beneficiaries to recover from negligent will drafting solicitors, there is little Commonwealth authority of this type. This category is not discussed below.

economic loss because of some relationship enjoyed, usually contractual, with a victim of physical damage. For example, a business suffers when a railway bridge on which it depends is damaged by a negligently operated ship.

4. Suits brought to recover the cost of repairing or replacing a defective product or structure under a theory of negligence rather than in contract or statutory sales law.

5. Claims brought against statutory public authorities for the negligent exercise of or failure to exercise statutory powers or duties. For example, a claim brought against a municipality for failing to detect latent defects in housing construction during municipal inspections.<sup>4</sup>

My work in this area and the presentation today depends on two basic ideas. While there are certain similarities between any one of these five types and one or more of the others, it is the differences between them that are most significant. Essentially, there exist five different variations of the negligence action within the category we call "economic loss." This is well-appreciated in the United States but less so in the Commonwealth.

Despite these significant differences, each of the five pure economic loss claims is substantially distinct from claims for physical harm, whether personal injury or property damage. This makes the category of "pure economic loss" a meaningful and important category of negligence law, distinct from standard accident law.

My story begins in 1976, the year I graduated from law school in Canada. This was also the year that I began my graduate studies in law at the University of Michigan. The standard line, as we hear it in Canada, is that no one needs a graduate degree to obtain a teaching position at a good law school in the United States. A J.D. from any one of the top ten law schools in the United States, possibly coupled with a good clerkship or a few years government service, will suffice. LL.M.s are for foreigners and Americans from lesser schools needing to upgrade their credentials.

---

4. The core issue in these cases is usually the breadth of immunity for discretionary decisions of a statutory public authority (expressed in both proximity and immunity language), and little, at least in theory, turns on the economic nature of the loss. See, e.g., *Kamloop v. Neilson*, [1984] 2 S.C.R. 2, 2-3 (Can.) (discussing the duty of care owed by city inspectors to "persons whose relationship was sufficiently close that they ought to have been reasonably within its [the city's] contemplation as likely to be injured by a breach of duty"). In the Commonwealth, the leading defective structure cases have often involved suits against negligent municipal building inspectors, where the negligence in the first instance was economic loss caused by the builder. See, e.g., *Anns v. Merton London Borough Council*, [1978] A.C. 728, 733 (H.L.) (appeal taken from Eng.) (where the plaintiff claimed that the Merton London Borough Council failed to ensure the proper construction of foundations either by failing to make an inspection at all or by overlooking the foundation problems during inspection); *Murphy v. Brentwood Dist. Council*, [1991] 1 A.C. 398 (H.L.) (damages claimed by plaintiffs were alleged to be the result of the municipality approving plans for a house with a defective foundation); *Kamloops*, 2 S.C.R. at 2 (also addressing the liability of building inspector). The arguments for a duty of care for both plaintiffs tended to be merged, although there is in fact no reason why, for example, the municipality might owe a duty but the builder might not. This category is not discussed below.

Moreover, the idea of doing graduate work in law in another country is seldom entertained by American law graduates.

Canadians don't quite fit that model. If one wants a teaching position in a Canadian law school, an LL.M is almost required. Increasingly, one requires a doctorate. In 1976, this effectively meant a prospective Canadian law professor needed a graduate degree from either England or the United States. Graduate education was little developed in Canada. Traditionally, the preferred route had been England, more or less for colonial certification, similar to the reasons why small state law school graduates might go to an Ivy League school in the United States. But the clever Americans were making inroads with generous scholarships—that was a big factor in my going to Michigan. A few Canadians, and Allen Linden was one of the first, had the foresight to see that the United States was the stage on which the greatest changes in law and legal education of the twentieth century would take place.

Many of us knew one more thing about graduate legal education in a foreign country, whether that be England, the United States, or elsewhere. We believed there was inherent value in learning how a different country with a different political and legal history and culture dealt with the same issues we were dealing with in Canada. We knew that difference was instructive—not necessarily better, but always instructive.

The study of difference is still highly valued in Canadian law schools. I learned many lessons in difference at Michigan, most more profound and interesting than my topic today. In contrast, Americans have often been content with their excellent domestic systems—difference has not seduced them. In my opinion, that is a shame. I commend you for inviting so many foreigners to participate in this conference today.

Back to pure economic loss—essentially a financial loss that is not causally connected to personal injury or property damage suffered by the same plaintiff.<sup>5</sup> This was, or at least I thought it was, the hottest topic in Canadian tort law in 1976. Imagine my disappointment when I arrived in Michigan. I had been admitted, funded, and supplied with a panel of three advisors based on my proposal to study “pure economic loss.” The first thing I discovered is that none of my advisors had a clue what I was proposing to study. None of them had ever heard of “pure economic loss,” let alone as an organizing principle of negligence law.<sup>6</sup> Perhaps many of you feel the same way today. Let me try to explain why that might be so and

---

5. Robert J. Rhee, *A Production Theory of Pure Economic Loss*, 104 NW. U. L. REV. 49, 49 (2010).

6. My adviser was Professor Luke K. Cooperrider, assisted by Professors Marcus Plant and Donald Cohen.

then to explain why I learned more about this topic than I ever would have dreamed by studying U.S. economic loss law at Michigan.

Pure economic loss became the hot Canadian tort topic that I thought it was largely as a result of a famous 1963 decision of the English House of Lords in a case called *Hedley Byrne v. Heller*.<sup>7</sup> There, for the first time in the British Commonwealth, a cause of action for *negligent* misrepresentation leading to pure financial loss was recognized. It was here that pure economic loss as an organizing category was born. Thirteen years later my Canadian professors, or at least those who had heard of the decision, were still stumbling around trying to make sense of it. The pace of legal change, and for better or worse the pace and volume of case law digestion, has changed a great deal since 1976. Back then it took a few decades for *Hedley Byrne* to become recognized for what it eventually was, second only to *Donoghue v. Stevenson*,<sup>8</sup> the most influential torts decision ever in the British Commonwealth.<sup>9</sup>

How, you may wonder, does an English decision figure so prominently in a story about a Canadian going to graduate school in the United States? At the time I attended law school in Canada, English decisions were treated as if they were decisions of the Canadian courts. Not *de jure*, but *de facto*. Nowhere more than in the legal system had Canada remained a colony of Mother England more than 100 years after formal independence. Indeed, several of my professors and many judges treated English decisions as if they were superior to those of the Canadian courts.<sup>10</sup> Our law schools were populated by professors who were trained in English law, if not English nationals themselves. These same professors would warn us against even referring to decisions from the United States. Allan Linden was truly a pioneer. This all seems so foolish today.

The law of negligent misrepresentation as established in *Hedley Byrne* has been enormously influential to both tort and contract law in the Commonwealth, including Canada. But the decision had a much broader impact than just within the confines of misrepresentation itself. In 1967, the great Patrick Atiyah published an article in England in which he observed that “[u]ntil . . . *Hedley Byrne* . . . it was reasonably clear that the general rule was that liability in the tort of negligence did not extend to purely economic loss.”<sup>11</sup>

Atiyah went on to question whether *Hedley Byrne* had effectively overturned a general rule precluding recovery for pure economic loss in

---

7. [1964] A.C. 465 (H.L.).

8. [1932] A.C. 562 (H.L.) (appeal taken from Scot.).

9. As identified in *Anns*, which itself is a decision of great importance in British tort law. See *Anns*, [1978] A.C. at 751–52.

10. See Bruce Feldthusen, *City of Kamloops v. Nielsen: A Comment on the Supreme Court's Modest Clarification of Colonial Tort Law*, 30 MCGILL L.J. 539, 556–58 (1985).

11. P.S. Atiyah, *Negligence and Economic Loss*, 83 LAW .Q. REV. 248, 248 (1967).

negligence that had existed for centuries.<sup>12</sup>

In fact, there never had been any such general rule.<sup>13</sup> For the most part, few had ever tried to recover economic loss in negligence. They turned to contract instead.<sup>14</sup> There was then, and is today, a clearly-established exclusionary rule for what we call relational economic loss—economic loss suffered because of some financial relationship, usually contractual, that exists between the plaintiff and the victim of physical damage.<sup>15</sup> For example, if a tortfeasor negligently severs an electricity line belonging to a utility company, a plaintiff may not recover for financial losses suffered while it is deprived of power. The same exclusionary rule exists in the United States.<sup>16</sup> It is usually described as the rule that precludes recovery for negligent interference with contractual relations.<sup>17</sup> I am sure Patrick Atiyah was well aware of this, and well aware that *Hedley Byrne* had little or nothing to do with the exclusionary rule for relational loss.<sup>18</sup> Nevertheless, his article was seminal in developing the recognition of pure economic loss as an organizing category of Commonwealth negligence law.

Of course, that was my problem back in Ann Arbor in 1976. In the United States, pure economic loss had not yet been recognized as an organizing category of negligence law. Indeed, many American tort lawyers would still not recognize it as such today. My supervisors simply did not recognize the term. It would take more discussion to determine that they were quite familiar with precisely the types of cases I wished to study.

I began by directing their attention to *Hedley Byrne*. They had never heard of the case, but of course my supervisors were familiar with the law of misrepresentation, including negligent misrepresentation. Perhaps the easiest way to identify that body of case law to this audience is by reference to section 552 of the *Restatement (Second) of Torts*.<sup>19</sup> Interestingly, the action in negligence for misrepresentation was coming into its own in the

12. *Id.* at 256–61.

13. *See id.* at 265–69 (explaining that when one considers case law regarding claims for pecuniary loss brought in tort, the results are capricious).

14. *See* FELDTUSEN, *supra* note 1, at 27.

15. *See* Ronen Perry, *The Role of Retributive Justice in the Common Law of Torts: A Descriptive Theory*, 73 TENN. L. REV. 177, 193 (2006).

16. A firm exclusionary rule precluding almost all recovery for relational economic loss has existed in the United States since the mid-nineteenth century. *See* *Anthony v. Slaid*, 52 Mass. 290 (1846).

17. *See* Peter Benson, *The Problem with Pure Economic Loss*, 60 S.C. L. REV. 823, 824 n.2 (2009).

18. The argument that it had overturned the exclusionary rule for relational loss was made and rejected a year earlier in *Weller & Co. v. Foot & Mouth Disease Research Inst.*, [1966] 1 Q.B. 569 (Eng.).

19. RESTATEMENT (SECOND) OF TORTS § 552 (1977).

United States at about the same time it was recognized in *Hedley Byrne*. There were subtle differences, however, that would prove significant. One might describe the action in the United States as negligent *misrepresentation*, negligence being but one manner of finding liability for misrepresentation.<sup>20</sup> In contrast, the Commonwealth's approach was better described as *negligent* misrepresentation, an expansion of the parameters of the basic personal injury negligence action. The significance of the difference between negligence in word and deed, although prominent in *Hedley Byrne* itself, has attracted relatively little attention in the Commonwealth. Instead, what came to be regarded as significant about the misrepresentation action in the Commonwealth was that it extended liability in negligence to a heretofore unrecognized category of actionable damage—pure economic loss.<sup>21</sup>

I probed further by asking my supervisors if they were familiar with the exclusionary rule for relational loss. They did recognize the rule that precludes recovery for negligent interference with contractual relations, although they would not have described it as a prominent part of mainstream tort law. This rule dates back until at least 1846 in the United States<sup>22</sup> and 1875 in England<sup>23</sup> and is applied almost without exception in those two countries to preclude recovery for economic loss consequential upon physical damage to a third party.<sup>24</sup> Not coincidentally, as I shall explain below, this exclusionary rule is not recognized in Australia<sup>25</sup> and is subject to several exceptions in Canada.<sup>26</sup> In the United States, this is usually described as the rule that precludes recovery for negligent interference with contractual relations, the term “economic loss” figuring little if at all until much later.<sup>27</sup>

Kindly wishing to ease my discomfort, Professor Marcus Plant then intervened to assure me that he was familiar with an emerging term, “economic loss,” in quite another context—the product liability field. This is a somewhat different type of pure economic loss that refers to a claim to recover the cost of repairing or replacing a product or structure that suffers

---

20. The others being deceit and strict liability for breach of warranty.

21. See *supra* note 7 and accompanying text.

22. See *Anthony v. Slaid*, 52 Mass. 290 (1846).

23. See *Cattle v. Stockton Waterworks Co.*, [1875] 10 L.R.Q.B. 453, 457; *Simpson & Co. v. Thompson*, [1877] 3 App. Cas. 279, 289–290 (H.L.) (appeal taken from Scot.).

24. See FELDTHUSEN, *supra* note 1 at 207, for a more detailed discussion of when exceptions to this generally strict rule are applied.

25. See *Perre v Apand Pty Ltd.* (1999) 198 CLR 180, 193, 219.

26. See *Bow Valley Husky (Bermuda) Ltd. v. St. John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210, para. 46 (Can.).

27. The leading authority is *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927), *superseded by statute*, *Trans-Alaska Pipeline Authorization Act*, Pub. L. No. 93-153, § 202, 87 Stat. 584 (1973) (codified at 43 U.S.C. § 1651 (2009)).

from an internal manufacturing or construction defect.<sup>28</sup> The general, although not universal, rule in the United States is that such claims are governed exclusively by statutory sales law and precluded in tort, whether the action is brought in negligence, strict tort, or tortious warranty.<sup>29</sup> The rule in England is now essentially the same.<sup>30</sup> Again, Australia<sup>31</sup> and Canada<sup>32</sup> have more liberal rules of recovery.

At this point in the developing effort to solve the mystery of pure economic loss in the United States, one of my supervisors asked the question that I should have asked myself, at least after reading the Atiyah article.<sup>33</sup> He asked whether my thesis could possibly be that there existed some useful relationship between the study of the exclusionary rule for relational loss and the exclusionary rule in the product liability context. Piling on, as a group of law professors can do when dealing with a poor graduate student, another supervisor was more blunt, asking: What on earth did the law of negligent misrepresentation have to do with either exclusionary rule? How, for example, would a study of an accountant's possible liability to a corporate investor who had relied on negligently prepared corporate accounts enlighten one about whether a restaurant on an island could recover its business losses from a ship that had damaged the only bridge that allowed customers to access the island?

As a Canadian of that era, the answer was obvious to me—these cases all involved claims for pure economic loss. Patrick Atiyah suggested they should be grouped together.<sup>34</sup> It was equally obvious to me that this

28. Economic loss in product liability is defined as financial loss which is not a consequence of physical damage to the plaintiff's person or property. FELDTUSEN, *supra* note 1, at 174 n.24.

29. American courts have long precluded recovery in such a claim, and this rule gained traction when the United States Supreme Court approved of it in the maritime case *East River Steamship Corp. v. Transamerican Delaval*, 476 U.S. 858 (1986).

30. This rule came into focus in England after *Murphy v. Brentwood Dist. Council*, [1991] 1 A.C. 398 (H.L.). Indeed, prior to the issue being raised in *Murphy*, there were few Commonwealth cases that discussed recovery for cost of repairing or replacing the defective product or structure itself. See FELDTUSEN, *supra* note 1, at 181–83 (discussing the relevant case law and the development of this rule).

31. The court in *Woolcock St. Invs. Pty v CTG Pty Ltd.* (2004) 216 CLR 515, seemed to adopt the same result as the prevailing English or American position except with a methodology that suggested it was not establishing a precedent, but rather rendering a fact-specific decision. Australian courts also permit a homeowner to sue for defects to residential premises, or more accurately, one court has permitted a *particular* homeowner to sue in a particular case. See *Bryan v Maloney* (1995) 182 CLR 609.

32. See *Winnipeg Condo. Corp. No. 36 v. Bird Constr. Co.*, [1995] 1 S.C.R. 85, 97 (Can.) (going at least as far as to allow recovery in negligence for dangerous defects—a rule also recognized in a few American states).

33. Atiyah, *supra* note 11.

34. See *id.* at 275–76.

explanation was not going to convince a single member of my graduate panel, at least not without a great deal more work, and so ended my dreams of a year of Wolverine games and rock concerts at Cobo Hall. It was back to the library.

You will be relieved to know that I do not plan to reveal below the details of the law governing these and other types of pure economic loss cases across the English speaking world. I hope you will buy my book instead. I do, however, have some observations, questions, and tentative conclusions to share with you.

The first question is: Why did the Commonwealth courts and writers adopt pure economic loss in negligence as an organizing category? What made them think (even if, as in the case of Atiyah, it was a thought they raised and then immediately rejected) that relational loss jurisprudence could be enlightened by misrepresentation law and vice versa? In contrast, why did the Americans, as exemplified by my graduate committee, find the grouping of these different lines of authority to be incoherent?

It is tempting to attribute credit (or is it blame?) to Atiyah and perhaps to counsel in *Weller*<sup>35</sup> who seem to have been the first to employ this approach, even if their attempt was soundly rejected. Perhaps it was the catalytic power of the decision in *Hedley Byrne*<sup>36</sup> which blew up the dam of doctrinal rigidity in Commonwealth private law? Perhaps it was the lingering formalism of the previous century—if two cases both had the words “economic loss” in their holdings, they had to be meaningfully linked. These were the days when the instrumentalism that dominates American tort law was almost entirely foreign to Commonwealth law. To be frank, I really have no idea why the law developed as it did in the Commonwealth.

The American position is easier to understand. In my opinion, there is virtually no useful cross-fertilization between the law of negligent misrepresentation and the rule that precludes recovery for relational loss or the law that precludes recovery for damage to a product or structure itself. The law of negligent misrepresentation has much to draw upon from the general law of misrepresentation and from the law of contract. It is typically a commercial tort. The product liability rule is based on respect for contractual allocations of risk primarily in commercial law. Finally, the law of relational economic loss is about drawing bright lines to limit the otherwise indeterminate consequences of ordinary, physical-damage negligence law. My supervisors’ intuition that I was misguided in thinking that they were meaningfully related to one another was correct.<sup>37</sup>

---

35. [1966] 1 Q.B. 569 (Eng.).

36. [1964] A.C. 465 (H.L.).

37. Obviously, there comes a higher level of abstraction where similarities exist—there are legal wrongs in the private law sphere; there are insurance considerations; there are deterrence considerations; there are risk allocation considerations; et cetera. By the time it comes to considering litigating of such a claim, or allocating the risk in advance of such a claim, my view is

The next question is: Did the generalizing approach to pure economic loss produce any significant differences between law in the United States on the one hand and law in the Commonwealth on the other? I think it has made a tremendous difference. For more than twenty-five years after *Hedley Byrne* was decided in Canada, and perhaps until this day in Australia, courts have rambled meaninglessly from one line of authority to another to absolutely no useful end. Two hundred years of relational loss jurisprudence produced a firm exclusionary rule that everyone in commerce recognized and adapted to without difficulty. Muttering *Hedley Byrne* like a magic chant, Commonwealth lawyers and judges abandoned the exclusionary rule or replaced it with unpredictable, unprincipled ad hoc decisions.<sup>38</sup>

The chaos was impossible to contain, and it next spread to defective product/structure law. If there ever was a case for applying contract law over tort law, it would be to deal with questions of whether plaintiffs got what they bargained for from the person with whom they bargained. Tort law has a limited role, if any, to play in this area. Nevertheless, potential negligence<sup>39</sup> liability for non-accident caused damages, such as the cost of repairing or replacing defective products or structures, began to develop in the Commonwealth at about the same time that Atiyah published his article. Again, these came forward as “economic loss” cases, and neither misrepresentation law nor relational loss law had anything useful to contribute to this debate. Nevertheless, the spirit of *Hedley Byrne*, and the general right to recover economic loss in negligence that it supposedly had created, managed to destroy well-established and well-founded principles of contract law as applied in the defective product and structure areas.<sup>40</sup>

---

that these similarities pale in comparison to the functional benefits of concentrating more on the differences within the categories.

38. There are many Canadian examples, which finally culminated in the decision in *Canadian Nat'l Ry. v Norsk Pac. S.S. Co.*, [1992] 1 S.C.R. 1021 (Can.). It was not until 1997, in *Bow Valley Husky (Bermuda) Ltd. v. St. John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210 (Can.), that the Supreme Court of Canada eventually reestablished (almost) the exclusionary rule for relational loss, which it ought not to have abandoned in the first place. The best example of ad hoc decision-making and the resulting chaos, in my opinion, is the Australian decision in *Perre v Apand Pty Ltd.* (1999) 198 CLR 180. See also Bruce Feldthusen, *Pure Economic Loss in the High Court of Australia: Reinventing the Square Wheel?*, 8 TORT L. REV. 33, 52 (2000) (explaining that in *Perre v Apand*, the High Court of Australia “encourage[ed] an expensive and uncertain case-by-case approach to economic loss generally and to relational loss particularly”).

39. In the United States, the debate involved not only negligence, but also strict tort and tortious warranty.

40. By coincidence, a number of the leading decisions involved suits against municipal authorities for negligent inspection or failure to inspect defective structures. See *supra* note 4 and accompanying text. As noted previously, the courts erroneously assumed that the scope of the public authority’s liability had to be identical to that of the remote builder’s. See *supra* note 4 and

It took years for first England<sup>41</sup> and then Canada<sup>42</sup> to correct this jumble and to return, for the most part, to sensibly recognizing misrepresentation, relational loss, and defective product liability as three quite distinct areas of study, as had always been the case in the United States.<sup>43</sup> Australia would eventually determine that builders were not liable to non-privity parties for defective structures.<sup>44</sup> However, the High Court still groups all economic loss claims together and tends to resolve them with high level abstractions such as “vulnerability” on a case by case basis.<sup>45</sup> This leads to an over-investment of judicial and litigation resources in what ought to be a simple question of commercial law. It destroys certainty. Why?

If you accept what I have said so far, the final question is whether I have simply proven to you that American lawyers are right when they decline to do graduate work in the Commonwealth. Not so fast. It turns out that the distinction between economic loss and physical damage is indeed significant, and it also turns out that the time may just be right for tort lawyers in the United States to start paying attention to that fundamental distinction.

Pure economic loss is meaningfully different from personal injury and property damage. Financial loss is morally different from personal injury and death. A human being is not a thing. It is no coincidence that both law and philosophy recognize *rights* in person and property but only economic *interests*. Many pure economic losses consist of transfers of wealth, not social losses. Moreover, many pure economic losses can be and have been allocated by contract in circumstances where private ordering is clearly superior to tort liability. Economic loss claims often, although not always, raise the potential for indeterminate liability.

Most of these variables apply, albeit with different emphasis, to each of the types of economic loss I have been discussing: misrepresentation, relational loss, and product/structure defect loss. Seldom, or with little

---

accompanying text. This development led to the idea that public authorities might also be liable for a much broader range of liability for economic loss than had previously been permitted. *See, e.g., Anns v. Merton London Borough Council*, [1978] A.C. 728, 751–54 (H.L.) (appeal taken from Eng.); *Kamloops v. Neilson*, [1984] 2 S.C.R. 2, 2–3 (Can.). Eventually England would foreclose such liability entirely in *Murphy*. In Canada, the illusion still exists that one may recover economic loss for the negligent exercise of statutory discretion, although actual decisions to that effect are virtually non-existent.

41. It was not until the 1991 decision in *Murphy* that some order returned.

42. *See Winnipeg Condo. Corp. No. 36 v. Bird Constr. Co.*, [1995] 1 S.C.R. 85, 96–97, 105–06 (Can.) (specifically endorsing the five categories of pure economic loss identified earlier, but adopting the unsupportable position that a builder is liable to a remote purchaser for dangerous defects).

43. Opinions differ, but in support of this being a good thing, I would point to the relative stability that has prevailed in all three of these areas of economic loss law in Canada since the Supreme Court decided to require the plaintiffs to categorize rather than co-mingle their claims.

44. *See Woolcock St. Invs. Pty v CTG Pty Ltd.* (2004) 216 CLR 515, 515.

45. *Id.* at 530–33.

impact, do they apply to personal injury or property damage. Taken together, these factors demonstrate that there is little to be gained in trying to approach pure economic loss negligence cases with the basic rules of physical damage negligence law based on foreseeable harm to a foreseeable plaintiff.

It is true that the fundamental distinction between pure economic loss on the one hand and physical damage on the other is most important in jurisdictions where there is no settled jurisprudence and where the different categories of economic loss are jumbled. As noted above, there is ample evidence from Canada and Australia that when the courts do not grasp these fundamental distinctions, the chances are good that ad hoc decision making will replace reasoned analysis.<sup>46</sup> In contrast, respecting the distinction between economic loss and physical damage has proven important in the United States.<sup>47</sup> The distinction is implicit in the old U.S. interference with contract cases and the misrepresentation authorities. It is explicit and has been most significant in the newer U.S. product liability cases. Indeed, the U.S. product liability cases are among the most impressive of all judicial decisions in explaining the distinctions between economic loss and physical damage.<sup>48</sup>

Now for a surprise ending. Not too long ago the American Law Institute launched an ambitious project to produce the *Restatement Third, Economic Torts and Related Wrongs*. This project was far broader than, but included, the topics covered in this article. The Reporter for the project was Professor Mark Gergen, someone I had never met before the project began. It turned out that he and I shared many of the same views about economic negligence law, and he was kind enough to refer to my work as he formulated his analysis and drafts.

In December 2007, despite having produced a tremendous amount of superb background material and drafts, Professor Gergen resigned as the Reporter for the project. In his letter of resignation sent to the Advisers, Consultants, and Council Members, Professor Gergen said:

At the meeting I presented Council Draft No. 2 covering much of the field of economic negligence. There was strong disagreement

---

46. See *supra* notes 38–45 and accompanying text.

47. See *Seely v. White Motor Co.*, 403 P.2d 145, 147 (1965); see also Sarah Borstel Porter, *Economic Loss in Product Liability: Strict Liability or Uniform Commercial Code?* Spring Motors Distributing, Inc. v. Ford Motor Co., 28 B.C. L. REV. 383, 390-91 (1987) (explaining the important distinction drawn by the California Supreme Court in *Seely* between recovery for personal injury and economic loss). Since *Seely*, most U.S. jurisdictions have accepted this distinction as central. See FELDTTHUSEN, *supra* note 1, at 190.

48. See *infra* note 47 and accompanying text.

voiced at the meeting about the direction taken in the draft. *The draft states the law of economic negligence (and in particular negligent misrepresentation) in terms that emphasize its relation to contract law and that distinguish the law of economic negligence from accident law involving physical harm. The criticism was that the law of economic negligence should be situated within a general tort of negligence. . . .* On these and many other points, stating negligent misrepresentation and economic negligence more generally to emphasize the relation of these bodies of law to contract law illuminates the law and avoids confusion and unnecessary error.<sup>49</sup>

Professor Gergen resigned over a fundamental disagreement as to whether the distinction between economic loss and physical damage was justified, and whether the close relationship between economic loss cases and contract law, in which Professor Gergen believed, actually existed. Having attended some of the American Law Institute meetings, I can tell you that those who saw economic negligence as a wrinkle on the general law of physical damage negligence law believed equally that it is productive to group all negligence cases together and to resolve them with reference to high level principles rather than relatively clear rules that apply in easily identified categories of cases. Of course I believe this is a totally misguided approach.

The irony is that the United States today finds itself facing the very questions with which I began my graduate work in 1976. Is it useful to distinguish meaningfully between economic loss and physical damage? Is it useful to distinguish clearly among different types of economic negligence claims? Whether one sides with Gergen and me, or against us, American tort lawyers and scholars should find the Commonwealth experience with these questions very interesting indeed.

---

49. Letter from Mark P. Gergen, Fondren Chair of Faculty Excellence, University of Texas School of Law to Advisers, Consultants, and Council Members, American Law Institute (Dec. 2007) (on file with the author) (emphasis added).