



## A USELESS APANDAGE: Perre v Apand and pure economic loss

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*“It is not enough to say that this court’s approach, in any development of the ambit of liability, should be cautious and incremental. Of course it should. It is necessary to express the content of the approach which is proper and the criteria that will distinguish (so far as possible) a cautious increment that conforms to legal authority from an incautious one which would take the law beyond its acceptable boundary. That boundary is set, ultimately, by the answer to the question: ought the alleged tortfeasor to be under a legal obligation to observe care for the protection of the plaintiff against the incidence of the risk which has in fact ensued? Inescapably, the answer to that question will reflect “a general public sentiment of moral wrongdoing for which the offender must pay”.<sup>1</sup> But in the hope of affording better guidance, and a higher measure of predictability, than is offered by such a tautologous formula, the courts have developed first rules and categories and more recently approaches and methodologies to yield the law’s response.*

*This appeal affords this court an opportunity to clarify the law. Plainly it is an area of the law which calls out for such treatment. Only a measure of reconceptualisation will provide an enduring foundation for the application of legal principles to this and future cases in the place of the present disorder and confusion.”<sup>2</sup>*

So said Kirby J in *Perre v Apand Pty Ltd*<sup>3</sup> (“Perre”). The legal issues raised by *Perre* offered the High Court an invaluable opportunity to make a lasting contribution to the extension or limitation or “reconceptualisation” of the scope of tort liability in Australia for ‘pure’ economic loss. The novel set of circumstances in *Perre* placed the High Court in a prime position to provide definitive guidance as to the circumstances in which a legal entity negligently causing damage to the property of

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<sup>1</sup> *Jaensch v Coffey* (1984) 155 CLR 549; at 607; per Deane J citing *Donoghue v Stevenson* [1932] AC 562; at 580 per Lord Atkin; cf McHugh, “Neighbourhood, Proximity and Reliance”, in Finn (ed), *Essays on Torts* (1989) 5 at 38; *Pyrenees Shire Council v Day* (1998) 192 CLR 330; at 417.

<sup>2</sup> *Perre v Apand Pty Ltd* (1999)164 ALR 606 at 667-668.

<sup>3</sup> (1999)164 ALR 606.

one party can also be held liable to others who suffer only economic loss as a consequence of the relevant damage. *Perre* provided the High Court with a unique opportunity to revive, or complete the process of rendering ineffectual, the “disorder and confusion” emanating from its earlier foray into this area in *Caltex Oil (Australia) Pty Ltd v The Dredge “Willemstad”*<sup>4</sup> (“*Caltex*”).

The High Court in *Perre* in fact managed to outdo itself. The court’s justices handed down seven judgments<sup>5</sup> with even less cohesiveness than was evident in *Caltex*, and in fact added some clear divergence in the approaches favoured by its members. The diversity of mechanisms or methodology utilised by each member of the High Court to reach the same result begs the question of whether, ultimately, each member of the High Court in *Perre* simply found a degree of “moral wrongdoing” on the part of the respondent, and corresponding loss on the part of the appellant, for which the respondent ought compensate. The difficulty appeared to arise, however, in the utilisation and identification by each member of the court of factors and legal principle which could be called into play to explain his or her decision and provide a foundation for application in future cases. The uncertainty in direction of legal principle has, in turn, impacted upon the ability of lower courts to determine cases involving damage amounting to pure economic loss.<sup>6</sup>

The factors receiving particular attention in *Perre* shall be examined in order to assess the contribution (or lack thereof) each makes to edifying and clarifying the law as it identifies the circumstances which will indicate the availability of a tort remedy for pure economic loss consequent upon damage to third party property.

## **Legal Background**

Tort law has not traditionally provided a remedy for claims of negligently inflicted ‘pure’ economic loss, or loss that is not consequent upon injury to the plaintiff or damage to its property. This refusal to grant relief has been described as the “exclusionary rule”. The development of the law of negligence in Australia, however, has seen courts identifying “exceptions” to the rule in novel situations where relief has been consequently granted. Owing to the judicial approval in Australia afforded to the House of Lords decision in *Hedley Byrne & Co Ltd v Heller*

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<sup>4</sup> (1976) 11 ALR 227.

<sup>5</sup> Albeit Gleeson CJ agreed with the reasons given by Gummow J.

<sup>6</sup> See, for example, the judgment of Gillard J of the Victorian Supreme Court case of *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* [2003] VSC 27 (20 February 2003). This case essentially involved an action to recoup economic loss suffered as a result of the prohibition placed on gas consumption following the Longford explosion.

*& Partners Ltd*,<sup>7</sup> this country has now recognised claims for negligent misstatements and negligent advice. Furthermore, the High Court in *Bryan v Maloney*<sup>8</sup> demonstrated a willingness to impose liability for defective building work, albeit pursuant to a contract between the builder and a third party, which required expenditure on the part of the plaintiff and otherwise resulted in a reduction in the value of the property. A further exception to the exclusionary rule manifested in *Hill (t/a R F Hill & Associates) v Van Erp*,<sup>9</sup> (“*Hill v Van Erp*”) where the High Court awarded damages arising out of negligent legal work involving a third party.

### **Caltex – A Changing Landscape**

The case of *Caltex*, however, was somewhat groundbreaking. There the High Court held that the plaintiff could recover damages for what has been described as “relational economic loss”.<sup>10</sup> This term has been used to describe the circumstances where the relevant loss to the plaintiff flowed from negligent damage to the property of third party, where the plaintiff is in a contractual or other relationship with the third party.

*Caltex* was no doubt the most notable and resonating case on ‘pure’ economic loss resulting from damage to the property of a third party, prior to the High Court revisiting the topic in *Perre*. The case of *Caltex* concerned an underwater pipeline owned by a third party, AOR, which carried petroleum products from AOR’s refinery to Caltex’s oil terminal. The pipeline was broken by the defendant’s dredge while it was deepening a shipping channel. The operators of the dredge had been aware of the pipeline, and caused the damage by their negligent navigation.<sup>11</sup> The High Court there found in favour of the Caltex in its claim against the defendant for the cost of arranging alternative means of transport of its oil products while the pipeline was out of operation.

Unfortunately, and partially as a result of the High Court opting to write five separate judgments, subsequent courts have experienced difficulty divining a clear principle

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<sup>7</sup> [1963] 2 All ER 575.

<sup>8</sup> (1995) 128 ALR 163.

<sup>9</sup> (1997) 142 ALR 687.

<sup>10</sup> See *Perre v Apand Pty Ltd* (1999) 164 ALR 606 at 619 (per McHugh J). Also discussed in Swanton, Jane, ‘Liability in negligence for ‘pure’ economic loss’ (2000) 14 (2) *Commercial Law Quarterly* 7, at 7 and Swanton, Jane and McDonald, Barbara ‘Liability in negligence for pure economic loss’ (2000) 74 *The Australian Law Journal* 17 at 17.

<sup>11</sup> By their processing agreement, Caltex supplied crude oil to the refinery for processing by AOR, who delivered the refined products to Caltex through the pipeline. Caltex retained notional ownership in its crude oil being refined, and owned the products actually passing to it through the pipeline, however, pursuant to the agreement the risk of damage or loss to the products rested with AOR until they reached the terminal.

emanating from the court in *Caltex*. Despite the apparent support for the *Caltex* decision of Gibbs CJ, Mason, Wilson and Dawson JJ in their joint judgment in *San Sebastian Pty Ltd v Minister Administering Environmental Planning Act*,<sup>12</sup> all attempts by litigants to apply the principle in *Caltex* to other situations before alternate and inferior courts have been unsuccessful.<sup>13</sup> In reference to *Caltex*, the Judicial Committee of the Privy Council in *Candlewood Navigation Corporation Ltd v Mitsui OSK Lines Ltd*<sup>14</sup> said:

“The judgments in the High Court contain exhaustive reviews of the relevant law and of the problems to which it gives rise, but their Lordships have not been able to extract from them any single *ratio decidendi*.”<sup>15</sup>

Analysing the judgments of each member of the High Court in *Caltex*, their Lordships concluded that they were:

“... entitled, and indeed bound, to reach their own decision without the assistance of any single *ratio decidendi* to be found in *Caltex*.”<sup>16</sup>

Accordingly, the House of Lords opted to apply the exclusionary rule that there can be no liability for negligently inflicted economic loss by causing damage to property not belonging to the plaintiff.<sup>17</sup>

It was thus against this backdrop that the High Court in *Perre* was given the opportunity to clarify the circumstances in which pure economic loss consequent upon damage to third party property was actionable in negligence.

## **Perre – The Facts**

The facts of *Perre*, simplified somewhat, were as follows. Apand Pty Ltd (the respondent), a major player in the Australian potato industry, supplied seed potatoes to growers throughout Australia. It supplied diseased seed to the Sparnons, who were potato growers in South Australia. As a consequence the

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<sup>12</sup> (1986) 68 ALR 161.

<sup>13</sup> See *Christoper v The Motor Vessel “Fiji Gas”* [1993] Aust Torts Reports 61,960; *Ball v Consolidated Rutile Ltd* [1990] Aust Torts Reports 67,797. Discussed in Swanton, Jane, ‘Liability in negligence for ‘pure’ economic loss’ (2000) 14 (2) *Commercial Law Quarterly* 7, at 7 and Swanton, Jane and McDonald, Barbara ‘Liability in negligence for pure economic loss’ (2000) 74 *The Australian Law Journal* 17 at 17.

<sup>14</sup> (1985) 60 ALR 163.

<sup>15</sup> *Candlewood Navigation Corporation Ltd v Mitsui OSK Lines Ltd* (1985) 60 ALR 163, at 171 (per Lord Fraser of Tullybelton).

<sup>16</sup> *Candlewood Navigation Corporation Ltd v Mitsui OSK Lines Ltd* (1985) 60 ALR 163, at 174.

<sup>17</sup> Or in which the plaintiff has a possessory interest.

Sparnons produced a potato crop infected with bacterial wilt, a potato disease. The Perres<sup>18</sup> (the appellant) carried on business growing, packing and processing potatoes on property a few kilometres from the Sparnons'. The Perres' crops, however, were not infected with bacterial wilt. The Perres would ordinarily export the bulk of their potatoes to Western Australia, however, that state prohibited the entry of potatoes which had been grown, harvested, cleaned or packed within 20 km of a known outbreak of bacterial wilt occurring in the previous five years. As a consequence of the outbreak of bacterial wilt on the Sparnons' property, the Perres were unable to export their crops in their usual manner and they suffered significant economic loss.

### **Perre – The Findings**

The Perres sued Apand Pty Ltd for damages in the tort of negligence. It was not disputed that the loss suffered by the Perres was reasonably foreseeable and the evidence revealed that Apand Pty Ltd knew persons such as the Perres would be liable to suffer economic loss in the event of an outbreak of bacterial wilt. At first instance, von Doussa J sitting in the Federal Court dismissed the Perres' claim on the basis that the necessary relationship of proximity did not exist between Apand Pty Ltd and the Perres. The Full Court of the Federal Court subsequently dismissed the Perres' appeal, principally on the basis that to do otherwise would subject the Apand Pty Ltd to indeterminate liability.<sup>19</sup>

Thus the High Court was called to determine not only the correctness of the decision reached in *Caltex* being whether 'relational' economic loss constituted a valid exception to the exclusionary rule, but also whether an exception could be found to the exclusionary rule where no relationship existed between the plaintiff (the Perres) and the third party suffering damage to its property (the Sparnons).

All seven members of the High Court in *Perre* found rather conclusively that pure economic loss, or financial loss which stood alone and was not consequent upon damage to the property of the plaintiff, was actionable in negligence, even where no relationship existed between the plaintiff and the third party suffering damage. Accordingly, the High Court clearly extended the category of case in which pure economic loss is actionable.

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<sup>18</sup> A group of companies and partnerships linked by membership of the Perre family.

<sup>19</sup> It should be noted that the Sparnons succeeded before both courts.

## **Perre – The Limitations**

What the High Court did not provide in *Perre* was a cohesive approach setting down an intelligible legal principle. Instead the High Court provided indications as to the inclinations of each of its members in respect of the factors or circumstances which each such member considered indicative of a duty arising and rather unsatisfactory indications of the tests for the establishment of a duty of care preferred by each.

The failure by the High Court to provide anything resembling a single ratio decidendi that could be used to guide inferior courts and legal practitioners and their clients bargaining in the shadow of the law into the future, is most unfortunate. In order to be guided by the High Court in *Perre*, judges and practitioners must instead look to each of the seven judgments and attempt to discern 'common threads' that may assist in predicting whether a duty of care should be established in an instant case.

## **Duty Of Care In Novel Cases**

It is a generally accepted incident of tort law in Australia that where injury is negligently inflicted upon a person, or damage is caused to a person's property, courts will ordinarily accept that if the relevant harm was reasonably foreseeable by the defendant, a duty of care will be held to have been owed.

However, in novel cases, such as those involving pure economic loss,<sup>20</sup> courts have found that something more than reasonable foreseeability of harm may need to be established before a duty will be recognised.<sup>21</sup> Prior to hearing *Perre*, the High Court had experienced not inconsiderable difficulty articulating the relevant test determinative of a duty of care in negligence in novel cases.<sup>22</sup>

## **Proximity – A Changing Legal Landscape**

Proximity as a unifying principle began to gather momentum as an adjunct to a finding that the damage suffered was foreseeable following the High Court's criticism of pure foreseeability of harm as the lone test for establishing the duty of

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<sup>20</sup> Other cases considered novel include those where the relevant damage is a psychiatric injury, those where the injury or damage is caused to the plaintiff indirectly rather than directly, and those where the harm results from the defendant's failure to act rather than a direct act.

<sup>21</sup> *Jaensch v Coffey* (1984) 54 ALR 417 at 419-421, 427, 436, 441-448; *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 441, 467, 477, 495; *San Sebastian Pty Ltd v Minister Administering Environmental Planning Act* (1986) 68 ALR 161 at 178, 181-186, *Gala v Preston* (1991) 172 CLR 243 at 254-5, *Bryan v Maloney* (1995) 128 ALR 163 at 171-173.

<sup>22</sup> See *Pyrenees Shire Council v Day* (1998) 192 CLR 330; *Hill v Van Erp* (1997) 142 ALR 687.

care in *Chapman v Hearse*.<sup>23</sup> There the court held that foreseeability did no more than “mark the limits beyond which a wrongdoer will not be held responsible for damage resulting from his wrongful act”.<sup>24</sup> After *Chapman v Hearse*, the High Court appeared to give more and more attention to whether there was ‘proximity’ between the defendant and plaintiff in determining whether a duty of care was owed. This approach was well demonstrated in the joint judgment of Mason CJ, Deane, Gaudron and McHugh JJ in *Gala v Preston*<sup>25</sup> where it was noted that:

“The requirement of proximity constitutes the general determinant of the categories of case in which the common law of negligence recognises the existence of a duty to take reasonable care to avoid a reasonably foreseeable and real risk of injury.”<sup>26</sup>

The correctness of this approach was indicated by the High Court in *Burnie Port Authority v General Jones Pty Ltd*.<sup>27</sup> However, in *Hill v Van Erp*,<sup>28</sup> a case concerning pure economic loss, albeit not in the context of damage to third party property, the High Court (by majority) signalled that proximity should not be regarded as the element from which a duty of care should in all cases be determined.<sup>29</sup> In this regard, Gummow J asserted:

“To my mind, there is real difficulty in treating the requirement of a relationship of proximity as an overriding requirement which provides the conceptual determinant (or a determinant) for the recognition of an existence of a duty to take reasonable care to avoid reasonably foreseeable risk of injury.”<sup>30</sup>

An alternative to a focus on notions of proximity in determining whether a duty of care should be found, has been described as the incremental approach. This is the notion that the law should develop through judges building on recognised sets of

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<sup>23</sup> (1961) 106 CLR 112.

<sup>24</sup> *Chapman v Hearse* (1961) 106 CLR 112 at 122.

<sup>25</sup> (1991) 172 CLR 243.

<sup>26</sup> *Gala v Preston* (1991) 172 CLR 243 at 253.

<sup>27</sup> (1994) 179 CLR 520.

<sup>28</sup> *Hill (t/a R F Hill & Associates) v Van Erp* (1997) 142 ALR 687.

<sup>29</sup> *Ibid* at 700-701, 708-709, 725-726, 747-748.

<sup>30</sup> *Ibid* at 747. Kirby J gave further weight to the suggestion that proximity was no longer the principal factor suggestive of a duty arising in *Pyrenees Shire Council v Day* (1998) 192 CLR 330.

actual circumstances existing in case law and being guided by principle and policy derived from earlier cases when confronted with novel situations.<sup>31</sup>

## **Perre – The Appropriate Test For Establishing Duty Of Care in Novel Cases**

Accordingly, *Perre* provided to the court an opportunity to resolve the previous inconsistencies of approach to determining the duty of care requirement and offer clarification as to the applicable principle. Unfortunately, the High Court there, instead, disagreed rather vehemently as to the approach which should be utilised in determining whether a duty of care might be recognised in novel cases. While somewhat difficult to divine and not particularly clearly articulated by the members of the High Court in *Perre*, the differences of approach can be simplified as follows.

### **The Three Stage Approach**

Kirby J in *Perre* argued passionately for the adoption in Australia of the approach favoured in England.<sup>32</sup> As he had argued in *Pyrenees Shire Council v Day*,<sup>33</sup> Kirby J suggested that a decision-maker need ask three questions:

1. Was it reasonably foreseeable to the alleged wrongdoer that particular conduct or an omission on its part would be likely to cause harm to persons who have suffered damage or a person in the same position?
2. Does there exist between the alleged wrongdoer and such person a relationship characterised by the law as one of “proximity” or “neighbourhood”?
3. If so, is it fair, just and reasonable that the law should impose a duty of a given scope upon the alleged wrongdoer for the benefit of such a person?<sup>34</sup>

Kirby J also formed the view that the application of this approach was gaining support in other common law countries.<sup>35</sup>

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<sup>31</sup> An approach repeatedly argued for by Justice Brennan, see in particular, *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 481.

<sup>32</sup> As evidenced in cases such as *Caparo Industries Plc v Dickman* [1990] 2 AC 605 and *Anns v Merton London Borough Council* [1978] AC 728.

<sup>33</sup> (1998) 192 CLR 330.

<sup>34</sup> *Perre v Apand Pty Ltd* (1999) 164 ALR 606 at 676.

<sup>35</sup> *Perre v Apand Pty Ltd* (1999) 164 ALR 606 at 676.

McHugh J, however, was particularly critical of the “three-stage” approach. He considered that the concept of ‘proximity’ had no more content than it had when used as the unifying criterion of duty of care.<sup>36</sup> He also expressed concern that were the three-stage test adopted, it would be utilised in every case where duty was in issue. In his view, this would deny the operation of the established categories of case and the certainty he regarded them as providing. His Honour also expressed concern that the indeterminacy of concepts like “fair” and “just” - and the divergent views of practitioners as to their applicability in given factual situations - would extend the range of admissible evidentiary materials and result in cases taking longer to be heard, becoming more expensive to try and more difficult to settle. He considered that notions of “justice” and “fairness” offered little if any assistance to the practitioners and trial judges called upon to apply the law “to concrete facts arising from real life activities.”<sup>37</sup> In this regard, he noted:

“No doubt in some cases judges cannot escape applying notions of “current ideas of justice or morality” in determining the duty question, any more than they can escape them in determining whether the foreseeable consequences of negligence should be regarded as too remote for liability to be imposed. As Cooke P pointed out in *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* “whatever formula be used, the outcome in a grey area case has to be determined by judicial judgment. Formulae can help to organise thinking but they cannot provide answers.” But if negligence doctrine is to escape the charge of being riddled with indeterminacy, ideas of justice and morality should be invoked only as *criteria of last resort* when more concrete reasons, rules or principles fail to provide a persuasive answer to the problem.”<sup>38</sup> (emphasis added)

Gleeson CJ, in attempting to provide an alternative general rule to the “bright line rule” which constituted the exclusionary rule, proffered the view that the “solution (did) not lie” in the three-stage test.<sup>39</sup> Hayne J also voiced criticism of the three-stage formulation.<sup>40</sup> Hayne J was particularly critical of the second stage or “proximity” requirement. In this regard, he noted:

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<sup>36</sup> *Perre v Apand Pty Ltd* (1999)164 ALR 606 at 625.

<sup>37</sup> *Perre v Apand Pty Ltd* (1999)164 ALR 606 at 625.

<sup>38</sup> *Perre v Apand Pty Ltd* (1999)164 ALR 606 at 626.

<sup>39</sup> *Perre v Apand Pty Ltd* (1999)164 ALR 606 at 610-611.

<sup>40</sup> *Ibid* at 698.

“... although the “relationship of proximity” may be a useful description of the result of the decision whether, in particular circumstances, the defendant owed a duty to the plaintiff not to cause pure economic loss, it is only in that sense that the relationship of proximity “remains the general conceptual determinant and the unifying theme of the categories of case in which the common law of negligence recognises the existence of duty to take reasonable care to avoid a reasonably foreseeable risk of injury to another”. ”<sup>41</sup>

Hayne J was also disinclined to support a test which required or contained a requirement that a duty be imposed in circumstances where it was “fair, just and reasonable”, and stated:

“The adoption of a test cast in those terms does not more than invite attention to what it is that may properly be taken into account in deciding what is fair, just and reasonable and does not suggest any limit to the range of relevant considerations.”<sup>42</sup>

Hayne J considered that notions like “proximity” and “fairness” constituted little more than descriptive labels which could be applied to all the circumstances where the law has recognised that a duty arose, but provided no practical utility as a prospective ‘test’ as such. He considered that without the identification of the factors that lead to the application of words like “fair”, “just” and “reasonable”, the words themselves stated no principle and were nothing more than a qualitative description of the intended result of every application of law.<sup>43</sup>

### **The Incremental or Categories Approach**

It was the lack of definition of terms like “proximity” and “fairness” contained in the three-stage approach which led Justice Hayne to conclude that the law in the area of pure economic loss must develop incrementally “for as long as no unifying principle emerges.”<sup>44</sup>

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<sup>41</sup> Ibid at 697.

<sup>42</sup> Ibid at 698.

<sup>43</sup> Ibid at 698.

<sup>44</sup> Ibid at 698.

In place of the three-stage approach, McHugh J in *Perre* also threw his support behind incrementalism.<sup>45</sup> This approach essentially requires courts to ask whether the instant case fell into a category where the existence of a duty had been judicially recognised, or could be regarded as an incremental development of one of these categories.<sup>46</sup> To this end, Justice McHugh asserted:

“Having rejected arbitrary exclusions, proximity, impairment of precise legal rights and *Anns* and *Caparo* as suitable determinants of duty, where does one find a conceptual framework that will promote predictability and continuity and at the same time facilitate change in the law when it is needed? I think that the existing legal materials already contain part of the answer. We have the established categories, a considerable body of case law and the useful concept of reasonable foreseeability. If a case falls outside an established category, but the defendant should reasonably have foreseen that its conduct would cause harm to the plaintiff, we have only to ask whether the reasons that called for or denied a duty in other (usually similar) cases require the imposition of a duty in the instant case ... It is not an approach that appeals to grand theorists who prefer to decide cases by general principles applicable to all cases. But in an area of law such as awarding damages for negligently inflicted economic loss, which is still developing and which has been recently cast adrift from any unifying principle, there is no alternative to a cautious development of the law on a case by case basis. Perhaps another unifying principle may emerge and gain widespread acceptance. Past experience suggests that, if it does, its fall from favour will not be long in coming. Until a unifying principle again emerges, however, the best solution is to proceed incrementally from the established cases and principles.”<sup>47</sup>

Justice Gummow, however, with whose reasons Gleeson CJ agreed, explicitly rejected incrementalism or the “categories” approach as the proper approach to novel cases involving pure economic loss in *Perre*. To this end, he asserted:

“The case law will advance from one precedent to the next. Yet the making of a new precedent will not be determined merely by seeking the comfort of an earlier decision of which the case at bar may be seen as an incremental

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<sup>45</sup> Ibid at 630. The support for this approach was again evidenced by McHugh J and Hayne J in *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 32, 97.

<sup>46</sup> As described by McHugh J in *Perre v Apand Pty Ltd* (1999) 164 ALR 606 at 624.

<sup>47</sup> Ibid at 629-630.

development, with an analogy to an established category. Such a proposition, in terms used by McCarthy J in the Irish Supreme Court, “suffers from a temporal defect – that rights should be determined by the accident of birth” (*Ward v McMaster* [1988] IR 337; at 347).<sup>48</sup>

His Honour’s suggestion, however, that the court should, instead, determine whether the “salient features”<sup>49</sup> of the matter gave rise to a duty of care owed, provides potentially a further discrete approach. As a result of Gummow J’s further suggestion that “in determining whether the relationship is so close that the duty of care arises, attention is to be paid to the particular connections between the parties”,<sup>50</sup> his approach, while not sufficiently articulated, could actually resemble something of a hybrid between the categories approach and one founded on traditional conceptions of proximity.

Furthermore, Callinan J’s judgment, while far from clear, appeared to support an approach based on the incremental development of the law, but he muddies the waters somewhat by quoting a passage from *Caltex* which appeared supportive of proximity as a unifying principle. In this regard, he asserted:

“And it must be accepted that this is an area of the law in which the courts should move incrementally and very cautiously indeed. It is not yet possible to identify a bright line of demarcation between those cases of pure economic loss in which damages are recoverable and those in which they are not. The law is still developing in (a) somewhat piecemeal fashion ...  
“that Stephen J predicted in *Caltex*:

"As the body of precedent accumulates some general area of demarcation between what is and is not a sufficient degree of proximity in any particular class of case of pure economic loss will no doubt emerge; but its emergence neither can be, nor should it be, other than as a reflection of the piecemeal conclusions arrived at in precedent cases.”

To further complicate matters, Kirby J, despite his avowal of the three-stage approach, perhaps indicated that while he favoured the three-stage approach, he

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<sup>48</sup> Ibid at 659. Gummow J expressed the same view in *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1. This was also discussed in Burbidge, R J, ‘Junk Science: Medicine and the Law’, (2001) 75 *The Australian Law Journal* 761 at 763.

<sup>49</sup> Ibid at 659.

<sup>50</sup> Ibid at 659.

did not reject the assertion that the law should develop incrementally. To this end, he stated (as reproduced previously):

“It is not enough to say that this court’s approach, in any development of the ambit of liability, should be cautious and incremental. Of course it should. It is necessary to express the content of the approach which is proper and the criteria that will distinguish (so far as possible) a cautious increment that conforms to legal authority from an incautious one which would take the law beyond its acceptable boundary.”<sup>51</sup>

It is unclear as to how Kirby J envisioned the incremental development of the law interacting with the applications of the three-stage test favoured by him.

### **Perre - Uniform Principle Would Have Been Superior**

It appears difficult to deny that a clear and consistent approach to determining whether a duty of care will be found in novel cases would be superior to providing “guidance” of a divergent and contradictory nature. The judicial utility of identifying a methodology was recently emphasised by Kirby J in the matter of *Graham Barclay Oysters Pty Ltd v Ryan*<sup>52</sup>. There he noted:

“Actions at common law for negligence probably still constitute the largest segment of civil litigation before Australian courts. It is therefore natural, and efficient if it be possible, for the law to afford a methodology or approach to such cases where liability is in dispute. Adopting a methodology encourages consistency and the avoidance of legal error.”<sup>53</sup>

Despite the considerable uncertainty in the law as to the appropriate methodology to be employed in determining whether a duty of care could be established in novel situations prior to *Perre* being heard, the lack of agreement as to the appropriate methodology or approach to the duty of care question to be employed in cases of pure economic loss, resulted in the High Court in *Perre* providing very little which could be hoped to promote greater certainty into the future. Instead of providing guidance as to how courts of the future should approach the question of whether a duty of care is owed in novel cases, resolving the previous inconsistencies of

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<sup>51</sup> Ibid at 667.

<sup>52</sup> [2002] HCA 54.

<sup>53</sup> *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54 at para 229 (per Kirby J).

approach and offering clarification as to the applicable principle, the High Court in *Perre* provided “doctrinal chaos”.<sup>54</sup>

### **Justification For The Factors Identified**

On many occasions prior to hearing *Perre*, the High Court has indicated that the main factors militating against imposing liability for pure economic loss are:

1. The potential that this area of law has to impose indeterminate liability;
2. The need to avoid allowing recovery for loss resultant upon legitimate commercial competition.

### **Fear of Indeterminate Liability and Stifling Legitimate Commercial Pursuits**

The fear of indeterminate liability being the principal concern of those allowing recover for pure economic loss was in fact aptly described by the High Court in *Caltex*. In deciding to find in favour of Caltex where only economic loss was claimed absent of physical injury to person or property, Stephen J acknowledged:

“No doubt to discard the element of physical injury to person or property as a prerequisite to the recovery of damages in negligence means that its effect of tending to ensure that compensable damage is restricted to that which is immediately consequential upon the tortious act also disappears; there then looms the spectre, described by Cardozo C.J. in *Ultramares Corporation v. Touche* (1931) as that of “liability in an indeterminate amount for an indeterminate time to an indeterminate class”. However to counter this spectre by rejecting all recovery for economic loss unless accompanied by and directly consequential upon such physical injury is Draconic; it operates to confer upon such physical injury a special status unexplained either by logic or by common experience. No reason exists for according to it such special status other than its character of tending to ensure a reassuringly proximate nexus between tortious act and recoverable damage; to this alone

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<sup>54</sup> So described by Christian Witting in ‘The Three-Stage Test Abandoned in Australia – or Not? (2002) 118 *The Law Quarterly Review* 214. See also the recent judgement of Gillard J in the Victorian case of *Johnson Tiles v Esso Australia Pty Ltd* [2003] VSC 27 (20 February 2003). In that case His Honour noted that it was difficult to discern any clear principle as to whether a duty ought be imposed in cases of pure economic loss. In that case, however, His Honour graciously recognised that *Perre* identified certain factors (for example, dominance, and whether the defendant party was insured) that he viewed as providing guidance in determining whether a duty may be imposed.

does it owe such merit as it may have as a necessary element in the recovery of damages in negligence.”<sup>55</sup>

Mason J in *Caltex* similarly referred to the apprehension of indeterminate liability as the “principle factor inhibiting the acceptance of a more generalized duty of care in relation to economic loss”.<sup>56</sup>

The High Court again acknowledged the special nature of pure economic loss as being a potential source of indeterminate liability in *San Sebastian Pty Ltd v Minister Administering Environmental Planning Act*.<sup>57</sup> There Gibbs CJ, Mason, Wilson and Dawson JJ in their joint judgment posited:

“The recovery of economic loss has traditionally excited an apprehension that it will give rise to indeterminate liability. And there is also an apprehension that the application of the standard of reasonable foreseeability may allow recovery of economic loss of such magnitude and in such circumstances as to provoke doubts about the justice of imposing liability for it on the defendant.”<sup>58</sup>

Putting the issue beyond all doubt, the High Court reiterated that the spectre of indeterminate liability and the oppression of legitimate commercial pursuits constituted the prime considerations which would militate against a duty of care being found in a case involving pure economic loss in *Bryan v Maloney*,<sup>59</sup> *Hill v Van Erp*<sup>60</sup> and *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords (Reg)*.<sup>61</sup>

It certainly appeared at first instance to the trial judge, von Doussa J, and the Full Federal Court in *Perre* that the spectre of indeterminate liability militated strongly against a finding in favour of the plaintiffs there. With some creative reconceptualising of the necessary degree of “knowledge” of the defendant of the foreseeable consequences of its behaviour upon the plaintiff, the High Court in *Perre* was able to find in favour of the plaintiffs whilst simultaneously maintaining

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<sup>55</sup> *Caltex Oil (Australia) Pty Ltd v The Dredge “Willemstad”* (1976) 11 ALR 227 at 255.

<sup>56</sup> *Caltex Oil (Australia) Pty Ltd v The Dredge “Willemstad”* (1976) 11 ALR 227 at 274.

<sup>57</sup> (1986) 68 ALR 161.

<sup>58</sup> *San Sebastian Pty Ltd v Minister Administering Environmental Planning Act* (1986) 68 ALR 161 at 168. Brennan J echoed these sentiments at 178.

<sup>59</sup> (1995) 128 ALR 163 at 166 (per Mason CJ, Deane and Gaudron JJ).

<sup>60</sup> (1997) 142 ALR 687 at 694 (per Brennan J), 697, 700-701 and 705 (per Dawson J), 709 (per Toohey J), 711-712 and 716 (per Gaudron J), 725, 729-730 (per McHugh J) and 745-746 (per Gummow J).

<sup>61</sup> (1997) 142 ALR 750 at 773, 783 (per McHugh J), 797 (per Gummow J).

that to do so did not expose the defendant, or future defendants following the principles laid down in *Perre*, to indeterminate liability.

As a result of this reconceptualisation of the necessary degree of “knowledge”, the members of the High Court in *Perre* were able to conclude that the policy reasons – avoidance of indeterminate liability and protecting legitimate commercial practices – for the operation of the “exclusionary rule” were inapplicable on the facts. In fact, had the requisite degree of “knowledge” required by previous decisions been applied in *Perre*, the avoidance of indeterminate liability would also certainly not have been regarded as inapplicable.

### **Knowledge Of Potential Loss To A Specific Individual – A Factor Traditionally Mitigating The Fear Of Indeterminate Liability**

There is little doubt that the High Court in *Perre*, and in the cases that went before it on the issue of pure economic loss, acknowledged that the considerable importance they placed upon the ‘knowledge’ requirement, amounted essentially to a means of safeguarding or addressing the fear of indeterminate liability unique to cases of pure economic loss.<sup>62</sup> The knowledge requirement, however, had been previously held to be more rigorous than was its characterisation by the High Court in *Perre*.

Prior to the High Court hearing *Perre*, the knowledge requirement appeared to require that it be reasonably foreseeable to the defendant that its conduct would be likely to impact upon the *individual plaintiff* before the court, such that the plaintiff would suffer economic loss. Numerous passages from the judgment of Mason J in *Caltex* appear to support this view of the necessary requirement.<sup>63</sup> The adopting of a knowledge requirement that needed to be referable to the individual plaintiff, as a means of protecting against potentially indeterminate liability, was evident in the dicta of Mason J, particularly where it was asserted:

“It is preferable, then ... that the delimitation of the duty of care in relation to economic damage through negligent conduct be expressed in terms which are related more closely to the *principal factor* inhibiting the acceptance of a more generalized duty of care in relation to economic loss, that is, *the apprehension of an indeterminate liability*. A defendant will then be liable for economic damage due to his negligent conduct when he can reasonably

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<sup>62</sup> This type of liability is also relevant to cases of psychiatric injury: See *Jaensch v Coffey* (1984) 54 ALR 417 at 419-421.

<sup>63</sup> *Caltex Oil (Australia) Pty Ltd v The Dredge “Willemstad”* (1976) 11 ALR 227 at 273-275.

foresee that *a specific individual*, as distinct from a general class of persons, will suffer financial loss as a consequence of his conduct. This approach eliminates or diminishes the prospect that there will come into existence liability to an *indeterminate class of persons*; it ensures that liability is confined to those individuals whose financial loss falls within the area of foreseeability...”<sup>64</sup> (emphasis added)

Further support for this proposition was offered by Gibbs J:

“In my opinion it is still right to say that as a general rule damages are not recoverable for economic loss which is not consequential upon injury to the plaintiff’s person or property. The fact that the loss was foreseeable is not enough to make it recoverable. However, there are exceptional cases in which the defendant has *knowledge or means of knowledge* that *the plaintiff individually*, and not merely as a member of an unascertained class, will be likely to suffer economic loss as a consequence of his negligence, and owes *the plaintiff* a duty to take care not to cause him such damage by his negligent act.”<sup>65</sup> (emphasis added)

This importance of the defendant’s requisite “knowledge” being referable to the individual plaintiff was effectively put beyond down when Stephen J further observed:

“... the defendants, when the dredging operations were in progress, must be taken to have *known* that carelessness in those operations, causing injury to the pipelines, *would affect Caltex* in precisely the way it did, by aborting the continued use of the pipelines for the delivery to it of petroleum products. The learned trial judge said in this regard, in a passage from his reasons for judgment: “In this case it is my opinion that damages of the kind claimed by Caltex were foreseeable both by the dredge and by Decca. They both *knew, or had the means of knowing*, that the pipeline led from the refinery to the terminal. Its fracture would obviously involve the very kind of disruption and consequent expense for which Caltex sues.” On this view of the requirement of reasonable proximity Caltex should be held to have suffered economic

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<sup>64</sup> Ibid at 274-275 (per Mason J).

<sup>65</sup> Ibid at 245 (per Gibbs J).

loss of a kind recoverable against those whose lack of care led to the injury to the pipelines.”<sup>66</sup> (emphasis added)

The High Court appeared to implicitly support its approach in *Caltex* on this point in *San Sebastian Pty Ltd v Minister Administering Environmental Planning Act*.<sup>67</sup>

There Gibbs CJ, Mason, Wilson and Dawson JJ in their joint judgment noted:

“It was with a view to diminishing the risk of indeterminate liability for negligent acts, as distinct from negligent statements, that the members of this court in *Caltex* sought to limit the persons, or class of persons, to whom a duty of care may be owed in respect of economic loss. It will be recalled that in that case Gibbs J considered that economic loss is recoverable in negligence where the defendant has knowledge or means of knowledge that the plaintiff individually, and not merely as a member of an unascertained class, will be likely to suffer economic loss as a consequence of his negligence. Mason J expressed a similar view ...”<sup>68</sup>

Following the determination of *San Sebastian Pty Ltd v Minister Administering Environmental Planning Act*,<sup>69</sup> the High Court has remained committed to the defendant’s knowledge of foreseeable economic loss being suffered by the plaintiff as being a fundamental feature of pure economic loss cases.<sup>70</sup> Its approach in *Hill v Van Erp* and *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords (Reg)*<sup>71</sup> - cases involving pure economic loss, albeit not cases of pure economic loss consequent upon damage to property – were particularly consistent with the emphasis placed on the defendant’s knowledge both of the plaintiff’s *identity* and the type or extent of economic loss which would be suffered which was evident in *Caltex*. In this regard, in *Hill v Van Erp*, Dawson J asserted:

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<sup>66</sup> Ibid at 263 (per Stephen J). It should be noted that the Judicial Committee of the Privy Council in *Candlewood Navigation Corporation Ltd v Mitsui OSK Lines Ltd* 60 ALR 163, at 172-3 considered that Stephen J in *Caltex* based his decision on five features demonstrating a close degree of proximity, rather than “merely, or even primarily, the fact that the probable victim of negligence was a particular known person”.

<sup>67</sup> (1986) 68 ALR 161.

<sup>68</sup> *San Sebastian Pty Ltd v Minister Administering Environmental Planning Act* (1986) 68 ALR 161 at 168.

<sup>69</sup> (1986) 68 ALR 161.

<sup>70</sup> See *L Shaddock v Parramatta City Council (No 1)* (1981) 150 CLAR 225; *Hawkins v Clayton* (1988) 164 CLR 539; *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords (Reg)* (1997) 142 ALR 750 and *Hill v Van Erp* (1997) 142 ALR 687. Also discussed in Swanton, Jane and McDonald, Barbara ‘Liability in negligence for pure economic loss’ (2000) 74 *The Australian Law Journal* 17 at 18.

<sup>71</sup> (1997) 142 ALR 750.

“... in *Caltex* ... this court held that, although as a general rule damages are not recoverable for pure economic loss even where it is foreseeable, damages are recoverable where the defendant has the knowledge or means of knowledge that *a particular person*, not merely as a member of an unascertained class, will be likely to suffer economic loss as a consequence of his negligence. Again, the particular relationship between the parties was held to give rise to a duty of care.”<sup>72</sup>

And further that:

“While the loss Mrs Van Erp has suffered is pure economic loss, the considerations which ordinarily prompt concern about imposing liability for such loss are absent. In the first place, to impose liability upon the solicitor in such a situation is not to raise the prospect of indeterminate liability. An intended beneficiary under a will is a *specific, identifiable individual* rather than a member of an unascertained class. Nor is the liability to such a person at large. The maximum amount of the damages which might be awarded is fixed by the size of the intended bequest. Indeed, both the beneficiary’s existence and *identity* and the amount to which he or she is entitled will ordinarily be brought to a solicitor’s attention.”<sup>73</sup>

Since *Caltex*, the High Court has remained relatively consistent in its conceptualisation of the “knowledge” requirement as needing to be referable to a specific individual in order to provide a suitable control mechanism protecting against the potential for indeterminacy.<sup>74</sup> Whilst not conclusive on this point, it is perhaps only the dicta of Brennan CJ in *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords (Reg)*,<sup>75</sup> which indicated that the strict approach of requiring actual knowledge of the individual plaintiff may be losing support. Whilst somewhat inconclusive, the following may be read to evidence the High Court employing a less rigid approach:

“The uniform course of authority shows that mere foreseeability of the possibility that a statement made or advice given by A to B might be communicated to *a class of which C is a member* and that C might enter into

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<sup>72</sup> *Hill (t/a R F Hill & Associates) v Van Erp* (1997) 142 ALR 687 at 698.

<sup>73</sup> *Hill v Van Erp* (1997) 142 ALR 687 at 701-2 (per Dawson J).

<sup>74</sup> See *Jaensch v Coffey* (1984) 54 ALR 417; *San Sebastian Pty Ltd v Minister Administering Environmental Planning Act* (1986) 68 ALR 161, *Bryan v Maloney* (1995) 128 ALR 163; *Hill v Van Erp* (1997) 142 ALR 687; *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords (Reg)* (1997) 142 ALR 750.

<sup>75</sup> (1997) 142 ALR 750.

some transaction as the result thereof and suffer financial loss in that transaction is not sufficient to impose on A a duty of care owed to C in the making of the statement or the giving of the advice ... But, *in every case*, it is necessary for the plaintiff to allege and prove that the defendant *knew or ought reasonably to have known* that the information or advice would be communicated to the plaintiff, *either individually or as a member of an identified class*, that the information or advice would be so communicated for a purpose that would be very likely to lead *the plaintiff* to enter into a transaction of the kind that the plaintiff does enter into and that it would be very likely that *the plaintiff* would enter into such a transaction in reliance on the information or advice and thereby risk the incurring of economic loss if the statement should be untrue or the advice should be unsound. If any of these elements be wanting, the plaintiff fails to establish that the defendant owed the plaintiff a duty to use reasonable care in making the statement or giving the advice.”<sup>76</sup> (emphasis added)

### **The High Court’s Relaxation of the Knowledge Requirement in *Perre***

What is perhaps notable then in *Perre* is that the High Court clearly stated that it did not require that the defendant have knowledge of the foreseeable repercussions of its actions on the *actual* plaintiff. In this regard, Gaudron J asserted that it was of no consequence to the operation of the principle of recovery that the plaintiff was the member of a class rather than an identifiable individual, nor that the members of the class could not be identified with accuracy.<sup>77</sup>

McHugh and Hayne JJ also analysed the potential for the facts in *Perre* to facilitate indeterminate liability. Identifying the error that they regarded as having been committed by the courts below in the instant case, Justices McHugh and Hayne argued that the law’s concern about indeterminacy did not represent concern as to the potential size or number of claims that could be generated, but rather whether they could be calculated. It is no doubt true that judicial concern with the potential size and number of claims is relevant to the policy consideration of proportionality between the wrong and its consequences to the defendant, rather than potential indeterminacy.

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<sup>76</sup> *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords (Reg)* (1997) 142 ALR 750, at 757.

<sup>77</sup> *Perre v Apand Pty Ltd* (1999)164 ALR 606 at 618.

McHugh J identified the requisite degree of knowledge necessary to eschew concerns of indeterminate liability as follows:

“The losses suffered by the Perres were a reasonably foreseeable consequence of Apand’s conduct in supplying the diseased seed; the Perres were *members of a class* whose members, whether numerous or not, were *ascertainable* by Apand; ...imposing the duty on Apand does not expose it to indeterminate liability although its liability may be large; imposing the duty does not unreasonably interfere with Apand’s commercial freedom because it was already under a duty to the Sparnons to take reasonable care; and Apand knew of the risk to potato growers and the consequences of that risk occurring.”<sup>78</sup>

The High Court effectively indicated that it was only when a plaintiff was merely a member of an “unascertained class” who could foreseeably suffer loss, that it would be disinclined to find that a duty of care was owed.<sup>79</sup> By concluding that the defendant need not reasonably foresee that a specific individual may suffer loss, and that rather the plaintiff need only be a member of an “ascertainable class”,<sup>80</sup> the knowledge requirement favoured by the High Court in *Perre* no doubt extends considerably the principle set down in *Caltex*. Whilst the precise formulations varied, the High Court in *Caltex* clearly regarded as critical the fact that the defendant *knew* that Caltex individually used the pipeline and that damage to the pipeline would be likely to cause financial harm to Caltex, in the shape of additional costs consequent upon having to have its products transported by road.

### **The Defendant’s Knowledge As A Relevant Factor**

In any event, there is no doubt after *Perre* that the defendant’s *knowledge* of persons<sup>81</sup> whom it could reasonably foresee would be likely to suffer economic loss by its negligent conduct is, if not the most important, then a particularly integral factor in determining whether liability should be imposed in claims for pure economic loss.

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<sup>78</sup> *Perre v Apand Pty Ltd* (1999)164 ALR 606 at 619-620.

<sup>79</sup> *Perre v Apand Pty Ltd* (1999) 164 ALR 606 at 619-620, 634, 642-4 (per McHugh J), at 611-2 (per Gleeson CJ), at 618 (per Gaudron J), at 661 (per Gummow J), at 682 (per Kirby J), 694-5, 700-1 (per Hayne J) and at 710-1 (per Callinan J).

<sup>80</sup> See in particular *Perre v Apand Pty Ltd* (1999) 164 ALR 606 at 619 (per McHugh J).

<sup>81</sup> Irrespective of whether the nature of that knowledge be of the plaintiff individually or as a member of an ascertainable class of persons.

The High Court in *Perre* reiterated repeatedly the importance it apparently attributed to the fact that the defendant *knew* of the existence of a class of persons of which the plaintiff was a member and could have foreseen that its conduct would result in financial loss to persons within that class. In this regard, Gleeson CJ asserted:

“The acknowledgment, in the internal communications of the respondent, that there was a need to be careful so as not to damage the interests of those involved in potato growing on land within 20 km of a farm that might be affected by bacterial wilt, is not merely a matter of legally irrelevant prejudice. It shows *actual foresight* of the likelihood of harm, and *knowledge of an ascertainable class* of vulnerable persons.”<sup>82</sup>

### **Limitations of Knowledge and Ascertainable Class Notions**

The limitations of the ‘knowledge’ requirement, as it was represented in *Caltex*, were compellingly articulated by the Privy Council in *Candlewood Navigation Corporation Ltd v Mitsui OSK Lines Ltd*.<sup>83</sup> There the court noted:

“Their Lordships have carefully considered these reasons for the decision in the case of *Caltex*. With regard to the reasons given by Gibbs and Mason JJ, their Lordships have difficulty in seeing how to distinguish between a plaintiff as an individual and a plaintiff as a member of an unascertained class. The test can hardly be whether the plaintiff is known by name to the wrongdoer. Nor does it seem logical for the test to depend upon the plaintiff being a single individual. Further, why should there be a distinction for this purpose between a case where the wrongdoer knows (or has the means of knowing) that the persons likely to be affected by his negligence consist of a definite number of persons whom he can identify either by name or in some other way (for example as being the owners of particular factories or hotels) and who may therefore be regarded as an ascertained class, and a case where the wrongdoer knows only that there are several persons, the exact number being to him unknown, and some or all of whom he could not identify by name or otherwise, and who may therefore be regarded as an unascertained class? Moreover, much of the argument in favour of an ascertained class seems to depend upon the view that the class would normally consist of only a few individuals. But would it be different if the

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<sup>82</sup> *Perre v Apand Pty Ltd* (1999) 164 ALR 606, at 611.

<sup>83</sup> (1985) 60 ALR 163.

class, though ascertained, was large? Suppose for instance that the class consisted of all the pupils in a particular school. If it was a kindergarten school with only six pupils they might be regarded as constituting an ascertained class, even if their names were unknown to the wrongdoer. If the school was a large one with over a thousand pupils it might be suggested that they were not an ascertained class. But it is not easy to see a distinction in principle merely because the number of possible claimants is larger in one case than in the other. Apart from cases of negligent misstatement, with which their Lordships are not here concerned, they do not consider that it is practicable by reference to an ascertained class to find a satisfactory control mechanism which could be applied in such a way as to give reasonable certainty in its results.”<sup>84</sup>

Unfortunately, despite the High Court in *Perre* referring to the dicta of Gibbs J in *Caltex* which was perceived to provide authority for liability to be imposed providing the plaintiff was not a member of an “unascertained class”,<sup>85</sup> the court did not satisfactorily address the concerns of the Privy Council in the passage cited above in *Candlewood Navigation Corporation Ltd v Mitsui OSK Lines Ltd*.<sup>86</sup> In fact, in *Perre* the High Court gave some attention to the fact that relevant trials were conducted using damaged seed in that case with “26 growers”.<sup>87</sup> It is difficult to determine what significance should be attributed to this observation. It would have been useful, however, if the High Court had indicated what its attitude would have been if the “ascertainable class” constituted 500 or 5000 growers instead of 26. One may suspect that the matter would have been approached differently, but the principles laid down in *Perre* make no allowance for the size of the relevant class, as long as its members were ascertainable.

As a result of the approach favoured in *Perre*, courts would now have great difficulty determining a case on pure economic loss without analysing the “knowledge” of the defendant in the terms described above. However, in addition to the degree of knowledge on the part of the defendant necessary to indicate a duty of care, the

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<sup>84</sup> *Candlewood Navigation Corporation Ltd v Mitsui OSK Lines Ltd* (1985) 60 ALR 163 at 173-4 (per Lord Fraser of Tullybelton).

<sup>85</sup> *Caltex Oil (Australia) Pty Ltd v The Dredge “Willemstad”* (1976) 11 ALR 227 at 245.

<sup>86</sup> (1985) 60 ALR 163.

<sup>87</sup> *Perre v Apand Pty Ltd* (1999) 164 ALR 606 at 621.

High Court in *Perre* identified a number of additional factors or “salient features”<sup>88</sup> which it considered indicative of a duty of care in the circumstances.

### **Vulnerability**

The High Court in *Perre* also clearly regarded as significant the “vulnerability” of the plaintiff to loss occasioned at the hands of the defendant.<sup>89</sup> Indeed, Gleeson CJ and McHugh J considered vulnerability the common theme in cases of economic loss.<sup>90</sup> If the plaintiff was powerless to prevent or decrease the risk of the occurrence of the loss suffered by them, this would appear to sway the court in their favour. McHugh J, indicated that he did not consider the ability to insure to be a relevant form of protection. Arguing at some length for the importance of a finding that the plaintiff was vulnerable to loss at the hands of the defendant, McHugh J asserted in *Perre*:

“Cases where a plaintiff will fail to establish a duty of care in cases of pure economic loss are not limited to cases where imposing a duty of care would expose the defendant to indeterminate liability or interfere with its legitimate acts of trade. In many cases, there will be no sound reason for imposing a duty on the defendant to protect the plaintiff from economic loss where it was reasonably open to the plaintiff to take steps to protect itself. The vulnerability of the plaintiff to harm from the defendant's conduct is therefore ordinarily a prerequisite to imposing a duty. If the plaintiff has taken, or could have taken steps to protect itself from the defendant's conduct and was not induced by the defendant's conduct from taking such steps, there is no reason why the law should step in and impose a duty on the defendant to protect the plaintiff from the risk of pure economic loss.”<sup>91</sup>

Justice Callinan was also supportive of such a view. This is evident from his observation that:

“The appellants were rendered powerless to abate, or to prevent the occurrence of the loss to which they were subjected. In no way did they act

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<sup>88</sup> A term used by Gummow J in *Perre v Apand Pty Ltd* (1999) 164 ALR 606 at 661 (per Gummow J).

<sup>89</sup> *Perre v Apand Pty Ltd* (1999) 164 ALR 606 at 611-612 (per Gleeson J), at 618 (per Gaudron J), at 619, 622, 632, 636-639, 641, 645 (per McHugh J), at 685, 688 (Kirby J), at 718 (per Callinan J).

<sup>90</sup> *Perre v Apand Pty Ltd* (1999) 164 ALR 606 at 611 (per Gleeson J), 637 (per McHugh J).

<sup>91</sup> *Perre v Apand Pty Ltd* (1999) 164 ALR 606 at 636.

illegally, improperly, or unreasonably or without regard for their own interests.”<sup>92</sup>

### **Control Over The Exercise Of A Legal Right**

A number of members of the High Court in *Perre* also considered as significant the degree of “control” exercised by the defendant over the plaintiff’s legal right to export its produce to Western Australia.<sup>93</sup> Gaudron J argued strongly for the merit of a factor based upon control over the impairment of a legal right in *Hill v Van Erp*.<sup>94</sup> Again in *Perre*, she asserted:

“Where a person is in a position to control the exercise or enjoyment by another of a legal right, that position of control and, by corollary, the other’s dependence on the person with control are, in my view, special factors or, which is the same thing, give rise to a special relationship of “proximity” or “neighbourhood” such that the law will impose liability upon the person with control if his or her negligent act or omission results in the loss or impairment of that right and is, thereby, productive of economic loss.”<sup>95</sup>

It would be wrong, however, to presume that the High Court gave unqualified acceptance to the desirability of this factor. McHugh J, in fact, argued cogently that a principal based on impairment of legal rights is flawed. He expressed the view that courts should not accept that a defendant owes a duty of care merely because its conduct may defeat or qualify a “precise legal right”.<sup>96</sup> There is no doubt some cogency in this argument. Unlike in legatee cases such as *Hill v Van Erp* and *White v Jones*,<sup>97</sup> where the legal “right” was viewed as the right of a beneficiary to receive the testamentary gift, the notion of the defendant controlling or defeating the exercise of a legal right can only be applied readily in cases of pure economic loss consequent upon damage to third party property if the notion of a “legal right” is defined particularly imprecisely to encompass potential rights or expectations of the plaintiff. Acknowledging this limitation, McHugh J asserted in *Perre* that:

“Nor do I think that this Court should accept that a defendant should owe a duty of care merely because its conduct may defeat or impair “a precise

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<sup>92</sup> *Perre v Apand Pty Ltd* (1999) 164 ALR 606 at 718-719.

<sup>93</sup> *Perre v Apand Pty Ltd* (1999) 164 ALR 606 at 612 (per Gleeson CJ), 616-618 (per Gaudron J), 657 (per Gummow J), 717 (Callinan J).

<sup>94</sup> *Hill v Van Erp* (1997) 142 ALR 687 at 715-716.

<sup>95</sup> *Perre v Apand Pty Ltd* (1999) 164 ALR 606 at 617.

<sup>96</sup> *Perre v Apand Pty Ltd* (1999) 164 ALR 606 at 627.

<sup>97</sup> [1995] 2 AC 207.

legal right" of the plaintiff in circumstances where the defendant is in a relationship with the plaintiff and in a position to control the enjoyment of that right... The Perres no doubt had a right to trade, and that is a right that in various circumstances the law will protect, but not by imposing duties of care on others simply because they are in a position to control the enjoyment of the plaintiff's right to trade."<sup>98</sup>

An extension of the type of legal right in issue in *Hill v Van Erp* to encompass general rights such as the right to sell goods (here potatoes), arguably strips the concept of utility as indicator of proper claims. It is almost difficult to imagine *any* loss to a plaintiff that could not be reconceptualised to represent the impairment of a legal right if this definition were to be accepted. Whilst the powerful dissenting judgment of Justice McHugh on this point may have provided useful guidance to courts determining pure economic loss claims in the future, unfortunately McHugh J's remark later in his judgment that the defendant's "control of the plaintiff's right, interest or expectation will be an important test for vulnerability"<sup>99</sup> obviously creates some degree of confusion as to exactly what significance His Honour placed upon any infringement by a defendant of a legal right hitherto enjoyed by a plaintiff.

### **Perre - Ancillary Factors**

As set out above, a number of members of the High Court in *Perre* expressed the opinion that the following factors were relevant in determining whether a duty of care was owed:

1. The fact that the plaintiffs were members of an "ascertained class" of persons foreseeably likely to suffer financial loss from the defendant's negligence;
2. The fact that the plaintiffs were vulnerable to loss inflicted upon them by the defendant in that they were powerless to prevent it;
3. The defendant having control over the plaintiffs exercise of a legal right.

Individual judges, however, also pointed to a number of other factors which they clearly considered important in reaching their decision in *Perre*. It is obviously difficult to determine the importance that should be attributed to these factors in

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<sup>98</sup> *Perre v Apand Pty Ltd* (1999) 164 ALR 606 at 627.

<sup>99</sup> *Perre v Apand Pty Ltd* (1999) 164 ALR 606 at 640.

predicting how pure economic loss cases will be determined in the future. If each or any of the following factors carried sufficient import to the High Court Justice advocating them, that their absence may have resulted in a finding for the defendant instead of the plaintiff, the state of the law of pure economic loss in Australia at present is even less certain than might otherwise be assumed.

### **The Position If The Negligent Conduct Engaged In By The Defendant Had Been Deliberate**

In claims for pure economic loss, Justice Hayne clearly considered of particular importance an assessment by the relevant court of what the position would be if the defendant had deliberately, as opposed to negligently, engaged in the conduct complained of. In terms that suggest that he may have found differently absent this characteristic, he asserted:

“If that deliberate conduct would have been illegal or would have made the respondent tortiously liable to the appellants (or some of them) then it is conduct that would fall outside the boundaries of acceptable commercial dealing. If, by contrast, deliberate conduct would not have been illegal and would not have made the respondent tortiously liable to any of the appellants, there seem very powerful reasons to think that no duty to take care should be imposed in such circumstances. To put the matter another way, if deliberate conduct is neither unlawful nor tortious, why should the same kind of conduct (engaged in carelessly rather than deliberately) be tortious?”

Such an inquiry is consistent with the development of the common law in relation to deliberate interference with the trade of another.”<sup>100</sup>

The conduct complained of in *Perre* would of course have been illegal had it been engaged in deliberately.

### **A Concurrent Duty**

In his judgment, Justice McHugh reiterated that one of the central tenets of the common law is that a person is legally responsible for his or her choices, and the common law has generally sought to interfere with the autonomy of individuals only

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<sup>100</sup> *Perre v Apand Pty Ltd* (1999) 164 ALR 606 at 701.

to the extent necessary for the maintenance of society.<sup>101</sup> Accordingly, McHugh J considered that because protection of the individual's autonomy is the reason for the immunity conferred by the legitimate protection or pursuit of interest doctrine, that doctrine can have no application in a case where the defendant already owes a duty of care to another party which would disable him from performing the act causative of the loss to the plaintiff. Citing the decision in *Caltex* as being based in part on the defendant being in breach of the duty of care owed to the owner of the pipeline, McHugh J considered of significance the fact that Apand Pty Ltd, in engaging in the conduct complained of by the plaintiffs, were in breach of their duty to the Sparnons.

### **Close To Physical Damage**

Justice Callinan made comment in *Perre* that although the plaintiff's property was not physically damaged, the effect on that property by the defendant's conduct almost equated to physical damage. In this regard, he asserted:

“In a sense, the amenity of a property is very much akin to a physical attribute of a property. A particular activity on parcel "A" may adversely affect the amenity of parcel "B" although the two parcels do not adjoin each other. This may occur for example, as a result of a massive and overwhelming development on parcel A rendering obsolescent a building on parcel B; or a particular activity on parcel A, although not constituting an actionable nuisance, may make the outlook from parcel B much less attractive, or subject it to noise pollution. A similar comparison might be made in respect of plant and equipment the use of which has been effectively sterilized by force of a Regulation, in the same way as the infliction of physical damage to it might disable it. Such effects are *very similar to actual physical damage* and are not logically readily distinguishable from physical damage. Absent negligence or infringement of legislation the causing of blight will not ordinarily be actionable. Such effects are *very similar in impact* to the negligently caused effects upon the appellants' properties of the outbreak of bacterial wilt on the Sparnons' property leading to the Western Australian embargo, and consequentially, *in a real sense, involve the imposition of a blight upon their properties by way of a significant reduction in the utility and productivity of them, and*

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<sup>101</sup> *Perre v Apand Pty Ltd* (1999) 164 ALR 606 at 635.

*accordingly their value*. I regard this too therefore as a relevant consideration.”<sup>102</sup> (emphasis added).

Gleeson CJ in *Perre*, however, appeared to disagree with this conceptualisation.<sup>103</sup>

### **Geographical Propinquity**

Callinan J also considered relevant the “geographical propinquity” to the Perres’ property of the property to which the respondent caused the Saturna seed to be introduced (the Sparnons’ property).<sup>104</sup> Additionally, His Honour regarded as relevant the “commercial propinquity” of the Perres to the defendant, being the fact that both were both involved in the same industry in the same year and had been so involved for some time. Whilst he had not indicated his preference for a particular methodology within which to approach the question of whether a duty is owed in pure economic loss cases, Callinan J considered that the geographical and commercial propinquity of the parties in *Perre* bespoke “in a real sense, proximity”. The relevance of establishing proximity to his preferred approach was not discussed. This is obviously somewhat unfortunate.

### **What About Those Whose Losses Stem Less Directly From The Defendant’s Negligence?**

In dissent in part in *Perre*, McHugh J expressed the view that in general no duty should be owed to those who suffer purely economic loss as a result of the “ripple effect” of the defendant’s negligence conduct. In this regard, McHugh J asserted:

“The problem of the “ripple effect” means that the courts must be careful in using constructive knowledge to extend the class to whom a duty is owed. It would not be wise, or perhaps even possible, to set out exhaustively when it would be permissible to rely on constructive knowledge. Speaking generally, however, it may be necessary to draw a distinction between using constructive knowledge to identify those within a class who are primarily affected by the defendant’s negligence (the first line victims) and using constructive knowledge to identify those who have suffered economic loss

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<sup>102</sup> *Perre v Apand Pty Ltd* (1999) 164 ALR 606 at 719-720.

<sup>103</sup> *Perre v Apand Pty Ltd* (1999) 164 ALR 606 at 609.

<sup>104</sup> *Perre v Apand Pty Ltd* (1999) 164 ALR 606 at 718.

purely as the result of economic loss to the first line victims. That is, as a general rule, no duty will be owed to those who suffer loss as part of a ripple effect. Ordinarily, it will be an artificial exercise to conclude that, before acting or failing to act, the defendant should have contemplated the interests of those persons who suffer loss because of the ripple effect of economic loss on the first line victims. While the defendant might reasonably foresee that the first line victims might have contractual and similar relationships with others, it would usually be stretching the concept of determinacy to hold that the defendant could have realistically calculated its liability to second line victims.”<sup>105</sup>

The notion of “primary” and “second” line victims was not enunciated further by McHugh J, probably making this notion almost impossible to apply in practice. After all, in almost all instances where pure economic loss is being claimed resulting from damage to third party property, almost all those who suffer pure economic loss are “second line victims” in some respects. It is most unfortunate that McHugh J did not elect to further enunciate this notion.

### **Perre – Suspicion Of Ultimate Question Of Moral Wrongdoing?**

It is difficult to feel entirely comfortable with seven separate judges of the High Court employing a diversity of methodologies, some clearly divergent, and identifying a raft of potentially relevant factors, all having their approaches and varied factors lead them to the ultimate conclusion that a duty of care was owed in *Perre*. Whilst rarely acknowledged, it is difficult not to question whether, ultimately, what all members of the High Court found, was a degree of “moral wrongdoing” on the part of the Apand Pty Ltd which caused loss to the Perres, for which it was thought that that company should pay. There is some suggestion of the simplicity of this approach in the statement of McHugh J in *Perre*:

“The law of negligence, as an instrument of corrective justice, would be in a sorry state if it did not require Apand to have regard to the interests of the Perres when it supplied the seed to Virgara Brothers for planting by the Sparmons.”<sup>106</sup>

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<sup>105</sup> *Perre v Apand Pty Ltd* (1999) 164 ALR 606 at 634.

<sup>106</sup> *Perre v Apand Pty Ltd* (1999) 164 ALR 606 at 645-646 (per McHugh J).

### **Subsequent Attempts To Apply**

Perhaps the true test of *Perre* will be the ease and consistency with which it is applied in lower courts. For the reasons set out above, whilst one intuitively would imagine that lower courts will struggle with the task of applying the principles set down in *Perre* (if any can be conclusively divined) to alternate fact scenarios, there is at present little evidence of the success or otherwise of lower courts in this regard. One notable exception, however, was the decision of Bailey J in *Metal Roofing & Cladding Pty Ltd v Eire Pty Ltd*.<sup>107</sup> The entire judgment of Bailey J comprised the following:

“I agree with Riley J that the appeal should be dismissed for the reasons referred to in his judgment. The only comment which I wish to add is to emphasize the present disgraceful uncertainty in the law dealing with claims for pure economic loss in negligence. Both Mildren J and Riley J refer to having found nothing to change their opposing views in the present matter by reference to the High Court's recent decision in *Perre v Apand Pty Ltd* (1999) HCA 36, unreported, 12 August 1999. Similarly, I have laboured through the 437 para (and, a good deal of the material referred to in the 539 footnotes) of the seven judgments upholding that appeal. With the greatest of respect, there is nothing there in terms of agreement on basic guiding principles to assist with resolution of claims such as the present. I appreciate that these observations will be of no comfort to either the appellant in the present matter or countless future litigants until such time as there is consensus as to the fundamental principles in this branch of the law of tort.”<sup>108</sup>

Whilst he may be regarded as somewhat bold to express his opinion in such terms, one cannot but have sympathy for Bailey J in his attempts to ascertain the guiding principles provided by *Perre*.

*Johnson Tiles Pty Ltd v Esso Australia Pty Ltd*<sup>109</sup> similarly serves to highlight the struggle lower courts have encountered in divining any clear principle from *Perre*.

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<sup>107</sup> (1999) 9 NTLR 82.

<sup>108</sup> *Metal Roofing & Cladding Pty Ltd v Eire Pty Ltd* (1999) 9 NTLR 82 at [24].

<sup>109</sup> [2003] VSC 27 (20 February 2003), discussed above.

## Conclusion

The High Court in *Perre* was called upon to break new ground. Never before in Australia had a plaintiff recovered for economic loss consequent upon damage to the property of a third party, in circumstances where no relationship existed between the plaintiff and the third party. Despite effecting a rather remarkable extension of Australian tort law, the judgments in *Perre* offer little to lower courts and practitioners attempting to apply the law to alternate factual matrices. While members of the High Court evidenced some degree of agreement as to a number of factors which may lead to a duty being found - such as the defendant's knowledge of the foreseeable risk of injury to the plaintiff, the plaintiff's vulnerability to economic loss at the hands of the defendant and the defendant's control over the exercise by the plaintiff of a legal right – differing emphasis was placed upon each factor by each of the High Court Justices. Further factors were also enunciated by a number of judges, without clarification of the relative importance of these additional factors in each judge reaching his or her decision.

As a result of divergent views as to the appropriate methodologies to be employed and the factors which were determinative in arriving at their decisions, the members of the High Court have made it inordinately difficult to extrapolate from the decision in *Perre*.

Kirby J in *Perre* had expressed his opinion that “The law of negligence in cases of claims for pure economic loss is completely unsatisfactory.”<sup>110</sup> Unfortunately, this comment is as apt, and possibly more apt, to describe the state of Australian law *after Perre* than was the case previously. When grappling with the novel area of pure economic loss, *Perre* does not offer practitioners and courts of the future constructive guidance which may lead to a higher measure of predictability. Judges called upon to apply *Perre* have been left with almost a complete lack of assistance as to the proper approach for determining when a duty will be recognised where recovery for pure economic loss sought. Given the difficulty litigants had experienced in their attempts to apply *Caltex*, the present state of the law following *Perre* is a great disappointment indeed.

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<sup>110</sup> *Perre v Apand Pty Ltd* (1999)164 ALR 606 at 685.

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