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BLURRED VISIONS: THE POLITICS OF CIVIL OBLIGATION

Allan C. Hutchinson and Robert Maisey***

The snail had known better days. And the unsuspecting May Donoghue was to know healthier times. But this unlikely encounter between a decomposing mollusc and a Scottish shop assistant on a fateful day in 1928 set the main stage for the evolving drama of the Anglo-Canadian common law. When Mrs. Donoghue and her friend went to Paisley's Wellmeadow Cafe on a bright sunny August evening, she could have had no inkling of the doctrinal mayhem that their innocent social outing was to wreak. Seeking only modest refreshment, she received a severe dose of gastro-enteritis and a few days in Glasgow Royal Infirmary. Championed by the irrepressible Walter Leechman, she was able to obtain five years later from the estate of the late David Stevenson, the offending ginger beer's manufacturer, a settlement of \$200 for her troubles. As for the snail, we will never know whether its notoriety was deserved or whether it is one of the most mismaligned creatures in the law's menagerie.

Notwithstanding Mrs. Donoghue's illness, it was the law that probably suffered the more lasting discomfort and substantial harm. Indeed, Thomas Minchella, the cafe's owner, served up a noisome concoction that the common law has still not managed to get out of its system and that continues to cause more than its fair share of doctrinal queasiness. However, courts and commentators have been slow to realize that the real challenge is not to cure the common law of this contagion, but to accept that its blighted condition is its natural state of (un)health. In legal terms, *Donoghue v. Stevenson*¹ was the first major case to explore the fractious relation between contract and tort. Lord Atkin's pioneering judgment set the tone and standard for future doctrinal contributions to the law and politics of civil obligation. As such, it has become both the bane and boon of legal doctrine's existence: it has ensured that tort law remains the battleground of social theory.²

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¹ *Donoghue v. Stevenson*, [1932] A.C. 562.

² W. Page Keeton, *Prosser and Keeton on the Law of Torts* (St. Paul, Minn.: West Publishing Company, 1984) at 15.

GHOST STORIES

Looking back at the law of civil obligations over the past sixty years is like watching the re-run of a bad gothic horror/romance movie. It is third-rate melodrama that is long on lack-lustre thrills and spills, but short on sustained storyline and substantial reflection. The script seems to unfold in spite of itself through stilted and uneven dialogue and the plot progresses in fits and starts through a haphazard series of contrived crises. Working with an all-too-familiar cast of characters and settings, there is an endless working and re-working of hackneyed routines and trite set-pieces. It is a cinematic chronicle that is as plodding as it is predictable and as unfocused as it is unenlightening. In short, the doctrinal history of civil obligations comes as something of an intellectual pastiche of *Dallas*, *Twin Peaks*, *Gone With The Wind* and *Nightmare on Elm Street*. It might appropriately be titled *A Dog's Breakfast*.³

At the heart of this legal soap-opera are two star-crossed lovers, the more traditional Contract and the less established Tort. Irresistibly drawn together, but fundamentally incompatible, each is trying to cope with the changing demands of historical living and to forge a robust and independent identity for itself within the context of a shared relationship. However, Contract and Tort's efforts are daunted and haunted by the judicial ghosts of doctrine past: Lord Buckmaster is heard to chant with monotonous regularity — "if one step, why not fifty?";⁴ Lord Abinger is convinced that, if privity of contract is relaxed, "the most absurd and outrageous consequences, to which I cannot see the limit, would ensue";⁵ Baron Bramwell never tires of preaching the virtues of a sturdy self-reliance that frowns upon whinging efforts to shift blame for one's own misfortunes to others;⁶ and Lord Atkin dogs them with his obsessive search for "some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances."⁷

Plagued by these judicial phantasms, Contract and Tort have still sought to make a go of things. Beginning almost a century earlier, the acquaintance of Contract and Tort only blossomed into a friendship in 1932. After a lengthy courtship, in which tort seemed to have redressed the doctrinal imbalance between them, their engagement was formally announced in 1968. With judicial encounters of the ghostly kind apparently no longer a problem, the union of contract and tort was solemnized in 1982 in a much anticipated and publicised wedding.⁸ Always a difficult match of theoretical opposites, there was soon

³ See *infra*, note 48: A. W. B. Simpson, *A History of the Common Law of Contract* (Oxford: Clarendon Press, 1975) at 325.

⁴ *Supra*, note 1 at 582.

⁵ *Wright v. Winterbottom* (1842), 152 E.R. 402 at 405.

⁶ *Holmes v. Mather* (1875), L.R. 10 Ex. 261.

⁷ *Supra*, note 1 at 592.

⁸ See Smith, "Economic Loss and The Common Law Marriage of Contracts and Tort" (1984) 18 U.B.C.L. Rev. 95 at 101.

jurisprudential trouble in doctrinal paradise. Almost before the honeymoon had begun, the academic nay-sayers and scholarly kill-joys were out in force. Fuelled by rumours of discontent and discord, the judicial phantasms reappeared. Indeed, it became clear to those in the know that the marriage had never been consummated. In 1990, in a thoroughly expected and suitably weighty announcement, the annulment of Contract and Tort's nuptials was finalised: each was free to pursue its own life, unencumbered by concerns and responsibilities for the other.

In this ill-fated saga, the scenes about the possibility of tortious recovery for pure economic loss are a pivotal part of the story-line. Unfortunately, they are particularly confused and confusing. Among the doctrinal detritus of snails, peeling floors, diseased cattle, broken bridges, dead fish and collapsing walls, the judicial actors grope for a connecting thread or a convincing solution. There is an almost constant flip-flopping of tentative conclusions and proposed resolutions. Unfortunately, the advice that, "when the ghosts of the past stand in the path of justice clanking their medieval chains, the proper course for the judge is to pass through them undeterred,"⁹ is easier said than done. The path to justice is always in doubt and, in doctrinal matters, the ghosts are never less real than anything else. This is especially evident in the area of recovery for economic loss where Contract and Tort share some of their most passionate moments and where the ghosts of judicial past are at their most bedeviling best.

In this essay, we want to present a critical review of tort law. It is not our intention to try and give 'right' answers¹⁰ or extricate judges from the doctrinal dilemma that they find (or have put) themselves in.¹¹ However, even though we are critical of current practice and doctrine, it is not our intention to engage in another bout of judge-bashing for its own sake. The overriding concern is to present a rudimentary theory of tort law. Like all efforts at good criticism, its avowed ambition is to clear the analytical ground and direct lawyers in what is the most useful way to proceed in their efforts to make a better world. It will be enough if we manage to advance the understanding of our present predicament. In this way, it might be that, with T.S. Eliot, although we will "arrive where we started," we will "know the place for the first time."¹²

In the first part of the essay, we outline the larger theoretical agenda that is implicated in the doctrinal inquiry over whether to allow tortious

⁹ *United Australia Ltd. v. Barclays Bank Ltd.*, [1941] A. C. 1 at 29 per Lord Atkin.

¹⁰ See Feldthusen, "Economic Loss in the Supreme Court of Canada: Yesterday and Tomorrow" (1991) 17 Can. Bus. L.J. 356; Cherniak and Stevens, "Two Steps Forward or One Step Back?: Anns at The Crossroads in Canada" (1992) 18 Can. Bus. L.J. 164.

¹¹ See Schlosser, "What Has Become of Anns?" (1991) 29 A.L.Rev. 673; Rafferty, "Case Comment" (1991) 70 Can. Bar Rev. 381.

¹² "Little Gidding" in *The Collected Works of T.S. Eliot*.

recovery for pure economic loss. Secondly, there is a brief account of the historical casemarks in the modern chronicle of its legal development. Next, we reveal the indeterminacy that pervades the judicial attempts to explain the hodge-podge of rules and exceptions that compromise the existing law. Fourthly, going beyond the extant doctrine, the social visions that animate and frame the doctrine's twists and turns are introduced. Fifthly, we trace the more general political currents that have impacted upon and influenced the doctrinal gravitation toward one or other social vision. Sixthly, there is a critical exploration of the crucial and contorted relation between Contract and Tort. Finally, there are some concluding thoughts on the continuing saga of civil obligations.

A THEORETICAL PRIMER

Most disciplines seek to resolve a set of core issues. Although these issues can appear deceptively simple, their underlying complexity tends to make fools of the most expert. The study of law is no different. However, while other disciplines seem to experience occasional lapses of professional confidence, law seems to exist in a permanent state of identity-crisis. Legal experts are forever haunted by their own foolish shadows and the echoes of some past failed prognostication. The spirited revival of jurisprudential writing in the past decade or so has merely served to exacerbate that experience. The deeper questions of law, politics and society are now firmly back on the law school agenda; their pertinence and unsettling influence is clearly visible in most self-respecting pieces of scholarship. In Canada, this renaissance has been given a greater salience and sharpness by the enactment of the *Charter of Rights and Freedoms* in 1982. But its effect is powerfully present in so-called private law scholarship. Discontented with a facile recounting of the case-by-case development of the cases, the best in tort scholarship has striven to plumb the deeper theoretical reaches of civil obligation.

Much of legal scholarship's particular energy and motivation is drawn from a more general desire to resolve the central dilemma of modern social theory — to provide an account of how social structures and values relate to the material conditions of life. Without some plausible explanation of this relation, the validity of social knowledge is suspect and the status of social theorizing remains deeply problematic. The challenge for contemporary scholars has been to provide an account of how large and local struggles over social structures and values — from efforts to combat widespread sexist and racist practices to attempts to overcome poor working conditions and abusive intimate relations — relate to the dynamic system of material conditions without reducing them entirely to epiphenomenal effects of that system. In short, the need to avoid totalistic, static or vulgarly instrumental analyses of social life must not be satisfied at the expense of divorcing social structures and values from the historical context and setting from which they take shape and upon which, in turn, they react.

As a branch of social theory, legal theory is obliged to share in that explanatory task and to run similar risks. Although less self-conscious in their reflections, legal scholars have grappled with this intellectual and political imperative in their debates over the 'Rule of Law'. Both left and right have sought to appropriate its powerful rhetorical appeal for their own political campaigns.¹³ Yet mainstream legal scholarship bears an additional burden — the task of distinguishing law from other social structures and political practices. In order to preserve the legal system's authority and legitimacy, traditional theorists must provide an explanation of social theory that not only addresses the relation between social phenomena and material existence, but that maintains law's autonomy from other social institutions. Can we know the judgment from the judge? Is law the result of a patriarchal or capitalist conspiracy? Is law the repository of transcendent principles? Thus the central mission of conventional jurisprudence has been to provide a convincing account of the relation between legal doctrine and socio-economic conditions that, at the same time, preserves a distinction between law and politics. Without such a distinction, law and lawyers will lose their claims to be the privileged and prestigious guardians of collective power: they will become only its naked purveyors.

In contemporary debate, there is almost complete agreement that law is neither fully beholden to socio-economic conditions nor fully independent from them. That law might not possess any autonomy or distinctiveness as a mode of thinking and acting is hardly ever taken seriously. Conversely, the belief that law can be thought about as an entirely autonomous field of human activity is rare.¹⁴ Rather than make a futile Kelsenian attempt "to free the science of law from alien elements", the present concern is to reveal the formal and substantive connections between law and these "alien elements".¹⁵ Indeed, contemporary jurisprudence seems to find an otherwise elusive intellectual and political unity in the notion that legal doctrine is "relatively autonomous" from the political formation of social life. Unfortunately, this unity is more apparent and superficial than real and informing. The notion of "relative autonomy" is so ample that it can accommodate almost all theorising about law. As such, it can offer little guidance or comfort to those seriously committed to explicating the law-and-politics conundrum. There is a vast and intellectually significant difference between those scholars who maintain that law is primarily separate

¹³ See Hutchinson and Monahan, "Democracy and The Rule of Law" in *The Rule of Law: Ideal or Ideology*, ed. by A. Hutchinson and P. Monahan, (Toronto: Carswell, 1986).

¹⁴ The exception to this is, of course, the work of Ernie Weinrib; see *supra*, Ch. 1. In a series of articles, he has sought to develop a theory of tort law that is truly formalist in ambition and achievement. For an account and critique of that attempt, see Hutchinson, "The Importance of Not Being Ernest" (1988) 34 McGill L.J. 233.

¹⁵ H. Kelson, *The Pure Theory of Law* (Berkeley: University of California Press, 1967).

from society, but is partly determined by it, and those who hold that law is primarily determined by society, but is partly separate from it. The differences between these positions are more than matters of emphasis and degree.

While it is possible and desirable to offer sensible explanations of doctrinally discrete and historically specific regions of legal and social change, scholars should resist the temptation to go further. It is mistaken to extrapolate from those findings to more universalisable statements about law in general at different times and in different places. As traditional Kuhnian wisdom reveals, *any* account (including, of course, this one) will itself be contingent upon historical circumstances and social context. Any kind of functionalist or instrumentalist account of the relation between law and politics, whether it comes from the right, left or centre of the political spectrum, is unconvincing.¹⁶ The relation between law and social conditions is indeterminate and indeterminately so. Like law and society itself, their relationship is contingent and its precise nature will vary with the context. In the same way that the socio-economic context underdetermines law, that very same law overdetermines the possible outcomes to any legal dispute. As such, law is an adventure in indeterminacy that is always moving, but never reaching its destination.

Moreover, all accounts of the relation between law and social conditions will be defeated by the fact that a theory will not be able to achieve the appropriate mix of analytical generality and historical particularity. If a theory of tort law is to achieve normative respectability and predictive power, it will have to move beyond rich and localised descriptions of law and prevailing social conditions. If that is all it does, it fails in its analytical ambitions. But, once this move is made, the theoretical offering will be unable to account for a sufficient range of legal and social data and lose its descriptive accuracy and integrity. Traditional theories of tort law become consigned to a contingent purgatory of frustrated achievement. As such, indeterminacy is seen to be an ineradicable and pervasive part of knowledge about ourselves, our situation and our theorising about them.

In this essay, we want to state and develop a particular understanding of the organic relation between law and the social conditions of life. Although the informing insight will be the indeterminacy of that relation and any theoretical attempts to understand it, we will suggest that this does not mean that theory's ambition is self-defeating nor that 'anything goes'. In one of the authors' work to date, there has been an explicit attempt to provide and defend such a theoretical understanding of law and politics' organic relation. Indeed, that work has been criticised from many quarters. Some have complained that the critique of legal doctrine is too instrumental and neglects

¹⁶ While the work of Ken Cooper-Stephenson is admirable in ambition, it is mistaken to attempt to pass off his suggestion that tort law is committed to the progressive unfolding of an egalitarian ethic as a descriptive claim rather than as a prescriptive proposal. See *supra*, Chs. 1 & 3.

its intellectual autonomy and transformative possibilities.¹⁷ Others have objected that the critique overstates the indeterminacy of legal doctrine and ignores its instrumental connections to larger political forces.¹⁸ Accordingly, in light of such a double threat, the time is ripe to undertake the ambitious and important project of illustrating the politics of legal indeterminacy by tracking the modern development of the law of torts and its relation to other social structures, material conditions and intellectual currents.

In order to situate this theoretical account, we will concentrate on the development of Anglo-Canadian torts over the past sixty years. The focus will be on the contorted relationship between contract and tort. We will concentrate on judicial efforts to confront and resolve the perennial puzzles of recovery for so-called 'pure economic loss'. In particular, the enduring and unresolved question of whether Mrs. Donoghue can recover for the diminished value of her ginger beer will be addressed. Because there has been considerable doctrinal movement, there is more than the usual amount of judicial introspection on the theoretical underpinnings of tort law and the nature of the judicial enterprise. Also, this has in turn occasioned considerable scholarly speculation upon the motivation and causes of those developments. Furthermore, during this period, there has been a considerable and conscious re-alignment in political ideologies in England and Canada — the supposed Thatcher-Mulroney revolution of the neo-conservative, free-market Right. It will be argued, therefore, that the varying trajectory of tort law and the related shifts in contract law offer a vivid opportunity to assess the relation of legal doctrine to these broad changes in the constitutive context of political culture.

AT A LOSS

No claim was made by Mrs Donoghue for the reduced value of her ginger beer; she had more important and pressing concerns. But it is highly unlikely that she would have been successful in such a claim.¹⁹ Since 1875, there had been a rule against the recovery of economic loss in tort. In *Cattle v. Stockton Waterworks Co.*,²⁰ water from the defendant's pipe had negligently flooded the soil under a road. The plaintiff was employed by a third party to build a tunnel under the road. The plaintiff's work was flooded and it incurred excess costs not covered by its lump sum contract. Recovery was denied because the loss was economic and not covered by any contractual relationship between the parties. The defendant had no responsibility: this was a relational

¹⁷ See, for example, Macklem, "Of Texts and Democratic Narratives" (1991) 41 U.T.L.J. at 114.

¹⁸ See, for example, Hunt, "Living Dangerously on The Deconstructive Edge" (1988) 26 Osgoode Hall L.J. at 869.

¹⁹ It needs to be emphasised that we do not intend to trivialise our account by focussing on a bottle of ginger beer. The aim is to use the infamous product as a symbol for all other and more valuable goods and services.

²⁰ (1875), L.R. 10 Q.B. 453.

economic loss to be borne by the employees. While this decision is still considered the leading authority on economic loss, it ought not to be forgotten that it was decided over 50 years before the modern law of negligence was born. Although regularly incanted, its persuasiveness is more historical than principled in force.

Contrary to common understanding, *Donoghue v. Stevenson* did not release tort liability onto an unsuspecting legal world. While contract was the primary mode of civil obligation, there existed a patchwork quilt of statutory and judicial schemes of tort liability. *Donoghue* extended liability to some new areas, but also softened legal responsibility in other older areas from one of strict liability to negligence.²¹ In his celebrated judgment, Lord Atkin introduced the general notion that a civil obligation arises between 'neighbours' to take care for each other's safety. Consequently, Mrs. Donoghue could recover damages for her sickness and, because they were a direct consequence, any lost wages. Yet, in a prescient dissent that has come to haunt the development of tort law, Lord Buckmaster argued that once such duties are held to exist, apart from those implied by contract or imposed by statute, they will consume the law of civil obligations: "if one step, why not fifty?"²² Nevertheless, while *Donoghue* extended the general provenance of negligence liability, it remained silent on the recovery of pure economic loss and, in particular, whether Mrs. Donoghue could claim for the diminished value of the ginger beer. Until 1964, the courts continued to set their collective face against allowing recovery for pure economic loss.²³

The turning-point was *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*²⁴ While focused on possible liability for negligent statements, it clearly carried enormous implications for the issue of economic loss at large. In *Hedley Byrne*, the defendant had provided information to the plaintiff about the financial status of a third party. The information was wrong and the plaintiff subsequently suffered substantial economic loss. The House of Lords was prepared to lift the rule against the recovery of pure economic loss because the defendant knew that the plaintiff might act on the advice. The loss, being associated with regular commercial contracts, was incurred in a relationship that was essentially contractual in nature and, therefore, could be recovered. However, the defendant had provided the information with a disclaimer clause attached. Again, this evidenced the contractual overtones of the transaction and permitted the defendant to escape liability. Accordingly, while the case was grounded in tort law,

²¹ Abel, "Torts" in *The Politics of Law: A Progressive Critique*, ed. by D. Kairys, (New York: Pantheon Books, 1982); Rabin, "The Historical Development of the Fault Principle: A Reinterpretation" (1982) 15 Ga. L. Rev. 925.

²² *Supra*, note 1 at 582.

²³ See, for example, *Brandon Electrical Engineering Co. (Leeds) Ltd. v. William Press & Son Ltd.* (1956), 106 L.J. 332.

²⁴ [1964] A.C. 465.

principles of contract led to its disposition. Moreover, *Hedley Byrne* left the law in a state of considerable confusion. Prior to the decision, there was no liability for negligent statements or pure economic loss. After the decision, there was recovery for negligent statements and, of necessity, for pure economic loss. Did this mean that pure economic loss was now generally recoverable? Or was it, in a somewhat ironic doctrinal twist, that pure economic loss was only recoverable in connection with negligent statements, a category that had previously given rise to no tort liability at all?

In a series of subsequent cases, the courts seemed to hold fast to the rule against the recovery of economic loss unless accompanied by and consequential upon physical or property damage.²⁵ For instance, in *Spartan Steel & Alloys Ltd. v. Martin & Co.*²⁶, the defendant struck an electrical wire that serviced the plaintiff's factory. The plaintiff lost property damaged by the electrical power cut-off and had to stop production until power was restored. The court held that, while the profit from the property that was damaged could be recovered from the defendant as it was directly consequential upon the defendant's negligence, the lost profits from the inability of the plaintiff to continue production in the time that the factory was closed could not be recovered as there had been no property damage during that period. It was a pure economic loss whose recovery would normally be governed by a contractual relationship. In a strong, but now ignored, dissent, Edmund Davies allowed recovery for all the lost profits because they were foreseeable and direct.

The Canadian courts steered a similar course to that of their English counterparts. However, in the leading case of *Rivtow Marine v. Washington Iron Works*²⁷, the Supreme Court tried to go in opposite directions at the same time. The result was predictably painful. Learning that a crane similar to their own had collapsed and killed its operator, the plaintiff inspected its own crane and found serious structural defects. The plaintiff took the crane out of service and claimed for the costs of repair and for lost profits during the period of repair. The majority held that such losses, as they were not consequential upon physical or property damage, were not recoverable. However, in a fascinating twist, the court allowed recovery of some of the lost profits as a result of the manufacturer's failure to warn the plaintiff of certain dangers that had come to its attention. As the defendants could have issued warnings in the low season, the plaintiff received the difference in profits between low and high season when it was obliged to take the crane out of service. In dissent, Laskin would have also allowed recovery of repair costs as they were incurred to prevent threatened physical harm. Nevertheless,

²⁵ See *Weller & Co. v. Foot and Mouth Institute*, [1966] 1 Q.B. 569; *Electrochrome Ltd. v. Welsh Plastic Ltd.*, [1968] 2 All E.R. 205; *S.C.M. (U.K.) Ltd. v. W.J. Whittall & Son Ltd.*, [1970] 3 All E.R. 245.

²⁶ [1973] Q.B. 27.

²⁷ [1974] S.C.R. 1189.

the whole court confirmed its doctrinal acceptance of a no recovery rule, but sought to carve out justifiable exceptions to it.

Although primarily concerned with the tort liability of municipalities, the House of Lords' decision in *Anns v. London Borough of Merton*²⁸ accepted that, where there had been a negligent failure to inspect properly the defective foundations of a housing block and structural damage had begun to appear, the plaintiff could recover the reduced market value of the property. In seeking to establish a single framework for analyzing the duty of care, Lord Wilberforce made his contentious pronouncement:

Through the trilogy of cases in this House, *Donoghue v. Stevenson*, *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* and *Home Office v. Dorset Yacht Co. Ltd.*, the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise.

In laying down such a general two-step approach, the House of Lords ensured that further exceptions were established to the rule against recovery of economic loss. Moreover, it was only a matter of time before some future case did away with the rule entirely.

That case was *Junior Books Ltd. v. Veitchi Co.*²⁹ in which the House of Lords pushed the gates to recovery for economic loss wide open: the exception consumed the rule. In short, it did away with the requirement of damage to person or property and made the existence of damaged property sufficient to trigger tortious liability. The pertinent facts were that, during the construction of a factory, a sub-contractor negligently laid a defective floor. There was no contract between the sub-contractor and the factory owner. Although there was no danger to anyone or anything, the owner decided to have the floor relaid at a cost of \$100,000. During the work, a further \$300,000 in expenses was incurred due to lost production. The House of Lords held that recovery of the entire \$400,000 was appropriate. While it refused to treat pure economic loss as a unique category of loss, the precise basis on which it did this was not entirely clear.

Undoubtedly, the parties were in a chain of close contractual relationships, but they lacked any privity between themselves. As such, they easily met

²⁸ [1978] A.C. 728.

²⁹ [1983] 1 A.C. 520.

the requirements for an established duty based upon neighbourhood, special relationship or proximity. However, the key question was the substance and scope of such a duty. While it could simply amount to a duty to perform a service in a non-negligent manner, it might also entail a general duty to all neighbours to meet any reasonable (contractual) expectations. Whichever it was, such extensive recovery in tort would significantly undermine the significance of contiguous contractual relationships between parties. The plaintiff would be able to insist on compensation from the defendant even when the defendant may not have known that the plaintiff had special demands or that there was no risk of physical injury to the plaintiff. Mindful of Brandon's dissenting words on the wisdom of enforcing a transmissible warranty of quality, there seemed little future reason to bother with the law of contract when contractual expectancies could be enforced through tort law.³⁰

The English courts' response to *Junior Books* was decidedly swift and negative. In a series of cases, it managed to undermine and cabin the decision without the House of Lords actually bringing itself to effect a formal overruling. In *Caparo v. Dickman*,³¹ auditors were found not liable to investors for misinformation published in a company's annual report. As the information was never given to the plaintiffs with their specific transaction in mind, there could be no general duty to neighbours based on foreseeability: the duty only existed to those in proximity. Likewise, in *Murphy v. Brentwood District Council*³² a municipality was held to owe no duty to a home owner when an inspector failed to find defects in the home's foundations. The House of Lords decided that the loss was purely economic and was more appropriately dealt with under contract, not tort. Recovery for pure economic loss was thus restricted to situations of close party proximity which are tantamount to contract relationships. Consequently, after a decade of development, English courts have reverted to the traditional rule of no recovery for economic loss, but they are occasionally prepared to recognize well-established exceptions, as in the case of negligent statements.

Canadian courts have been less doctrinaire and more pragmatic. In *Central Trust Co. v. Rafuse*,³³ the Supreme Court accepted that liability can arise from a contractual or tortious basis. However, where a contract existed, the contract would govern any tort liability. Consequently, there is no reason to preclude recovery of economic loss in tort based on the argument that the loss belongs to the law of contract. Moreover, in *Kamloops v. Nielson*³⁴ and *A.G. of Ontario v. Fatehi*³⁵, the Supreme Court expressed grave doubts about

³⁰ *Ibid.* at 551. For further discussion of *Junior Book's* implications, see *infra*, pp. 304–305.

³¹ [1990] 2 W.L.R. 358.

³² [1990] 3 W.L.R. 414.

³³ [1986] 2 S.C.R. 147].

³⁴ (1984), 10 D.L.R. (4th) 641 (S.C.C.).

³⁵ (1984), 31 C.C.L.T. 1.

the continuing applicability of *Rivtow* in light of the decision in *Anns*. In its most recent decision in *C.N.R. v. Norsk Pacific Steamship Co.*³⁶, a majority of the Supreme Court held that Canadian courts should follow *Kamloops* and *Anns* despite the recent decision of the House of Lords in *Murphy*. Pure economic loss is *prima facie* recoverable when there is sufficient proximity between the defendant's negligent act and the plaintiff's foreseeable loss; there will be no liability where policy so dictates. Notwithstanding a vigorous dissent along English lines, recovery was allowed for pure economic loss as a result of damage to a third party's property.

"WHO IS MY NEIGHBOUR?"

In both the English and Canadian contexts, it seems clear (at least for the time being) that the courts have abandoned Lord Atkin's search for some golden thread that will make general sense of the law's particulars. They have opted for a less doctrinaire and more pragmatic approach to tort law. In the graphic words of Purchas, there is "no precedent for the application of strict logic in treading the path leading from the general principle established in *Donoghue v. Stevenson* towards the Pandora's Box of unbridled damages at the end of the path of foreseeability."³⁷ Although each begin from different starting-points, the English and Canadian courts are stranded on the same adjoining and treacherous ground. Each are motivated by the need to allow recovery for economic loss in some contexts, but to deny it in others. In plotting this path, the challenge for the courts has been to map out a network of intersections and turnings that can be rationally defended and intellectually justified *within the law's own frame of reference*. Without the demonstration of such an internal or immanently rational account, any theoretical attempt to preserve the distinctiveness of law from politics is fatally compromised.

This analytical confusion and doctrinal chaos is nowhere more apparent than in the general judicial debate that centres on 'the duty of care'. While the existence of a duty tends to be the pivotal question in most cases, it takes on special significance and salience in economic loss cases. Under *Donoghue*, an obligation to take reasonable care is owed by everyone to their neighbours and is based upon a general duty of reasonable foreseeability. But, in *Hedley Byrne* situations, where loss is economic and not physical, a plaintiff can only recover economic loss when there is a special relationship with the defendant of reliance and proximity: the duty is more restrictive because of the fear that liability for negligent misstatements would be more difficult to determine than negligent acts. Hence, a different duty question was asked depending on whether a defendant had engaged in a negligent mis-statement (e.g. a service) or a negligent act

³⁶ (1992), 91 D.L.R. (4th) 289 (S.C.C.).

³⁷ *Greater Nottingham Co-operative v. Cementation*, [1988] 3 W.L.R. 396 at 407. See, also, *Caparo*, *supra*, note 30 at 362-5 per Lord Bridge, 374 per Lord Roskill and 379-81 per Lord Oliver.

(e.g. a manufactured product); pure economic loss was recoverable in the former, but not the latter. In an ironic turn, advocates of a "no recovery for economic loss" rule now argue that liability for negligent acts is more uncontrollable than for negligent mis-statements: the same fear that caused the *Hedley Byrne* judges to make negligent mis-statements distinct from negligent acts. The doctrinal device used to implement and police this distinction is "proximity". Whereas the *Donoghue* formula looks to whether the loss was a foreseeable consequence of the negligent act, proximity does not impose an obligation unless there is an awareness by the defendant that it has assumed a risk, voluntarily exercised a skill or knows that the plaintiff is relying on the defendant.

Contrary to judicial belief, proximity is not all that it is cracked up to be. Although disguised as a rule, a test, a matter of fact, it is an empty vessel that can be filled with whatever concoction that its user desires: only interpretation can infuse it with meaning. The idea of there being any definitive or determinate difference between 'foreseeability' and 'proximity' is entirely illusory. It is based on a set of normative values about what obligations ought to be owed between people: it is nothing more than an attempt to draw a line based on a value choice. At some point, courts will want to draw a line, but efforts to disguise proximity as an analytical rather than a political device give it an aura of objectivity that it does not deserve. The motive force, we are told in *Murphy*, behind this pretence is the felt need not to infringe on the ground of contract law.³⁸

In *Murphy*, the House of Lords chose to depart from its earlier judgment in *Anns*. The eulogies that have been written for that departed decision disagree over whether the law has been thrust into a state of uncertainty or whether it can continue along the same merry path as before.³⁹ However, both can lay some claim to the truth. *Murphy* may have formulated a new test, but the test lacks determinate meaning unless the implicit values which have taken law from *Anns* to *Murphy* by way of *Junior Books* are made explicit. The Law Lords have marched to the top of the hill and marched down again, but have they really gone anywhere? The formal appearances of *Anns* and *Murphy* may look different, but their reasonable application does not demand any different substantive outcome.

The *Anns* approach was used to expand liability in negligence for economic loss and reached its zenith in *Junior Books*. The later Canadian cases are certainly no retreat from this approach.⁴⁰ Its two-step approach collapsed all sorts of issues into the first part of the test in asking whether there was sufficient proximity or neighbourhood between the plaintiff and

³⁸ For discussion of the pretence, see *infra*, "Contorted Relations".

³⁹ See Schlosser, *supra*, note 11 at 673-700; MacQueen, "The Future of Liability for Defective Buildings" (1990) 44 Scots Law Times 337.

⁴⁰ See *Kamloops*, *supra*, note 34; *Just v. B.C.*, [1989] 2 S.C.R. 1228; and *Rothfield v. Manolagos*, [1989] 2 S.C.R. 1259, and *Norsk*, *supra*, note 36.

the defendant such that the actions of the defendant would likely cause harm to the plaintiff.⁴¹ The second part of the test is extremely vague in its general reference to policy considerations, and it simply asks in a more open fashion to re-visit the factors that are implied in answering the first part.

The first step of the *Anns* test can be equated with proximity, but, in addition, the damage must be a "reasonably foreseeable" consequence. Hence, a duty exists not merely to those with whom a defendant has a proximate or special relationship, but also to all those in the defendant's neighbourhood. The limits in the second step are optional. *Anns* uses the language from both *Donoghue's* neighbourhood test and *Hedley Byrne's* special relationship test. The distinction that was first drawn in *Hedley Byrne* may collapse under *Anns*. It is not always clear on what basis the courts have allowed or denied recovery. In *Ross v. Caunters*, it was stated that "the basis of the solicitor's liability to others is either an extension of *Hedley Byrne* or, more probably, a direct application of the principle of *Donoghue v. Stevenson*."⁴² Also, while many contend that *Donoghue* is not extended by the duty imposed through *Hedley Byrne*,⁴³ the wording of the *Anns* test can and has, as in *Junior Books*, sanctioned the "extension" of *Hedley Byrne* into the field of defective products.

The language which is used in applying the *Anns* test is important. In discussing the complexities of liability for economic loss, it was noted that:

... the courts of this country will continue to search for reasonable and workable limits to the liability of a negligent supplier of manufactured products or services, to the liability of a negligent contractor for contractual undertakings owed to others, and to the liability of persons who negligently make misrepresentations. In this search courts will be vigilant to protect the community from damages suffered by a breach of the "neighbourhood" duty.⁴⁴

This reference to neighbourhood sounds much more expansive than the notion of proximity and it should be obvious that the *Anns* proximity or neighbourhood test can easily capture all the neighbourhood relationships circumscribed in *Donoghue*. Proximity is, therefore, meaningless without discussion of the values and policy choices which energise these cases and operationalise its application. *Murphy* and *Anns* merge together as formal tests; it is the values given weight in a case that ultimately decide whether there is proximity or neighbourhood.

Although proximity appears to be a more precise description of a duty relationship than neighbourhood or reasonable foreseeability, it is not "a definable concept but merely a description of circumstances."⁴⁵ It is impossible to determine the issue of duty without reference to a whole host of other

⁴¹ See *Anns*, *supra*, note 28 at 751 per Lord Wilberforce.

⁴² *Ross v. Caunters*, [1979] 1 A.C. 193 at 199 per Sir Robert Megarry V.C.

⁴³ *Rivtow Marine*, *supra*, note 27 at 1210-11 per Ritchie J. and *Junior Books*, *supra*, note 29 at 207 per Lord Keith.

⁴⁴ *B.D.C. Ltd. v. Hofstrand Farms Ltd.* (1986), 26 D.L.R. (4th) 1 at 12-13 per Estey J.

⁴⁵ *Caparo*, *supra*, note 30 at 379 per Lord Oliver.

concepts and considerations. As a test, *Murphy* proximity gives no more direction than the *Anns* duty test. Both collapse policy issues into the duty stage of an analysis and thus disguise other issues. Proximity can just as easily expand or restrict liability as *Anns*. It is amorphous and can be used to support all manner of results. Although proximity is held out as being analytically and functionally different, it is ultimately a re-vamped *Anns* test. It is a catch-all phrase. Hinting at an idea of remoteness or causation, it is more encompassing than that.⁴⁶ It is simply another conceptual rug that is weaved together out of public policy and foreseeability. As such, it is no different than *Anns* in its potential scope and manipulability. Indeed, in *Murphy* there was considerable concern for what were essentially policy issues, such as the transmissible warranty problem, a desire to limit liability for municipal authority, and deference to legislative action. The problem with *Anns* was that it had been used to incorporate policies into tort law that put the *Murphy* court into apoplexy. *Murphy* overturns *Anns* to discredit the values which have become synonymous with *Anns*. However, although *Murphy*'s proximity is linked more to the understanding that law should proceed cautiously,⁴⁷ there is no reason why it could not accommodate the same values and policy choices as *Anns*.

LINES IN THE SAND

Predictably, therefore, tort doctrine is a haphazard collection of dead-ends and cul-de-sacs. It is our contention that the law does not presently nor can it in the future achieve an internally consistent or formally satisfying account of its own existence or development. It is destined to remain a hodge-podge of half-baked distinctions and superficial categorisations. As Simpson puts it, "since all questions about liability for negligence are supposed to turn on the doctrine of the duty of care, one must expect the duty of care to be something of a dog's breakfast."⁴⁸ The doctrinal product is more a result of political expediency than of technical soundness: its rudimentary predictability is only accessible and comprehensible in light of extra-legal considerations. The sham distinction between reasonable foreseeability and proximity is only one of the more general and blatant examples of a pervasive trend throughout the law. In the area of economic loss in tort, the courts rely on an array of distinctions whose plausibility and cogency are profoundly suspect. It must be remembered that it is not enough to point out differences between two activities or

⁴⁶ *University of Regina v. Pettick*, (1991) 77 D.L.R. (4th) 615 at 632 per Sherstobitoff J.A.

⁴⁷ See, *Council of the Shire of Sutherland v. Heyman* (1985), 157 C.L.R. 424 at 481 per Brennan J.: "It is preferable... that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a *prima facie* duty of care restrained only by indefinable considerations which ought to negate, or to reduce or limit the scope of the duty or the class of persons to whom it is owed."

⁴⁸ A.W.B. Simpson, *A History of the Common Law of Contract* (Oxford: Clarendon Press, 1975) at 325.

characteristics; that distinction must be sufficient to warrant the difference in legal treatment that is purported to result. For instance, while there is an obvious difference between blue-eyed and brown-eyed plaintiffs, it is not the kind of difference that can support or warrant completely different legal treatment in matters of tortious liability. In short, the difference must be related in some relevant and justifiable way to the purpose for making such a distinction.

In attempting to explain and justify the different treatment that is and ought to be accorded to the tortious recovery of 'pure economic loss', the Anglo-Canadian courts have fallen back on at least nine separate, although often combined, arguments. None of these arguments can carry, either individually or collectively, the kind of justificatory weight that they are expected to. Indeed, they all tend to snap under serious scrutiny. Moreover, while in some cases the courts place almost determinative weight on a particular argument, they brush it aside in other cases when its effect is inconvenient or undesired. These arguments are:

that economic loss is different from physical damage: Although it has been roundly condemned as being incapable of justification "on any intelligible principle,"⁴⁹ this distinction still plays a strong role in modern negligence law. Yet it is surely the case that all injuries are obliged to be quantified in monetary terms and, therefore, damages are reducible to financial losses. From the plaintiffs' point of view, no matter how the injuries are suffered or classified, they will still only receive compensation that is calculated and made on an economic basis. Moreover, treating economic loss differently from physical damage means that some equally negligent defendants will be less vulnerable to tortious claims than others simply because of the kind of damage that they cause; the banker and stockbroker will have less incentive to take care than manufacturers and builders. As Denning concluded, "I cannot think that liability depends on the nature of the damage."⁵⁰

that "pure" economic loss is different from consequential economic loss: Tort law has always allowed the recovery of economic losses that are consequential on physical injury or property damage. Apart from the difficulty of making a clear characterization in some circumstances, as in *Muirhead*⁵¹ it is not easy to understand how this difference should warrant an entirely different rule for each kind of damage. If economic loss resulting from damage done to property is recoverable, it seems to be drawing an extremely fine line

⁴⁹ *Hedley Byrne, supra*, note 24 at 517 per Lord Devlin.

⁵⁰ *Candler v. Crane, Christmas*, [1951] 2 K.B. 164 at 179.

⁵¹ *Muirhead v. Industrial Tank Specialities Ltd.*, [1985] 3 All E.R. 705. The principle of non-recovery for pure economic loss flowing from damaged property is forcefully reiterated in *Murphy, supra*, note 32 at 426 per Lord Keith: "The jump that is here made from liability under the *Donoghue v. Stevenson* principle for damage to person or property caused by a latent defect in a carelessly manufactured article to liability for the cost of rectifying a defect in such an article which is *ex hypothesi* no longer latent is difficult to accept."

to deny recovery for other types of economic loss such as the diminished value of goods or buildings with latent defects, profits not realized due to damaged property or the cost of repairs for defective property. The term 'pure' is dismissive and unfairly conjures up notions of undeserving plaintiffs. Moreover, consequential loss remains also an economic loss as much as a property loss. After all, "it is in his [or her] pocket, not in his [or her] person that (the plaintiff) has suffered".⁵² Presumably, while the loss is no less different to the plaintiff, the fact that the plaintiff's ownership of the power cable in *Spartan Steel* might have made all the difference to its recovery is ludicrous.

that economic loss must be consequential on damage to the plaintiff's property or person and not to that of a third party: As the majority in *Norsk* stated, the fact that the injured party is a third party should not be a barrier to recovery if it was reasonably foreseeable to the defendant that the third party could be injured. The argument against allowing recovery by third parties is akin to the argument in contract law that third parties generally cannot sue or be sued under a contract to which they are not a party. But, as *Donoghue* clearly decided, contract arguments do not apply in tort or carry the same weight. Moreover, the problem is more one of remoteness than of duty. While the rules for remoteness give a determinate array of answers, they do at least point to a more fitting agenda of questions to be asked.

that statements are different from acts: The origin of the distinction is from *Hedley Byrne* itself. Lord Reid stated that acts must be treated differently from statements because acts cause only one incident of damage, but statements can cause many.⁵³ Also, statements give rise to economic losses rather than physical injuries. Hence, a closer, more proximate relationship had to exist for the recovery of economic loss for a negligently given statement, a relationship which was described as equivalent to contract.⁵⁴ Yet the difference between acts and statements is more apparent than real. A statement is surely only one kind of act: to cry 'fire' in a crowded theatre is as much an act as a statement (as is the failure to do so). As cases like *Ross* show,⁵⁵ the courts are far from consistent or clear in deciding whether a particular occurrence involves a statement or an act. Furthermore, a statement can cause extensive physical injury, as in *Clayton*,⁵⁶ and an act can result in considerable economic loss, as in *Dutton*.⁵⁷ The courts have not hesitated to impose liability when

⁵² Cooke, "An Impossible Distinction" (1991), 107 L.Q.R. 46 at 50. Perhaps property loss should not be protected by tort at all as it too is a financial interest better governed by contract or insurance. See Abel, "Should Tort Law Protect Property against Accidental Loss?" in Furmston, *supra*, note 37 at 155.

⁵³ *Hedley Byrne*, *supra*, note 24 at 483 per Lord Reid.

⁵⁴ *Ibid.* at 530 per Lord Devlin.

⁵⁵ *Ross*, *supra*, note 42.

⁵⁶ *Clayton v. Woodman & Sons*, [1961] 3 All E.R. 249 (Q.B.).

⁵⁷ *Dutton v. Bognor Regis U.D.C.*, [1972] 1 Q.B. 373.

negligent statements have led to property damage or personal injury. In *Robson*, the defendant was liable for injuries sustained when its employee advised the plaintiff to step back and, in doing so, caused the plaintiff to fall off a stage.⁵⁸ Accordingly, in cases where there is physical harm, it is not the fact that injury resulted from a statement that is considered important, but the fact that there was physical harm irrespective of whether it resulted from a statement or an act.

that the negligent performance of services is different from the negligent manufacture of products: Provided the parties are in a suitably proximate relationship, pure economic loss is generally recoverable for the negligent performance of services, but not the negligent manufacture of goods. Consequential economic loss would usually be recoverable for both. The artificiality of the distinction is clearly revealed in *Pettick*,⁵⁹ which concerns negligence by architects. The majority characterizes the case as a negligent service case rather than a builder's liability case in order to bring it within the ambit of *Hedley Byrne* and allow recovery for economic loss from negligent misstatement. Yet, as the dissent points out, careless design is not recoverable as it is a function of manufacturing rather than a professional service. The majority's argument is rather strained, but it is forced to do so because of the non-recovery rule on pure economic loss for defects and manufactured goods. Similarly, in *Rivtow Marine*,⁶⁰ the Court circumvented the rule against recovery for design defects by the imposition of a duty to warn which brought the claim under *Hedley Byrne*. The plaintiff received lost profits that resulted from the failure to warn, but not those that resulted from the need to repair. Again, the distinction produced an illogical and confusing result.

It is contended that the rule of no recovery for economic loss still applies for products because recovery in such circumstances ought to be an issue of contractual warranty.⁶¹ Whatever merit this important distinction may have had historically, it is impossible to defend in a modern and complex economy in which the service and manufacturing sectors are inseparable. In a great many service cases, there are contractual obligations. Issues of contract are considered in those service cases which permit recovery of economic loss in tort. Consequently, if the supremacy of contract is important, the same rule can apply for both manufactured products and services. Indeed, there would no longer be a rationale to treat manufacturing differently than service industries. Manufactured goods and buildings are not made without the provision of information, services and advice. It would be anomalous that

⁵⁸ *Robson v. Chrysler Corporation (Canada)* (1962), 32 D.L.R. (2d) 49 (Alta. C.A.).

⁵⁹ See *Pettick*, *supra*, note 46.

⁶⁰ *Rivtow Marine*, *supra*, note 27.

⁶¹ *Murphy*, *supra*, note 32 at 425 per Lord Keith, at 435 per Lord Bridge, at 447 per Lord Oliver.

the negligent performance of a service would give rise to tortious liability for pure economic loss,⁶² but the actual construction would not.⁶³

The line between services and manufacturing is especially blurred by subsequent judicial treatment of *Junior Books*. In *Murphy*, it is suggested that *Junior Books* is an extension of *Hedley Byrne*.⁶⁴ Presumably, the plaintiffs relied on the special skill of the defendants. However, this clearly mixes the supposed distinction between manufacturing and information services. *Junior Books* is also a manufacturing case, and the judgments illustrate that the Lords considered the defendant's liability to be rooted in the principles of *Donoghue* rather than *Hedley Byrne*. Consequently, this difference is more confusing than it is useful.

that recovery for economic loss will open the floodgates to indeterminate liability: This constant concern is summed up by Cardozo's oft-quoted statement that liability for pure economic loss might result "in an indeterminate amount for an indeterminate time to an indeterminate class."⁶⁵ Contrary to received wisdom, there is no indication that such a fear is any greater in economic loss cases than in other negligence cases. While it is true that "the scope of liability for economic loss is potentially breathtaking,"⁶⁶ so are the consequences in human and economic terms that can flow from disasters like Bhopal or the Amico Cadiz. In those cases where liability was denied, the liability was far from indeterminate and not a real factor in the disposal of the cases: there is usually, as in *Murphy*, an obvious and easily calculable measure of damages; there is a fairly typical lapse of time between the negligent act and the economic loss and, as in *Junior Books*, it can be very brief; and there is usually, as in *Simaan* and *Greater Nottingham Co-operative Society*, an identifiable and limited class of potential defendants. Consequently, while too expansive liability is always a problem to be guarded against in tort, the potential for indeterminate liability in economic loss is insufficient on its own to warrant special treatment.

The defendant's lack of knowledge of risk and its potential liability to a class of undefinable plaintiffs are at the core of the concern over expansive liability. The *Abramovic* and *Three Mile Island* cases are examples where the defendant's actions impacted on a wide number of people who had no necessary connection to the defendant apart from the accidents in question.⁶⁷ Courts can clearly deny these claims, either because the defendant could not have foreseen that the plaintiff would be injured, or because the damages suffered were too remote.

⁶² *Pettick*, *supra*, note 46 and *Smith v. Bush*, [1990] A.C. 831.

⁶³ *Department of Environment v. Bates*, [1990] 2 All E.R. 943.

⁶⁴ *Murphy*, *supra*, note 32 at 427 per Lord Keith.

⁶⁵ *Ultramares Corp. v. Touche*, 225 N.Y. 170 (1931).

⁶⁶ *Pettick*, *supra*, note 46 at 632.

⁶⁷ *Abramovic v. C.P. Ltd.*, (1992) 6 O.R. (3d) 1 and *General Public Utilities v. Glass Kitchens of Lancaster*, 542 A. 2d 567 (1988).

Consequently, a case such as *Oakville Storage* might fall within the scope of liability since the plaintiff had a proprietary interest in the building that was destroyed and the defendant should have known that someone would have such a proprietary interest.⁶⁸ In *Caltex* and *Norsk*, although the plaintiffs were compensated for costs incurred, the defendants did not have actual knowledge of the plaintiffs. A similar logic can be applied to *Spartan Steel* — if a loss of profits on the first two melts was foreseeable, so was the loss on the third melt. In short, the available, albeit indeterminate, concepts of causation, duty and remoteness are as capable (or incapable) of dealing with the 'floodgates' dimensions of economic loss cases as with any other area of law.

that recovery for economic loss will result in uncertain liability: Uncertainty results from a lack of knowledge about legal liabilities, risks and potential plaintiffs. Broad and expansive liability flows from this uncertainty. This uncertainty is a direct consequence of a legal doctrine that has no clear position on economic loss that it is prepared to justify or stand by. For example, the doctrine emanating from the House of Lords in *Caparo* cannot possibly be consistent with *Smith v. Bush*. Thus, mindful of the uncertainty in other areas of law and that the remedy for such a state of affairs is arguably in the hands of the judges themselves, there is no good reason why liability should be denied simply because of an uncertainty created by constant doctrinal fluxes in law. It is a classic bootstrap argument and ought to be dismissed as such.

that recovery for 'pure' economic loss is more appropriately handled by contract: It is forcefully contended that it is essential to preserve the distinction between tort and contract. Once tort begins to infiltrate too freely into contract, "the world of commerce would be intolerable" and it would make a "mockery of contractual negotiations."⁶⁹ The judges offer no empirical

⁶⁸ *Oakville Storage v. C.N.R.* (1990), 80 D.L.R. (4th) 675. The concept of "stranger" appears to be sufficient to deny recovery in the United States. Stranger cases occur where the defendant had no reasonable knowledge that its negligent actions would affect a plaintiff. In *Dundee Cement Co. v. Chemical Laboratories*, 712 F.2d 1166 (1983), a truck overturned and blocked the only entrance to a cement plant and this accident caused business loss for the cement plant. The court denied liability for the trucker since it would lead to "crushing, virtually open-ended liability." In *Aikens v. Baltimore & Ohio Railroad Co.*, 348 Pa. Super 17, 501 A.2d 277 (1985) at 278-279, the employees of a factory lost wages from a train derailment that closed the plant. The claim was dismissed as the defendant had no knowledge of a contract between the factory and the employees. The rhetoric in this case is particularly telling. The claim "would create an undue burden upon industrial freedom of action" and would "pose a danger to our economic system." See generally, Lieder, "Constructing a New Action for Negligent Infliction of Economic Loss: Building on Cardozo and Coase" (1991) 66 Wash. L. Rev. 937.

⁶⁹ *Weller v. Foot and Mouth Institute*, [1966] 1 Q.B. 569 per Widgery J. and Simaan, [1988] 2 W.L.R. 761. See, also, *Candlewood*, [1986] 1 A.C. 1 at 15 and *The Aliakmon*, 816-17 per Lord Brandon. For early sightings of an exclusionary rationale based on inappropriate interference with the proper sphere of contracts, see J. Fleming, *The Law of Torts*, 6th ed., (Sydney: Law Book Company, 1983) at 164, and Stevens, "Negligent Acts Causing Pure Financial Loss: Policy Factors at Work" (1973) 23 U. of Toronto. L.J. 431 at 455.

support for such predicted catastrophic consequences and fail to provide a general defence of the initial compartmentalisation of civil obligations at the traditional categorisation of economic loss as a head of contractual damage. Furthermore, it is conveniently overlooked that the original reason for the birth of modern negligence law through *Donoghue v. Stevenson* was the failure of contract law to respond equitably to the injustices created by an inflexible application of the privity doctrine. In light of this, it seems particularly wrong-headed to attempt to base a rule for tortious recovery, as in *Hedley Byrne*, on the existence of "a relationship equivalent to contract."⁷⁰ Moreover, while the courts have used, the mere existence of a relevant contract to deny tortious liability, as in *D. & F. Estates*, they have not, as in *Hedley Byrne* held to this consistently. Accordingly, rather than expect parties to plot a course through a complicated maze of different contracts, it would be more efficient, fair and conducive to good business practice to allow the party who suffered economic loss to sue directly the party who negligently caused that loss.

In *Rivtow*, the Court was concerned about the imposition of contractual warranties and standards into a products liability case in tort. This relates to the idea that pure economic loss concerns expectancy values, lost profits and normal business risks: the plaintiff is attempting to recover for having received something less than what it expected. While contract law is the usual protector of expectancy values,⁷¹ the courts have been prepared in other tort cases to allow recovery for such losses in circumstances where the loss is almost speculative in nature. In *Ross*, a beneficiary was able to recover for a lost inheritance that he placed no reliance upon nor even knew that he had, let alone expected.⁷²

that recovery for 'pure' economic loss can only be effected by legislative initiative: It is a common ploy by the courts to insist that such large-scale changes in the law are not properly within the jurisdiction of the courts. In economic loss cases, the argument is made that, as it involves consumer protection and gives rise to difficulty in circumscribing the precise ambit of liability, the matter should be left to legislatures. The role of the courts is not to engage in open-ended policy-making. As such, recovery for "pure" economic loss cannot be maintained or defended as an act of principled judicial decision-making.⁷³ Again, such an argument is only selectively deployed by

⁷⁰ *Hedley Byrne*, *supra*, note 24 per Lord Devlin.

⁷¹ The issue of the relation between contract and tort will be discussed at length *infra*, pp. 297-301. It should be noted here, however, that not everyone holds that the protection of expectancy interests is the role of contract law. See P. Atiyah, *The Rise and Fall of Freedom of Contract*, (Oxford; New York: Oxford University Press, 1979) at 754-64.

⁷² *Ross*, *supra*, note 42.

⁷³ See *Murphy*, *supra*, note 32 at 419 per Lord Mackay, 432 per Lord Keith, 451 per Lord Oliver, and 457 per Lord Jauncey.

the courts. A deference to legislative intervention belies the reality that courts have been the most active fora for the imposition of liability for economic loss. Further, legislation is often silent on the question of civil liability and it is for the courts to determine its existence. The extension of liability in, for instance, *Donoghue* and *Kamloops* belies the courts' integrity in relying on this argument. It could equally be argued that the decision to overturn *Ann's* after 13 years of accepted doctrinal existence is no less an act of legislative usurpation. This judicial conservatism simply tries to under-play its reliance on policy values in making a decision. There is the perception that an appeal to authority is more legitimate than an appeal to policy. Yet ultimately, it is the policy questions which drive the use of the authority.

In assessing and dismissing the cogency of these arguments, the objective has *not* been to build a case for the acceptance of recovery for pure economic loss into tort doctrine. There may indeed be persuasive reasons for excluding such liability at any particular point in time. Our point is that the legal arguments relied upon by the courts are not compelling in and of themselves: they do not comprise a convincing account of why recovery for pure economic loss resulting from negligent acts ought to be treated differently from other instances of tortious liability. Nor do internal accounts that, while going beyond the doctrinal arguments actually used, attempt to explain the courts' behaviour by the formal struggle over the nature of adjudication as a restrained practice of principle rather than a broad exercise in policy-making.⁷⁴ However, this conclusion does not mean that some account cannot be given of the courts' reasons for attempting to effect such an exclusionary manoeuvre. But, if there is any semblance of order or logic to the courts' chaotic and transparent efforts to make such doctrinal distinctions, it will be found in the larger social context that frames and intrudes upon the legal and judicial enterprise. It is to the historico-political forces that comprise that informing context and the ideological visions through which they are articulated that we now turn.

DOUBLE VISION

In seeking to establish the terms and conditions for collective life, societies must inevitably engage in the normative struggle between competing social visions. One important site for the ceaseless negotiation of this visionary conflict is the courts. Behind every doctrinal body of law, there stands a social vision that gives it life and meaning. As such, all lawyers and judges must possess a framework of ideas that help them grasp the past tradition of political ordering, the nature of present reality, the possibilities for future action, and the justifications for these understandings. As Duncan Kennedy puts it, "we are divided, among ourselves and also within ourselves, between irreconcilable visions of humanity and society, and between radically different

⁷⁴ See Feldthusen, *supra*, note 10 at 369.

aspirations for our common future."⁷⁵ Accordingly, the law of civil obligations is an extended conversation about the kind of society and individuals that people want to be. It concerns the institutional arrangement and substantive distribution of authority and power in the manifold relations between state, society and individuals.

More often implicit than explicit, these visions are the sustaining poetry of legal doctrine: they energise and animate the prosaic routines of economic and social life.⁷⁶ Social visions structure perception and prescription. They inhabit the twilight zone between pure normative abstractions and historically verifiable assertions. Although largely mythic in source and simplicity, they order reality and become part of our lived experience and self-understanding. By mediating the actual and the ideal, these visions of private ordering simultaneously empower and limit the political imagination. As such, they not only carry strong explanatory force, they also wield significant moral authority. While they resonate with utopian echoes, they are meant to convey a sense of the attainable and the realistic in historical experience. To affirm a particular vision is to accept a basic epistemology, a social theory and a human psychology. That vision commits its adherents to a whole host of foundational premises, insights and intuitions about the human condition and its potentialities.

While they often seem self-contained and exhaustive, these social visions are necessarily incomplete and not mutually exclusive. They are selective in emphasis and embrace. It is their *raison d'être* to comprise an accessible distillation of the historical and aspirational elements of our collective and personal lives. Because of their generality and aphoristic nature, they often lead to contradictions between visionary intimations and existential practices and result in incoherences among commonplace patterns of behaviour.⁷⁷ Consequently, the doctrinal practice is not always the child of the visionary parent. Nevertheless, although they are indeterminate in the guidance they offer, these visions do push in definite ideological directions and dictate a particular setting of the doctrinal agenda.

In the judicial arena, an appreciation of these visions' role and operation is essential to any effort to comprehend the development and of constitutional doctrine. Without such generative visions, legal reasoning would be reduced to a desultory game of catch-as-catch-can; the normative dimension of law would be lost. There are many different visions at work in the formulation and interpretation of legal doctrine. Legal actors are divided among and within

⁷⁵ See Kennedy, "Form and Substance in Private Law Adjudication" (1976) 89 Harv. L. Rev. 1685.

⁷⁶ See H. Steiner, *Moral Argument and Social Vision in the Modern Tort Law of Accidents* (Madison: University of Wisconsin Press, 1987).

⁷⁷ See M. Oakeshott, *Rationalism in Politics* (London: Methuen, 1962) at 123-25 and R. Unger, *Critical Legal Studies Movement* (Cambridge: Harvard University Press, 1987).

themselves about the appeal and efficacy of different visions of constitutional order. Accordingly, legal doctrine is not a reflected embodiment of one indwelling and sufficient vision, but is the formal site for the attempted, but elusive, blending and reconciliation of competing visions.⁷⁸ The temporary accommodations made are more a result of political expediency than moral purity. Although one vision may tend to dominate and infuse the law with its guiding principles, competing visions will constantly challenge it and provide a debilitating set of counter-principles. At times, the tension will precipitate doctrinal crisis; at other times, the friction will be subdued and relatively untroubling. Yet, muted or manifest, this antagonism fuels and informs doctrinal development.

The law of civil obligations is dominated by two central visions — “individualist” and “communitarian” — that have vied for control of the legal imagination.⁷⁹ The basic dynamic has been the competition between social regulation and private freedom for normative primacy and organisational control. It is the way each vision balances centralised authority and individual autonomy that gives it its special ambience and character, not the exclusive preference for one over the other. Whereas individualism stops short of libertarian anarchism and the championing of entirely unregulated economic activity, communitarianism does not extend to state totalitarianism and the implementation of a wholly orchestrated economic scheme. Of course, neither vision is intrinsically *better* than the other. They are only good or bad in light of pre-existing visionary commitments or, as Holmes stated, “deep-seated preferences;”⁸⁰ there is no meta-vision available. In matters of social vision, the inarticulate poetry of the heart has the first and the final word.

The central images of the individualist vision are state distrust and individual liberty. It imagines a world consisting of independent and self-sufficient persons who confidently draw up and robustly pursue their own life-plans. Each individual has a true moral and pre-social self, not contingently sculpted by the social milieu. Normative experience is private and does not lend itself to public reckoning; human fulfilment is a personal odyssey. Within such a society, freedom is achieved when people are treated as an end and not as a means to other people’s ends. Society is never more

⁷⁸ For a general account of this process, see Hutchinson and Monahan, “The Rights Stuff: Roberto Unger and Beyond” (1984) 62 *Texas L. Rev.* 1477 at 1501–18.

⁷⁹ This is not to suggest that these two visions exhaust the universal possibilities for imagining the terms and conditions of collective life. However, it is claimed that they offer an adequate and defensible account of the historical basis and limits of civil obligation in Anglo-Canadian jurisdictions. In line with the fact that such visions mediate the ideal and the actual, the snapshots presented draw upon a wide range of raw material and sources. As such, they are synthetic images rather than pure abstractions of empirical sketches. For a more general explanation, see A. Hutchinson, *Dwelling on the Threshold: Critical Essays in Modern Legal Thought* (Toronto: Carswell, 1988).

⁸⁰ O. W. Holmes, *Collected Legal Papers* (New York: Harcourt, Brace, 1921) at 312.

than the sum of the individual parts nor public morality more than a temporary coincidence of private values and preferences. The state facilitates freedom by imposing a minimum of formal and equal constraints upon people's activities. Society must approximate as closely as possible to a voluntary scheme of individual co-operation. Although the possibility or opportunity for fraternal association is not denied, it can only be a personal choice and can never become an integral feature of an individual's identity. Paternalism is to be studiously avoided in economic and political affairs.

The main enemy of freedom is the state and the collective will. Its tendency to abuse power and hamper the heroic individual must be kept in constant check lest the irresistible slide down the totalitarian slope is allowed to begin. This demands a limited, but strong state that focuses and exhausts its energies and authority in efforts to facilitate the individual pursuit of personal life-plans. This means that it must uphold the crucial institutions of private property and contractual exchange. To do more is oppressive and to do less is anarchic. The state must protect a pre-political sphere of pure autonomy which does not depend for its existence or legitimacy upon the state. Standing above politics, it sets the parameters and standards for the competitive struggle between self-directing individuals. Of course, none of this is intended to sanction crass egotism. When people ought to be sensitive and generous to those less well-off than themselves, altruism is a matter of personal morality and not collectively-imposed obligation. This basic distrust of the state is matched by an equally strong trust and confidence in the capacity and willingness of individuals to make the "right" choices. As such, the individual vision offers no general standards by which to judge the substantive worth of individual or collective action.

The central images of the communitarian vision are civic virtue, economic regulation and ordered government. In contrast to the individualist vision, republicanism does not understand society as a crude aggregate of separate things, but as connected cells in a thriving organism. Individuals are not universal and abstract moral entities, but are situated within a local and concrete context; they are political beings with particular historical and social affiliations. In an Aristotelian conception, it is maintained that an individual who finds moral fulfillment outside the community is "either a beast or a god."⁸¹ As between people, there exists a sense of belonging and reciprocal responsibility for others. Rather than conceive of freedom as individual license, it construes it as freedom-as-order; individuals are only fully themselves when they act as secure citizens of the mature republic and as protected players in a balanced economy.

Whereas the individualist vision imagines a freedom that is contractual in origin and static in nature, communitarianism looks to a more organic and dynamic understanding of freedom. Eschewing the idea of a collective consciousness or mystical *Volkgeist*, the community seeks to attain civic virtue

⁸¹ Aristotle, *Politics*, ed. by E. Barker, (1968).

and economic harmony by the cultivation of a set of shared values to infuse public and private life with a common purpose and theme. The social whole is much greater and coherent than the haphazard aggregation of its individual parts. Social worth and self-esteem are embedded in and nourished by affective affiliations: "solidarity is the social side of love."⁸² Personal liberty without public responsibility is, at best, hollow and unsatisfying; at worst, it is uncivil and corrupting. Instead of relying upon transcendent values and abstract rationality, the search for social justice is based upon a practical reason that is contextual and contingent in character. The notions of reason and tradition are thought of as mutually reinforcing, derivative and self-correcting; flights of metaphysical musing become hopelessly fanciful and indulgent. The economic goal is the stable establishment of a common good rather than the hectic pursuit of individual satisfaction. The political agora and the economic marketplace are not simply arenas for the confrontation of competing wills, but sites for the transcending of individual preferences in the search for a unified good.

Despite the occasional and spirited insistence on visionary purity, the common law is characterized by confusion and contradiction. Although there are strong and traditional themes that run through its history, these themes are sufficiently checked and infiltrated by other influences that any thought of visionary integrity is historically inaccurate and idealistically flawed. Consequently, the hallmark of contemporary liberalism is not simply its attempt to reconcile the competing influences and appeal of the individualist and communitarian visions — this is a commonplace and inevitable task for any legal sub-order. Its contemporary character comes from the particular form that that attempted integration takes. Sensitive to the limitations and injustice of overweening reliance on an individualist vision, liberals have grappled to combine "the pursuit of individuality with sociality and membership in a community."⁸³ The individualist and communitarian threads are intertwined throughout the historical tapestry of civil obligation's doctrinal development. They appear from case to case, from judgment to judgment, and occasionally within a single judgment.

WALLS AND HANDS

Whatever the particular concatenation of pressures that brought about its occurrence or the precise contours of its shape and effect, there has clearly been a profound move in the ideological constitution of Western and Northern societies. In traditional terms, there has been a move to the right: a Reagan-Thatcherite Revolution has taken its turn. Individual freedom is the marching order of the day and laissez-faire is its banner. There is an increased distrust of centralized economic planning and a related preference for a

⁸² R. Unger, *Law in Modern Society* (New York: The Free Press, 1976) at 206.

⁸³ See G. Gaus, *The Modern Liberal Theory of Man* (New York: St. Martin's Press, 1983) at 3-4.

strengthened reliance upon the market as the prime reform for achieving allocative efficiency and distributional equity. Indeed, this contingent success is interpreted by some as the final triumph of liberalism and politics and capitalism in economics; a post-historical age is upon us.⁸⁴ As a matter of symbolic significance, the invisible hand of the Western market has pushed over the Berlin Wall of the Eastern State.

In terms of visionary allegiance, there has been a shift away from a communitarian-centered account of social living to a more individualist-focused design. Mindful that a market economy still relies on particular kinds of institutional planning and public enforcement, the shift is more emphatic than paradigmatic. Nevertheless, it is largely uncontroversial to suggest that a move toward a more individualist vision of social organization is likely to have some strong implications for the doctrinal development of civil obligation. At its most general, it might be expected that there would be a general preference for promoting contract as the primary mode of incurring obligation to others and that there would be a corresponding loss of appetite for imposing liability through the less consensual device of tort law. Moreover, within contractual doctrine itself, there might be a greater willingness to make it conform more closely to the stripped-down logic of a market-based ethic. And this is precisely what has happened. The shift in general ideological orientation is manifested in the general structure and sweep of civil obligation's doctrinal development.

In schematic terms, there has been a definite realignment of reliance in the choice of legal principles and justificatory rhetoric. Over the last 10 years, contracts has become the favoured child of civil obligation's family: tort has blotted its copybook. Although it threatened to eclipse contract, tort has now been relegated to its more traditional role of filling in the gaps left by a robust application of contract law. *Caveat emptor* has been resurrected. It was not so much that contract was dead, but that it had, like *Elm Street's* Freddie Kreuger, merely slunk off into the shadows to lick its wounds and to prepare for a fresh assault on the citadel of civil obligation. Moreover, contract has itself been pared down so that it will comply more strictly to the dictates of this New Right Age.

In contract, over the past 25 years, the courts have oscillated between different legal visions of civil obligation.⁸⁵ In 1968, the traditional view predominated. The marketplace was to be the exclusive site for competitive exchange and the elaboration of terms for such deals. The law's role was to facilitate voluntary agreements and give effect to consumers' sovereign choice.⁸⁶

⁸⁴ See F. Fukuyama, *The End of History and the Last Man* (1991). For a critique of a market economy as one that excludes state regulation, see Hutchinson and Petter, "Private Wrong/Public Rights: The Liberal of the Charter" (1988) 38 U. of Toronto L.J. 278.

⁸⁵ See Adams and Brownsword, *The Ideologies of Contract Law, Legal Studies* at 205 and H. Collins, *The Law of Contracts* (London: Weidenfeld & Nicolson, 1986).

⁸⁶ See *Suisse Atlantique*, [1967] 1 A.C. 36.

Clarity of expectation and security of transaction were its foundations. There was to be no after-the-fact ad hoc readjustment. However, in the 1970's, courts began to look more intrusively behind the veneer of formal fairness and to evaluate the substantive justness of agreements reached. Unjust enrichment was frowned upon and there was to be proportionality between the seriousness of the breach and the generosity of the remedy; good faith and equitable dealings were to be the guiding lights of this active intervention.⁸⁷ A few years later, the courts were back on the traditional track. Eschewing considerations of "sympathy and politics",⁸⁸ the courts began to reaffirm the sanctity of party-autonomy and to question the pertinence of unconscionability.⁸⁹ Today, cases like *Walford v. Miles*⁹⁰ demonstrate that a formal and individualistic approach to contract is decidedly back in vogue: certainty and settled expectations are always to be preferred to the vagaries of good faith dealings.

A parallel pattern is evident in tort law. As much as the 1970's and early 1980's saw the expansion of tort law, since 1982 there has been a clear retracing of those fateful steps. As Templeman dismissively put it in 1988, with *Anns* "negligence began to resemble the proposition that we are all neighbours now, Pharisees and Samaritans alike, that foreseeability is a reflection of hindsight and that for every mischance in an accident-prone world someone solvent must be liable in damages."⁹¹ Beginning with *Junior Books*, the courts have effected a radical retreat from a formidable position in which tort law threatened to eviscerate entirely the body of contract law. In a nutshell, if it had been acted upon, *Junior Books* would have inflicted fatal damage to the ailing doctrine of contractual privity: the common law of Abinger's ghost would have been exorcised completely. Nevertheless, as subsequent events have shown, the decision was an aspiration more than an achievement.

The nature of the challenge that the courts faced, but chose not to meet, was clearly put by Roskill. In responding to the argument that recovery for the diminished value of the offending bottle of ginger beer should only sound in contract, he stated:

I seem to detect in that able argument reflections of the previous judicial approach to comparable problems before *Donoghue v. Stevenson* was decided. That approach usually resulted in the conclusion that in principle the proper remedy lay in contract and not outside it. But that approach and its concomitant

⁸⁷ See *Lloyds Bank Limited v. Bundy*, [1975] Q. B. 326; *Schroeder Publishing Company Limited v. MaCaulay*, [1974] 3 All E.R. 616. Of course, during this period there were also pockets of communitarian-based approaches to contractual relations. See, *Hong Kong Fir Shipping Company Limited v. Kawasaki Kise Kaisha Limited*, [1962] 2 Q.B. 71.

⁸⁸ *Gibson v. Manchester City Council*, [1978] 2 All E.R. 583 at 591 per Geoffrey Lane L.J.

⁸⁹ See *Photo Production Limited v. Securicor Transport Limited*, [1980] A.C. 827, and *Morgan v. National Westminster Bank Limited*, [1985] A.C. 687.

⁹⁰ [1992] 2 W.L.R. 174 (H.L.).

⁹¹ *C.B.S. Songs Limited v. Amstrad P.L.C.*, [1988] 1 A.C. 1013.

philosophy ended in 1932 and for my part I should be reluctant to countenance its re-emergence some fifty years later in the instant case. I think today the proper control lies not in asking whether the proper remedy should lie in contract or ... tort, not in somewhat capricious judicial determination whether a particular case falls on one side of the line or the other, not in somewhat artificial distinctions between physical and economic or financial loss when the two sometimes go together and sometimes do not ..., but in the first instance in establishing the relevant principles and then in deciding whether the particular case falls within or without those principles.⁹²

Under such a legal regimen, it would no longer be taken for granted that contract was the primary mode of imposing civil obligations or that, without the existence of a contract, people had no legal obligation to safeguard the economic interests of others. Indeed, the upshot of *Junior Books* might well have been that a plaintiff in tort could be better off than a similar plaintiff with a relevant contract. Warranties would run with the product: a subsequent purchaser of goods or services could have a broader and more effective range of legal rights and remedies than the original purchaser. In effect, the role of contract would be to vary existing tort duties. In a neat inversion of history, contract would become the polyfilla of the gaps in tort's general scheme of civil obligations. Manufacturers' liability would no longer rest on the formalistic dictates of contractual privity, but on the substantive demands of social justice.

However, as has now become apparent, there was a visionary change of heart and such a doctrinal transformation did not take place. Although never formally overruled, *Junior Books* has been exiled to the wilderness of single instances and its precedential writ runs no further than its own immediate and specific facts. Of course, the possibility of this move forward to the past was presaged by Lord Brandon in his assertive dissent in *Junior Books*. Only three years later, in 1985, Brandon had managed to persuade all his fellow judges in *The Aliakmon* to come over to his way of thinking.⁹³ It is a judgment that taps into and articulates a distinctive vision of civil obligation that is as traditionally individualistic as Lord Roskill's is progressively communitarian. After wrongly stating that liability in negligence had been restricted to instances of physical damage to persons or their property, Brandon cuts to the doctrinal chase and, invoking the spectres of both Buckmaster and Abinger, warns against the introduction of a 'transmissible warrant of quality' into the law:

The effect ... would be, in substance, to create, as between two persons who are not in any contractual relation with each other, obligations on one of those two persons to the other which are only really appropriate as between persons who do have such a relationship between them.

⁹² *Supra*, note 29 at 545. These words, of course, offer only a very illusory critique. Roskill wrongly implies the existence of some level of fixed and fixable principles that can be resorted to to resolve the dispute. Like Ronald Dworkin, he only 'solves' the problem by hiding it at a higher level of abstraction; see R. Dworkin, *Law's Empire*, (Cambridge: Belknap Press, 1986).

⁹³ *The Aliakmon*, [1986] A.C. 785.

In the case of a manufacturer or distributor of goods, the position would be that [it] warranted to the ultimate user or consumer of such goods that they were as well designed, as merchantable and as fit for their contemplated purpose as the exercise of reasonable care could make them.... In my view, the imposition of warranties of this kind on one person in favour of another, when there is no contractual relationship between them, is contrary to any sound policy requirement.⁹⁴

By 1990, *Murphy's* septet of law lords left no doubt that *Junior Books* was the high water mark of civil obligation and, as latter-day Canutes in reverse, decreed that the doctrinal tide was to ebb forthwith. Liability based on anything like a 'transmissible warrant of quality' was to be strenuously resisted. In a series of opinions that speak sotto voce in visionary terms, there is an unmistakable determination to leave *Junior Books* beached high and dry among the historical sand-dunes of legal doctrine. As Keith put it, cases like *Anns* and *Junior Books* "introduced a new species of liability governed by a principle indeterminate in character but having the potentiality of covering a wide range of situations, involving chattels as well as property, in which it had never hitherto been thought that the law of negligence had any place."⁹⁵ As such, *Murphy* set the judicial seal of visionary approval on the individualistic turn of doctrinal events.

CONTORTED RELATIONS

The traditional distinction between contract and tort law is based on simple and fundamental ideas that are attributable to the competing intimations of their visionary sources. Whereas contractual obligations are held to be voluntarily assumed by parties in an exchange relationship, tort duties are considered to be imposed by the function of law. Accordingly, in contract, rules had to be developed to determine what amounts to valid consideration to bring contracts into existence, which representations are enforceable as part of the contract, and which parties are privy to the contractual arrangements. In contrast, as tort law imposes obligations that are not voluntarily assumed, it must engineer rules that determine the scope and substance of such obligations. As such, a contract is much more beholden to an individualist vision and tort to a more communitarian account of collective responsibility. Furthermore, it will also not be surprising that questions of concurrent liability in contract and tort are much more compelling today than in the recent past.⁹⁶

The difference in rationales for contract and tort is thought to be particularly important in the enforcement and assessment of damages. Contract is generally thought to be about compensation for disappointing expectancy

⁹⁴ *Supra*, note 29 at 551.

⁹⁵ *Supra*, note 32 at 432. See also, *Ibid.* at 435 and 440 per Bridge and at 447 per Oliver.

⁹⁶ See Cane, "Contract, Tort and Economic Loss" in *The Law of Tort: Policies and Trends in Liability for Damage to Property and Economic Loss*, ed. by M. Furmston, (London: Duckworth, 1986) at 113.

and reliance interest by those who fail to keep agreements. This is defended as morally justified and economically warranted because it rewards initiative, promotes certainty and internalizes externalities. On the other hand, tort is generally considered to be about remedying wrongful violation to established interests by those who act below community standards. This is treated as morally justified and economically warranted because it deters the taking of unreasonable risks and allocates risks to those who are best able to bear them. As will be obvious, these general distinguishing features run into difficulties in economic loss cases, especially in situations like Mrs. Donoghue's where the claim is for expectancy losses resulting from a defective product. The argument is that any loss in value is an expectancy loss and therefore only recoverable in contract as it is "only out of bargains that expectations as to quality arise and only by reference to bargains that they can be measured."⁹⁷

Yet, on closer inspection, the concrete details of contract and tort doctrines suggest a different reality. The neat bifurcation of civil obligation into distinct analytical categories becomes much more blurred and much less convincing. Those ideas that have governed in contract have also had an influential role in the development in tort (and vice versa). For instance, although tort appears to do away with notions of privity, it relies upon analogous notions of proximity and foreseeability to achieve the same limiting of legal obligation and recovery. Also, through a variety of doctrinal devices, contract imposes obligations where they were not voluntarily assumed and relieves parties of obligations where they were voluntarily assumed: the notion of 'voluntariness' in contract is as much a cover for a vast range of conflicting norms as 'proximity' is in tort.⁹⁸ Moreover, it is far from obvious whether certain factual situations can or should be classified into the contract or tort branch of civil obligation. There is of a continuum that covers those circumstances that are largely of a contractual nature, such as *Pettick and Murphy*, a mix of negligence and contract, such as *Ross* and *Hedley Byrne*, and those that are largely non-contractual in nature, such as *Norsk* and *Caltex*. Consequently, economic loss is a matter of tort and contract; it cannot be excluded from one category to be considered exclusively by the other category. Law imposes private obligations through contract as much as it imposes public obligations through tort.

⁹⁷ Cane, *ibid.* at 138. Of course, the categorisation of pure economic loss as more appropriately to be a matter of contract law does not slam the door in Mrs. Donoghue's face. Although the prospect of recovery by her for the discounted value of the ginger beer is remote in light of recent developments in contract doctrine (*supra*), it is possible to imagine and construct a plausible argument that a sympathetic court might be willing to accept. Possible lines of argument include implied agency, assignment and third party benefits. For instance, it might be viable to pursue the opening in *Lambert v. Lewis*, [1982] A.C. 225. For a general discussion, see Collins, *supra*, note 85 and S. Waddams, *Milner's Cases and Materials on Contract* (Toronto: Emond Montgomery, 1985).

⁹⁸ *Supra*, pp. 287-290.

Mindful that both contract and tort protect future interests and expectancy values, the central issue is not whether pure economic loss should or should not be recoverable, but whether the behaviour that results in such loss should be dealt with as a matter of tort, contract or both. Although its precise nature and level is unsettled and contentious, contract and tort are moving toward protecting "dependency". This makes the distinction between expectancy and reliance irrelevant, because, in a dependency relationship, it does not matter whether the defendant is providing a benefit (expectancy) or is entrusted to exercise a skill (reliance). Knowledge of dependency concerns both the defendant knowing about the plaintiff's reliance on the actions of the defendant and the plaintiff's knowledge of its expectations from the defendant. The most difficult cases are those where the plaintiff has not acted to its detriment, despite the defendant's negligence, as in *Ross*, or where the plaintiff has no necessary knowledge of the particular defendant, but reasonably expects that the defendant will not act to the plaintiff's detriment, as in *Norsk*. It should make no difference in *Pettick*, for example, that the university relied on the defendants to provide a roof through a contract as much as it relied on them to exercise a skill in design based on a tortious duty. If non-privity parties of a contractual set of relationships are able to assert a dependency claim in tort, parties in a chain of contractual relationships should also be able to assert such a claim.⁹⁹

Accordingly, notwithstanding the decision in *Murphy* and *Rivtow*, there seems to be a begrudging acceptance that contract and tort must be viewed as being intimately related rather than artificially separated. *Donoghue*, *Hedley Byrne* and *Anns* are not restricted to tort cases, but also apply to contract relationships. Conversely, as in *Pettick*, a contractual relationship provides sufficient proximity to ground the finding of a tortious obligation. Moving beyond *Nunes Diamond*,¹⁰⁰ the Supreme Court of Canada has held that the existence of a contractual relationship does not automatically obliterate any tortious responsibilities between the parties. *Rafuse* concedes that tort obligations are owed between all people and that contract functions to vary those pre-existing duties. The existence of a contract does not bring the parties into a legal relationship, but works to change the nature of that relationship.

While *Rafuse* and *Pettick* are concerned with cases extending the principles of *Hedley Byrne*, there should be no reason to exclude manufacturing from these statement-based principles. As John McLaren puts it, modern reality is "a transactional environment moulded by a mass production economy and an ever more complex division of labour in the provision of goods and services."¹⁰¹ While the fear of a transmissible warranty of quality is never

⁹⁹ See Cane, *supra*, note 96 at 124-32.

¹⁰⁰ *Nunes Diamond Ltd. v. Dominion Electric Protection Co.*, [1972] S.C.R. 769.

¹⁰¹ McLaren, "The Convergence of Contract and Tort: A Return To A More Venerable Wisdom?" (1989) 68 Can. Bar Rev. 30 at 59.

really justified in *Murphy*, it is entirely consistent with conventional notions of implied warranty and, in property law, with covenants and easements, which are largely contractual in origin. Ultimately, ideas of warranty involve problems about the standard of care owed, not whether a duty of care is in fact owed. The hard case arises, as in *Junior Books*, where the plaintiff expected a floor at a higher standard than the defendant provided. However, in these contractual cases, traditional contract law has a greater role to play in adjudging the standard of care than tort. Although a duty of care was reasonably found to exist in *Junior Books*, there was no real inquiry as to whether the defendant actually knew it was under the higher contractual standard of care. If it did, it should have been held to that higher standard; if it did not, the tort (and, in this case, lower) standard of care should be applied.

Although *Rafuse* concerned a tort claim between the contracting parties themselves, its logic and sense extend to situations in which the tort claim is between parties who are not between themselves in a contractual relationship, but where at least one of them is party to a relevant contract. This issue is particularly pressing in the case of extending limitations of liability outside the bounds of a strict contractual relationship. It was raised in *Pettick*, but the court skirted around it. As the case was more about a contract than a tort, it should have been considered as such by the court. Even though the plaintiff was forced to frame the case in tort, the contract provisions would be read into and temper the tort standard. In *Pettick*, the dissent accepted that the limitation could create a collateral warranty; the one year warranty made would apply to the plaintiff even though the warranty was apparently made between the manufacturer and architect, but not the owner. The effect of this argument was to establish a transmissible warranty of limitation.¹⁰² Of course, it seems fair that, if plaintiffs are to be bound by a transmissible warranty of limitation, they ought to be able to avail themselves of a transmissible warranty of quality.

In economic loss cases involving related contracts, liability or recovery ought not to be an all-or-nothing matter. It is as wrong for manufacturers to always be fully liable to everyone, regardless of the terms of the initial sale of the goods or services, as it is for them to be liable to no one other than the original purchaser. The original contract should affect the nature of the manufacturers' liability, but it should not be its exclusive determinant. In

¹⁰² These limitation clauses must also be subject to the general contractual rules of validity in such cases. See *Smith v. Bush*, [1990] A.C. 831, and *Hunter v. Syncrude*, [1989] 1 S.C.R. 426. In line with this, the decision in *Pettick* should be criticized. The one year warranty of quality did not contain any disclaimer of liability, but there was a specific clause disclaiming other liability except as provided in the one year warranty. The court stated that: "The warranty is a bargain that holds the contractor liable irrespective of negligence for a period of time. A tort claim requires proof of negligence. That it should continue beyond the warranty period does not interfere with the legitimate expectations of the parties as to their contractual relationship." *Ibid.* at 658-59.

effect, Mrs. Donoghue should be able to recover for the reduced value of the ginger beer, but her claim should be conditioned or considered in light of the contractual terms of the original sale by David Stephenson. In this way, it might be possible to retain some equivalence between the circumstances under which the manufacturer sold the good or service and the extent of the manufacturer's obligations without placing the consumer in an unfairly advantageous or disadvantageous position. Moreover, such a solution draws its sustaining appeal and cogency from a judicious blending and borrowing from both visions of civil obligation.

CONCLUSION

Sixty years have passed since Lord Atkin's seminal pronouncement in *Donoghue*. He set judges and lawyers off on a quest to work out the responsibilities and reach of "neighbourliness" in a changing and challenging world. In that time, understandings about the social content and political consequences of that contested legal concept have gone through many characterisations and incarnations. As a predictable result, the legal doctrine of civil obligation has gone through many permutations and patterns. At the heart of this legal struggle remains the torturous relationship of contract and tort. While they seem forever destined to remain as close companions in the common law's family, they are categorically unable to effect any compatible mode of peaceful co-existence. The present state of affairs is as tenuous and volatile as any previous chapter in the common law's continuing saga. On viewing the gothic saga of civil obligation, Maitland could be forgiven a knowing, if rueful smile: it would not take such an astute critic of the common law long to notice the extent to which the ghosts of judges past still haunt contemporary law and the forms of action still rule us from the grave.

In this essay, we have sought to demonstrate that the law of recovery for pure economic loss cannot be rationally defended or intellectually justified within the law's own frame of reference. Without the demonstration of such an internal or immanently rational account, any judicial or jurisprudential attempt to preserve the distinctiveness of law from politics is fatally compromised. Of course, as David Howarth has insisted, in tracing the recent development of tort law, "the rise of [Thatcherite] values ... is not a complete explanation" and reference to such visionary intimations cannot account for the exact pattern of judicial decisions.¹⁰³ However, in contrast to Howarth and most tort scholars, we do not believe that any greater precision can be achieved by focusing more keenly on the conceptual framework within which the law works and develops. Doctrinal confusion is not a condition to be ameliorated by prescribing a more healthy rhetorical diet and conceptual work-out program for the judges. The relation between law and its larger socio-political context is indeterminate and indeterminately so: there is no

¹⁰³ Howarth, "Negligence after Murphy: Time To Re-think" 50 *Camb. L.J.* 58 at 66 and 68.

analytically snug fit between the two. Furthermore, the deficit in rationality and explanation cannot be met in any consistent or coherent way. Whereas the fit between doctrinal development and politics seems particularly close in the English law of tortious recovery for economic loss, there is a much greater and less complementary space between them in Canada. Contingency is the body and soul of law and legal theory.

Even when there is a strong parallel between narrow legal doctrine and broader socio-political currents, as appears to be presently so in England, there is always a precedential fly in the explanatory ointment. For instance, the decision of the House of Lords in *Smith v. Bush*¹⁰⁴ is such an entomological irritant. In relying upon the defendants' negligent survey in purchasing a house, the plaintiff sought damages for the cost of unanticipated repairs. The survey had been carried out for the obtaining of a mortgage and the mortgage company had disclaimed liability for the accuracy of any survey. As the survey was for valuation rather than structural purposes, the mortgage company advised the plaintiff to obtain independent professional advice. Moreover, the defendant surveyors had included a disclaimer in their report. The plaintiff was successful. The House of Lords placed considerable weight on the plaintiff's unequal bargaining power and his actual reliance on the professional's advice. Such a decision, by allowing tort liability to trump the existence of two separate contractual disclaimers, is very difficult to reconcile with the general retrenchment from legally-enforced social responsibilities that is represented by *Murphy*; the court's communitarian solicitude for ordinary consumers stands in stark contrast to its general allegiance to a broadly individualistic vision of civil obligation.

In accounting for the decision in *Smith v. Bush*, we say that it is "very difficult", rather than impossible, to reconcile with the prevailing individualistic turn in the judicial doctrine of civil obligations. An imaginative reading of *Smith v. Bush* discloses that its rationale is consistent with such an individualistic tendency. Although less glaring and more strained, the decision can be plausibly justified in terms of individualistic rhetoric: the imposition of liability upon professional surveyors is explicable as a recognition of the need for robust self-discipline and personal responsibility by all sectors of society, including its more privileged ones. As such, it can be contended that any attempt to account for judicial decisions in terms of one overriding general vision or conceptual logic will always be confounded. Nevertheless, the changing fate of claims for the recovery of economic loss over the last couple of decades offers a neat illustration of the confluence, albeit indeterminately contingent and contingently indeterminate, between legal doctrine and political context as mediated through competing visions of civil obligation.

¹⁰⁴ *Supra*, note 102.

In his judgment in the Federal Court of Appeal in *Norsk*, Macguigan J. opines that "the law demands some perception of justice for its life, even while it requires some channelling of justice for its survival."¹⁰⁵ As elegant and pithy as this judicial piece of wisdom is, it merely serves to underline rather than resolve the enduring intractability of law's dilemma. In the area of civil obligations and, in particular, in the recovery for economic loss, law can only ensure its survival by doing what threatens its life and can only continue its life by doing what jeopardizes its survival. Caught in such an existential bind, the only course of action is, like in the movies, to hope that the public will close its eyes to reality and dream of better days to come. In this, film-makers and lawyers have much in common — they are both in the visionary business of blurring the thin line between life and art. Whether art mimics life or life mimics art, mimicry is the cinematic name of the judicial game.

¹⁰⁵ *C.N.R. v. Norsk Pacific Steamship Co. Ltd.* (1990), 65 D.L.R. (4th) 320 at 360 per Macguigan J. (Fed. C.A.).