

## OF PRECEDENT, THEORY AND PRACTICE—THE CASE FOR A RETURN TO *ANNS*

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The English position with respect to duty of care in the context of recovery for pure economic loss is clear and is firmly set against recovery, as stated in the leading decision of the House of Lords in *Murphy v. Brentwood District Council*. The decisions of the House have long had an important—even decisive—impact on the common law landscape across the Commonwealth. However, this is one of the rare situations where there have been departures in the Commonwealth from the established English position. These departures have, nevertheless, been by no means uniform. Yet, one common theme that unifies these approaches is the commitment to the former English position as embodied in the propositions laid down by Lord Wilberforce in the House of Lords decision in *Anns v. Merton London Borough Council*. The *Anns* approach has, however, been rejected in England. This paper therefore seeks to demonstrate that the propositions laid down by Lord Wilberforce in *Anns* were entirely correct and workable and that all the subsequent formulations (in the main, those emanating from the House of Lords) effectively—and simply—restate the *Anns* formulation.

### I. INTRODUCTION

One of the most confused and confusing areas in the law of tort in general and the law of negligence in particular is, perhaps, that pertaining to the duty of care in the context of recovery for pure economic loss. The central difficulty is that of positing a sufficiently justified as well as workable set of control mechanisms that will ensure a balance between the desire to be fair to both claimant and defendant alike, whilst balancing considerations of fairness to the public as well. There are relatively fewer problems in this regard insofar as *physical* damage is concerned. However, issues of pure economic or financial loss are quite a different matter altogether—with the intensity of the various difficulties being exacerbated by the fact that the concept (and, indeed, world) of finance are now firmly established (indeed, indispensable) parts of the global and legal landscapes.

The English position is clear and is firmly set against recovery in this particular sphere. The leading decision still remains that of the House of Lords in *Murphy v.*

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*Brentwood District Council*.<sup>1</sup> Because of the widespread colonial legal heritage, it is not surprising that decisions of the House have long had an important—even decisive—impact on the common law landscape across the Commonwealth. However, this is one of the rare situations where there have been departures from the established English position. These departures have, nevertheless, been by no means uniform. This diverse variety of approaches is not only interesting but also extremely thought-provoking. One common theme that unifies many of these approaches is the commitment to the former English position as embodied in the propositions laid down by Lord Wilberforce in the House of Lords decision in *Anns v. Merton London Borough Council*<sup>2</sup>—propositions that were roundly rejected (in the English context) in the *Murphy* case. As we shall see, however, the latest Singapore position adopts a slightly different approach: apparently rejecting *Anns*, but setting out (in the process) an approach that does not really reflect that of the House in *Murphy*. Modifications of the approach in *Anns* case may be seen in other Commonwealth jurisdictions as well—notably, in the Canadian context.

At this juncture, the most important thesis of this article may be stated briefly: that the propositions laid down by Lord Wilberforce in *Anns* were entirely correct and workable and that all the subsequent formulations (in the main, those emanating from the House of Lords) ought to effectively—and simply—restate the *Anns* formulation. We will endeavour to demonstrate, in particular:

- (1) That the *Anns* formulation has (with the exception of England and Malaysia)<sup>3</sup> been embraced—in one form or another—throughout the Commonwealth. We will succinctly trace the various formulations, contributing (we hope) to the overall discourse on comparative common law in the process. In this regard, we will trace the developments in England, Australia, New Zealand, Canada, Singapore as well as Malaysia.
- (2) That the general embrace of the *Anns* formulation generally across the Commonwealth, whilst itself a strong reason endorsing that formulation, is justified on the basis of strong conceptual roots. At the conceptual level, we will argue that the *Anns* formulation takes into account both the *individual* relationship between the parties themselves as well as broader *communitarian* concerns. At the same time, it is proposed, for the sake of conceptual clarity, that the broader *communitarian* concerns be kept separate (as far as

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<sup>1</sup> [1991] 1 A.C. 398 [*Murphy*]; noted, T. Weir, “Fixing the Foundations” (1991) 50 Cambridge L.J. 24; J.G. Fleming, “Requiem for *Anns*” (1990) 106 Law Q. Rev. 525; I.N. Duncan Wallace, “*Anns* Beyond Repair” (1991) 107 Law Q. Rev. 228; and R. O’Dair, “*Murphy v Brentwood District Council*: A House With Firm Foundations?” (1991) 54 Mod. L. Rev. 561. See also generally B.S. Markesinis & S. Deakin, “The Random Element of their Lordships’ Infallible Judgment: An Economic and Comparative Analysis of the Tort of Negligence from *Anns* to *Murphy*” (1992) 55 Mod. L. Rev. 619. And for a perspective from the doctrine of precedent, see J.W. Harris, “*Murphy* makes it Eight—Overruling comes to Negligence” (1991) 11 Oxford J. Legal Stud. 416.

<sup>2</sup> [1978] A.C. 728 [*Anns*].

<sup>3</sup> See text accompanying note 194 (although the *Anns* formulation was endorsed in the previous case law and, as we shall see, the current Malaysian position is far too broad). The position in Australia has also appeared to shift in recent years as well: see text contained in Part II.C.

- possible) from the analysis of the *individual* relationship between the parties. We will analyse the formulation by Lord Wilberforce himself in *Anns*, focusing on the descriptive as well as prescriptive elements as well as possibilities. We also hope that we will, in the process, demonstrate that theory is by no means divorced from practice and that although no perfect universal theory can be found that will fit every specific fact situation, theory and practice, the universal and the particular, *complement* each other and are (in the final analysis) parts of *an integrated and holistic whole*.
- (3) Following from (1) and (2) above, we will conclude that there should—even, with respect, in England—be a return to the *Anns* formulation which has not only the weight of precedent behind it but also (and more importantly) is justified by weighty grounds that underlie the relevant decisions across the Commonwealth. We also argue that, despite the modifications to Lord Wilberforce’s formulation in *Anns*, the best way forward is a return to the straightforward propositions contained therein.

Because of its focal importance, it would not be inappropriate, at this juncture, to set out the propositions enunciated by Lord Wilberforce in *Anns*, as follows:

[I]n 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 of 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 persons to whom it is owed or the damages to which breach of it may give rise.<sup>4</sup>

We will argue that the first limb of the *Anns* formulation consists of a *legal* conception of reasonable foreseeability or proximity (as opposed to the purely *factual* conception of reasonable foreseeability) at least insofar as pure economic losses is concerned. Indeed, we will suggest that the complementary concepts of *reasonable reliance* and *voluntary assumption of responsibility* (which will be discussed in the case law developments across the Commonwealth in Part II below) constitute the best and most practical criteria for ascertaining whether there is proximity between the claimant and the defendant under the first limb.

The *policy* factors contained within the second limb of the *Anns* formulation reflect the significance of the wider communitarian interests. Due to the relative subjectivity and vagueness inherent in policy factors, we would suggest that, consistent with the *Anns* formulation, policy factors ought to be limited (as far as possible) to the second limb *only after* considering the legal conception of reasonable foreseeability or proximity contained in the first limb. Whilst it is recognised that the first and second limbs would inevitably interact with each other at the level of application

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<sup>4</sup> *Supra* note 2 at 751-752 [emphasis added].

(as may be seen in the analysis of case developments within the Commonwealth below), the preferred approach is to conceptually separate the analysis between the first and second limbs so as to minimize any uncertainty associated with the policy factors.

Finally, before examining the case law developments in the Commonwealth, we should clarify that we are of the view that the concept of the duty of care is both helpful and practical, although some writers have sought to argue otherwise.<sup>5</sup>

## II. OF PRECEDENT: THE COMMONWEALTH DECISIONS CONSIDERED

### A. Introduction

The case law developments across the Commonwealth insofar as the duty of care in the context of recovery for pure economic loss is concerned have been both extensive and far from uniform. What appears clear, however, is that the *Anns* formulation has (with the exception of England and Malaysia)<sup>6</sup> been embraced—in one form or another—throughout the Commonwealth. This, coupled with the strong conceptual foundations, supports the main thesis of our article to the effect that a return to the *Anns* formulation is both desirable and (more importantly) necessary. We hope to demonstrate this through a succinct overview of the relevant principles in specific jurisdictions. We also hope that we would, in the process, simultaneously furnish an update of the many developments in these jurisdictions.

### B. England

#### 1. Introduction

It is convenient to begin our discussion of the modern law of negligence in England by turning to the seminal decision of the House of Lords in *Donoghue v. Stevenson*,<sup>7</sup> in which Lord Atkin enunciated his well-known “neighbour principle.”<sup>8</sup> The major difficulty with Lord Atkin’s neighbour principle is, of course, in trying to determine its exact scope of application in any given situation concerning the duty of care. Some commentators take the view that Lord Atkin’s neighbour principle effectively embodies a “pure foreseeability test”<sup>9</sup> and, as such, has often been criticized for having established what some claim to be a potentially wide-ranging tort (particularly when applied in situations involving non-physical harm/damage or, in other

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<sup>5</sup> See e.g. P.H. Winfield, “Duty in Tortious Negligence” (1934) 34 Colum. L. Rev. 41 and W.W. Buckland, “The Duty to Take Care” (1935) 51 Law Q. Rev. 637. But compare N.J. McBride, “Duties of Care—Do They Really Exist?” (2004) 24 Oxford J. Legal Stud. 417, where, *inter alia*, a powerful argument is made from the need for normativity and the consequent need to avoid a cynical or sceptical view towards the concept of the duty of care.

<sup>6</sup> *Supra* note 3. And, now, possibly, Australia as well: *supra* note 3 as well as text contained in Part II.C. [1932] A.C. 562.

<sup>7</sup> [1932] A.C. 562.

<sup>8</sup> *Ibid.* at 580. See also text accompanying note 297.

<sup>9</sup> See e.g. K.F. Tan, “The Three-Part Test: Yet Another Test of Duty in Negligence” (1989) 31 Mal. L. Rev. 223 [K.F. Tan, “Three-Part Test”], especially at 224–226. It is generally accepted that the application of a “pure foreseeability test” is unobjectionable in a situation involving actual physical damage/harm.

words, in pure economic loss cases).<sup>10</sup> The present authors, however, take a different view and, as we shall demonstrate below, it is our submission that the neighbour principle actually focuses on the narrower (legal) concept of proximity instead.<sup>11</sup>

In tracing the development of the duty of care concept in England insofar as pure economic loss is concerned, the relatively early decision of the Court of Appeal in *Spartan Steel & Alloys Ltd. v. Martin & Co. (Contractors) Ltd.*<sup>12</sup> is worth a brief mention. Lord Denning M.R. was of the opinion that the question as to whether or not pure economic loss should be recoverable in tort was simply a matter of public policy,<sup>13</sup> a view that obviously did not find favour with subsequent English courts. Whilst it cannot be denied that public policy does play an important, if not necessary, role in the entire process, such an approach on the other extreme—in treating public policy as the *sole determinant* of the duty of care in the context of pure economic loss—is also not desirable.<sup>14</sup>

## 2. The Emergence of a “Two Stage Test” for Duty

The landmark decision of the House of Lords in *Anns*<sup>15</sup> was the next major development in this area of negligence law. The case is significant for the propositions laid down by Lord Wilberforce in approaching a question on the duty of care.<sup>16</sup> His Lordship offered us a “two stage test”—the first of which examines the relationship between the disputing parties to see if it is sufficiently *proximate* as to give rise to a *prima facie* duty of care, and the second of which then asks whether there are any *policy* factors which ought nevertheless to limit the scope of liability established by the test in the first stage. The present authors find the “two stage test” appealing because it not only acknowledges (quite candidly) the significance of the element of public policy but also does so in a way that is *separate and distinct* from the overall enquiry, a point to which we shall return below.<sup>17</sup> There is also some controversy (which we will address as well later on)<sup>18</sup> as to the exact import of Lord Wilberforce’s test in the first stage—did his Lordship mean to apply a “pure foreseeability test” or was the test in the first stage actually referring to the narrower (legal) concept of proximity? Nonetheless, it is our thesis that the “two stage test” is both cogent and coherent, and, consistent with the central thesis of this article, offers the best approach to resolving the duty of care question, particularly in situations involving pure economic loss.

Some years after *Anns* was decided, the House of Lords once again had the opportunity to re-consider the test for a duty of care in respect of non-physical harm

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<sup>10</sup> A good illustration of the potential problem of indeterminate liability is offered in the facts of *Spartan Steel & Alloys Ltd. v. Martin & Co. (Contractors) Ltd.* [1973] Q.B. 27.

<sup>11</sup> See text accompanying note 240.

<sup>12</sup> [1973] Q.B. 27.

<sup>13</sup> *Ibid.* at 37.

<sup>14</sup> For further elaboration, see text accompanying note 300.

<sup>15</sup> *Supra* note 2.

<sup>16</sup> See text accompanying note 4.

<sup>17</sup> See text accompanying note 279.

<sup>18</sup> See text accompanying note 240.

or damage in *Junior Books Ltd. v. Veitchi Co. Ltd.*<sup>19</sup> This was a case involving the extent of a builder's liability to the owner of a building (with whom the builder had no contractual relationship) for causing the latter pure economic loss. The House of Lords, by a majority, held that a duty of care existed and found the defendant liable. Lord Roskill, who delivered the main judgment for the majority, endorsed and applied Lord Wilberforce's "two stage test" in *Anns*. Insofar as the first stage of the test was concerned, his Lordship came to the conclusion that there was a requisite degree of proximity between the disputing parties by virtue of a number of factors<sup>20</sup> and, in particular, because the "relationship between the parties was as close as it could be short of actual privity of contract."<sup>21</sup> There were also, in respect of the second stage of the test, no policy factors that militated against a finding of a duty of care. Whilst Lord Brandon of Oakbrook was the sole dissenting Law Lord in this case, he too had endorsed the "two stage test" in *Anns* as a "general statement of principle."<sup>22</sup> His Lordship agreed with the majority (for substantially the same reasons) that there was sufficient proximity between the parties as to give rise to a *prima facie* duty of care, but that there were, in his view, considerations of policy that however limited the scope of that duty.

### 3. Retreat From, and the Ultimate Rejection of, *Anns*

It is fair to say that the "two stage test" enunciated by Lord Wilberforce in *Anns* had reached its highest watermark in the *Junior Books* case. Gradually, however, subsequent courts began to frown upon this test for duty and this eventually led to the decision of the House of Lords in *Caparo Industries Plc v. Dickman*,<sup>23</sup> where a "three part test" for duty was canvassed instead. Before proceeding to consider this latest test, it would be apposite, at this juncture, to briefly recount the case law "campaign" against *Anns* that preceded *Caparo*.

Lord Keith of Kinkel, in delivering the judgment of the Board in the Hong Kong Privy Council decision of *Yuen Kun Yeu v. Attorney-General of Hong Kong*,<sup>24</sup> observed thus:

Their Lordships venture to think that the two stage test formulated by Lord Wilberforce for determining the existence of a duty of care in negligence has been elevated to a degree of importance greater than it merits, and greater perhaps than its author intended.<sup>25</sup>

<sup>19</sup> [1983] 1 A.C. 520 [*Junior Books*].

<sup>20</sup> Including the element of *reliance* by the claimant on the defendant as well as an *assumption of responsibility* by the defendant insofar as the claimant was concerned, as to which see text accompanying note 267.

<sup>21</sup> *Supra* note 19 at 546. Compare also the speech by Lord Fraser of Tullybelton who, at 533, spoke of a relationship "... falling only just short of a direct contractual relationship."

<sup>22</sup> *Ibid.* at 550.

<sup>23</sup> [1990] 2 A.C. 605 [*Caparo*].

<sup>24</sup> [1988] A.C. 175.

<sup>25</sup> *Ibid.* at 191. See also at 194 where his Lordship made the following remarks: "In view of the direction in which the law has since been developing, their Lordships consider that for the future it should be recognised that the two-stage test ... is not to be regarded as in all circumstances a suitable guide to the existence of a duty of care."

In a similar vein, Lord Brandon of Oakbrook remarked, in the House of Lords decision of *Leigh and Silavan Ltd. v. Aliakmon Shipping Co. Ltd.*,<sup>26</sup> that the propositions laid down by Lord Wilberforce in the *Anns* case do “not provide, and cannot... have been intended by Lord Wilberforce to provide, a universally applicable test of the existence and scope of a duty of care in the law of negligence.”<sup>27</sup>

Another important decision that dealt with the scope of a builder’s duty of care to a subsequent home owner/occupier was *D & F Estates Ltd. v. Church Commissioners for England*.<sup>28</sup> The House of Lords in this case categorically rejected the plaintiff’s claim in tort against the defendant contractors on the basis that the loss suffered (*viz.*, the cost of carrying out remedial work) was purely economic in nature.<sup>29</sup> Such losses were only recoverable, if at all, under traditional contractual principles or under the *Defective Premises Act 1972*.<sup>30</sup> Further, whilst the learned Law Lords did not expressly overrule their earlier decisions in *Anns* and *Junior Books*, it was clear from the tenor of the two leading judgments that those decisions were no longer viewed favourably in England. Indeed, Lord Bridge of Harwich was of the opinion that:

The consensus of judicial opinion, with which I concur, seems to be that the decision of the majority [in *Junior Books*] is so far dependent upon the unique, albeit non-contractual, relationship between the pursuer and the defender in that case and the unique scope of the duty of care owed by the defender to the pursuer arising from that relationship that the decision cannot be regarded as laying down any principle of general application in the law of tort or delict.<sup>31</sup>

All this activity in the case law (with its less than encouraging sentiment towards *Anns*) eventually culminated in yet another decision of the House of Lords in *Murphy*.<sup>32</sup> In unanimously holding that the defendant council owed no duty of care to the claimant (a subsequent home owner) in respect of pure economic loss, the House of Lords consciously chose to depart from its previous decision in *Anns*. Lord Keith of Kinkel, whose displeasure with *Anns* was fairly explicit throughout his judgment, observed thus:

In my opinion it is clear that *Anns* did not proceed upon any basis of established principle, but 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 real property, in which it had never hitherto been thought that the law of negligence had any proper place.<sup>33</sup>

To drive home the point even further, his Lordship continued with these remarks:

*In my opinion there can be no doubt that Anns has for long been widely regarded as an unsatisfactory decision.* In relation to the scope of the duty owed by a

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<sup>26</sup> [1986] A.C. 785.

<sup>27</sup> *Ibid.* at 815.

<sup>28</sup> [1989] A.C. 177 [*D & F Estates*].

<sup>29</sup> See *e.g.* the speech by Lord Bridge of Harwich, *ibid.* at 206, as well as the speech by Lord Oliver of Aylmerton, *ibid.* at 213-214.

<sup>30</sup> (U.K.), 1972, c. 35.

<sup>31</sup> *Supra* note 28 at 202. See also *ibid.* at 215 where Lord Oliver of Aylmerton passed concurring remarks.

<sup>32</sup> *Supra* note 1.

<sup>33</sup> *Ibid.* at 471.

local authority it proceeded upon what must, with due respect to its source, be regarded as a somewhat superficial examination of principle and there has been extreme difficulty, highlighted most recently by the speeches in *D & F Estates*, in ascertaining upon exactly what basis of principle it did proceed. *I think it must now be recognised that it did not proceed on any basis of principle at all, but constituted a remarkable example of judicial legislation.* It has engendered a vast spate of litigation, and each of the cases in the field which have reached this House has been distinguished. Others have been distinguished in the Court of Appeal. The result has been to keep the effect of the decision within reasonable bounds, but that has been achieved only by applying strictly the words of Lord Wilberforce and by refusing to accept the logical implications of the decision itself. These logical implications show that the case properly considered has potentiality for collision with long-established principles regarding liability in the tort of negligence for economic loss. *There can be no doubt that to depart from the decision would re-establish a degree of certainty in this field of law which it has done a remarkable amount to upset.*<sup>34</sup>

The principal reason for the retreat from, and ultimate rejection of, *Anns* appears—in the main, at least—to be rooted in the fear of releasing the “floodgates of discretion” (and the consequent exercise of “judicial legislation”), and this led, as we shall see in a moment, to the formulation of yet another test (the “three part test”). As we shall argue, however, Lord Wilberforce’s formulation in *Anns* is, in the final analysis, still the best test we have.

#### 4. *The Emergence of a “Three Part Test” for Duty*

With the decline and fall of Lord Wilberforce’s “two stage test” for the duty of care in *Anns*, we now have, in England, a “three part test” for duty enunciated most notably in the House of Lords decision of *Caparo*,<sup>35</sup> a case involving alleged liability (on the part of company directors and auditors) for negligent misstatements. Lord Bridge of Harwich, in an oft-cited passage from his judgment, observed thus:

What emerges is that, *in addition to the foreseeability of damage*, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed *a relationship characterised by the law as one of ‘proximity’ or ‘neighbourhood’* and that the situation should be one in which the court considers it *fair, just and reasonable* that the law should impose a duty of a given scope upon the one party for the benefit of the other.<sup>36</sup>

This, in fact, encapsulates the latest “three part test” for determining a duty of care in England—comprising (1) foreseeability, (2) proximity, and (3) the need that imposition of the duty of care be “fair, just and reasonable.” As we shall see below,

<sup>34</sup> *Ibid.* at 471-472 [emphasis added]. See also, in an extrajudicial context, Lord Oliver of Aylmerton, “Judicial Legislation: Retreat From *Anns*” in *The Sultan Azlan Shah Law Lectures* (Selangor Darul Ehsan, Malaysia: Pelanduk Publications, 1999), c. 2.

<sup>35</sup> *Supra* note 23.

<sup>36</sup> *Ibid.* at 617-618 [emphasis added].



the *Caparo* “three part test” is, by no means, unambiguous in interpretation and application; Lord Bridge of Harwich himself had cautioned that “the concepts of proximity and fairness embodied in these additional ingredients are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope.”<sup>37</sup> Indeed, it would appear that in the final analysis, there is, in substance, very little difference between the *Caparo* “three part test” and the *Anns* “two stage test,” a point to which we will return in more detail below.<sup>38</sup>

Additionally, it ought to be noted that the House of Lords in *Caparo* had also endorsed the *incremental* approach advocated by Brennan J. in the Australian High Court decision of *Sutherland Shire Council v. Heyman*.<sup>39</sup> Lord Bridge of Harwich observed that:

Whilst recognising, of course, the importance of the underlying general principles common to the whole field of negligence, I think the law has now moved in the direction of attaching greater significance to the more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes.<sup>40</sup>

Notwithstanding the general acceptance of the “three part test” and the incremental approach in England today, it is interesting to note that the highest appellate courts in other parts of the Commonwealth have not similarly endorsed the latest English position. Instead, it appears that Lord Wilberforce’s “two stage test” in *Anns* has been adopted in one form or another elsewhere in the Commonwealth, particularly in the Canadian, New Zealand and Singaporean contexts. The present authors are, indeed, not surprised by this development. In our search for doctrinal coherence as well as a practical way forward for the duty of care concept, it is also the central thesis of this article that the current “three part test” in England ought to be jettisoned in favour of the “two stage test” in *Anns*. It is also very important to reiterate the fact that the “three part test” is, in any event, itself *very similar—if not identical—in substance* to the “two stage test,” although the latter (as we shall see) is much clearer and more practical.

## C. Australia

### 1. Introduction

The law in Australia concerning the recovery, in tort, for pure economic loss is shrouded in doctrinal chaos and uncertainty. This is probably due, in no small part,

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<sup>37</sup> *Ibid.* at 618. Compare also similar remarks made by Lord Roskill at 628 and by Lord Oliver of Aylmerton at 633.

<sup>38</sup> See text accompanying notes 304-309.

<sup>39</sup> (1985) 157 C.L.R. 424 [*Heyman*]. See also text accompanying note 47. Reference may also be made generally to C.F. Stychin, “Dangerous liaisons: new developments in the law of defective premises” (1996) 16 L.S. 387.

<sup>40</sup> [1990] 2 A.C. 605 at 618.

to the fact that the learned Justices of the Australian High Court do not generally (and with respect) speak with one voice. Essentially, the Court is divided in its approach to establishing the duty of care element in negligence, even when their Honours appear to be using the same language (for example, the expression “proximity”). As we shall discover in due course, many of the cases contain separate and at times disparate judgments that can only add to the complexity in trying to understand and rationalise what is already a very difficult and confusing area of tort law.

The general sentiment amongst Australian High Court judges is not to disallow recovery for pure economic loss caused by negligent acts or omissions so long as suitable control mechanisms are in place to limit the extent of the tortfeasor’s liability. At one time, the notion of “proximity” was regarded as the “conceptual determinant” or “unifying criterion” for establishing the existence of a duty of care in negligence. However, this is no longer the position today. Preferring instead the factual over the normative, some judges have begun to apply a list of alternative factors (including policy-oriented ones) to determine whether there is a duty of care in a given case.

## 2. *The Rise of Proximity as a “Unifying Criterion” of Liability*

Our analysis of the position in Australia begins with Stephen J.’s judgment in the High Court decision of *Caltex Oil (Australia) Pty. Ltd. v. The Dredge “Willemstad,”*<sup>41</sup> a case decided not long before *Anns*. It was recognised by Stephen J. that in claims for pure economic loss, reasonable foreseeability of harm alone was an inadequate control mechanism and that some further control of liability, based upon notions of proximity, was necessary. In his Honour’s view, the concept of proximity as a viable control mechanism would be shaped and developed by each subsequent court’s reference to a body of precedent case law (which would have identified the “salient features” in a particular relationship as giving rise to a duty of care) as well as by the impact of evolving policy considerations. Such an approach is, of course, entirely consistent with and typical of the piecemeal fashion in which the common law develops. Further, in Stephen J.’s formulation, policy issues are to be considered *as part of* the Court’s overall determination of the requisite degree of proximity that justifies recovery for pure economic loss.

In *Jaensch v. Coffey*,<sup>42</sup> Deane J., in a very helpful judgment, took pains to emphasise that Lord Atkin’s neighbour principle was not premised on the “unqualified” and factual concept of reasonable foreseeability alone but that it actually encapsulated the narrower, legal notion of proximity.<sup>43</sup> Proximity, which was a “substantive” control mechanism in his Honour’s view, proved a much stricter requirement because it involved “both an evaluation of the closeness of the relationship and a judgment of

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<sup>41</sup> (1976) 136 C.L.R. 529 [*Caltex Oil*] (see especially 572-577).

<sup>42</sup> (1984) 155 C.L.R. 549.

<sup>43</sup> “The proposition to be found in the writings of some eminent jurists that Lord Atkin’s ‘neighbour’ or ‘proximity’ requirement was an exercise in tautology...is, as Professor Morison points out, based on the premise that Lord Atkin’s overriding requirement of proximity involved no more than the notion of reasonable foreseeability. As I have indicated, that is a premise which I am quite unable to accept” (*ibid.* at 580).

the legal consequences of that evaluation.”<sup>44</sup> Further, whilst it is generally accepted that separate and specific reference to the notion of proximity is unnecessary in cases involving direct physical injury to person or damage to property (because the test of reasonable foreseeability of harm commonly suffices), Deane J. was quick to point out that this did not indicate the demise of proximity as a matter of principle, particularly so in “comparatively uncharted areas of the law of negligence” (e.g. in the field of liability for pure economic loss).<sup>45</sup> Instead, his Honour was of the view that upon analysis, the oft-cited passage from Lord Wilberforce’s judgment in *Anns* actually reflected “an acceptance, rather than a denial, of the existence of overriding limitations upon the test of reasonable foreseeability.”<sup>46</sup>

The apparent inadequacy of the reasonable foreseeability test was again highlighted by Gibbs C.J. in the seminal decision of *Heyman*,<sup>47</sup> the facts of which are not dissimilar to that in *Anns*. Gibbs C.J. pointed out, categorically in our view, that Lord Wilberforce’s oft-cited speech in *Anns* should not be interpreted as suggesting that foreseeability of harm *per se* was sufficient to meet the requirement of “proximity or neighbourhood” as set out in stage one of the test. Instead, his Honour appeared fairly convinced that Lord Wilberforce had actually intended the expression “proximity or neighbourhood” to be a “composite one, and to refer to the relationship described by Lord Atkin in *Donoghue v. Stevenson*,”<sup>48</sup> which relationship was aptly explained by Deane J. in *Jaensch v. Coffey*.<sup>49</sup> In contrast, Brennan J., who viewed Lord Atkin’s neighbour principle as simply a re-statement of the unqualified test of foreseeability, chose to equate Lord Wilberforce’s first stage with that very test. His Honour then proceeded to set out his (oft-cited) observations, which subsequently proved influential in the English House of Lords, on how the common law ought to develop novel categories of negligence—*viz.*, “incrementally and by analogy with established categories.”<sup>50</sup> It must be questioned, however, whether Brennan J.’s call for a cautious (precedent-based) approach to the development of negligence law is necessarily at odds with the arguably broader and more flexible (principle-based) approach of *Anns*. After all, is it not true that in adopting the *Anns* approach, judges do invariably have regard to previously-decided cases and their established categories?

The importance of the proximity requirement as a touchstone and control of the categories of case in which a duty of care is adjudged to arise was also emphasised by Deane J. in the *Heyman* decision. Whilst repeating many of his views which were expressed in *Jaensch v. Coffey* on the scope and ingredients of this requirement (which, in his Honour’s view, was clearly directed at the *relationship* between the

<sup>44</sup> *Ibid.* at 580. See also Deane J.’s formulation of the ingredients of the proximity requirement as involving, in the relationship between the parties, the notion of “nearness or closeness” and embracing the concepts of physical, circumstantial and causal proximity (at 584-585).

<sup>45</sup> *Ibid.* at 582-583.

<sup>46</sup> *Ibid.* at 582.

<sup>47</sup> *Supra* note 39.

<sup>48</sup> *Ibid.* at 442.

<sup>49</sup> *Supra* note 43. See also the views expressed by McHugh J. in the more recent decision of *Tame v. New South Wales* (2002) 191 A.L.R. 449 (at 474): “I find it difficult to believe that Lord Atkin was simply declaring that the *first step* in determining duty was a *factual question* of foreseeability or that it was *independent* of the concept that he called proximity. I think Lord Atkin saw the concept of proximity as *equivalent* to the concept of ‘neighbourhood’...” [emphasis added].

<sup>50</sup> *Supra* note 39 at 481.

parties),<sup>51</sup> Deane J. pointed out that regard must also be had to considerations of *public policy* (or to notions of what is “fair and reasonable”) when determining the issue of proximity.<sup>52</sup> Like Brennan J., however, Deane J. was of the view that the first stage of *Anns* was, notwithstanding Lord Wilberforce’s use of the expression “proximity or neighbourhood,” effectively referring to the wider concept of reasonable foreseeability of harm.<sup>53</sup> His Honour then sought to distinguish Lord Wilberforce’s use of the word “proximity” in stage one of *Anns* from Lord Atkin’s use of the same word (but in a much stricter and more appropriate context) in *Donoghue v. Stevenson*,<sup>54</sup> which distinction is, in our view, artificial and not justified on a proper reading of Lord Wilberforce’s two stage proposition in *Anns*.

The continued use of the proximity requirement as a “conceptual determinant” and a “unifying theme” for establishing the existence of a duty of care was further endorsed by the majority in *Bryan v. Maloney*.<sup>55</sup> This was of course a landmark decision as their Honours had consciously chosen to depart from the established position in England.<sup>56</sup> In a joint judgment, Mason C.J., Deane and Gaudron JJ. endorsed the approach of taking into account policy considerations when determining the issue as to whether there was a sufficient degree of proximity in the relationship between the parties.<sup>57</sup> This shows clearly the High Court’s continued preference for using the amorphous concept of proximity as the vehicle by which policy is put into practice in Australia. Is this however a desirable approach to establishing, ultimately, the duty of care element in negligence? We shall return to this point a little later. Whilst he too accepted the notion of proximity, Toohey J., who was also in the majority, expressed the view that the incremental approach to the duty of care question would, in any event, be preferable to the approach adopted by the House of Lords in *Murphy*. Yet, his Honour was quick to point out that the incremental approach itself was not without difficulty. In his Honour’s view, “the very term ‘incremental’ invites inquiry because what is incremental is to an extent in the eye of the beholder.”<sup>58</sup> Furthermore, does the word “incremental” not beg the question: “incremental to what”? How should one, for example, consider the past authorities—(a) all under one category (which appears unlikely), or (b) to subdivide them into smaller and distinct categories, and

<sup>51</sup> *Supra* note 44.

<sup>52</sup> *Supra* note 39 at 498. See also *Gala v. Preston* (1991) 172 C.L.R. 243 at 253.

<sup>53</sup> *Supra* note 39 at 506-507. *Contra* however the views of Lord Nicholls of Birkenhead in *Stovin v. Wise* [1996] A.C. 923 at 932. [“Close attention to the language of Lord Wilberforce, at 751-752, with its reference to a sufficient relationship of proximity or neighbourhood, shows that he regarded proximity as an integral requirement ...”]

<sup>54</sup> See Deane J.’s analysis of Lord Atkin’s neighbour principle in *Jaensch v. Coey*, *supra* note 43. Note also that this is where Deane J. and Brennan J. part company (see, in contrast, Brennan J.’s analysis of the neighbour principle in *Heyman*, *supra* note 39 at 478-479 and in *Gala v. Preston*, *supra* note 52 at 259).

<sup>55</sup> (1995) 182 C.L.R. 609 at 619; noted, R. Martin, “Defective Premises—the Empire Strikes Back” (1996) 59 Mod. L. Rev. 116 and D. Miller, “Builder’s Negligence Liability to Subsequent Purchaser” [1995] L.M.C.L.Q. 326. See also *Burnie Port Authority v. General Jones Pty. Ltd.* (1994) 179 C.L.R. 520 at 543.

<sup>56</sup> As embodied in the House of Lords decision of *Murphy v. Brentwood District Council*, *supra* note 32.

<sup>57</sup> (1995) 182 C.L.R. 609 at 618-619.

<sup>58</sup> *Ibid.* at 661. It has also been suggested that reasoning by analogy is problematic because “[a]n analogy can always be drawn between two cases if the judge is willing to view them at a high level of abstraction” (D. Kwei, “Duty of Care, Aristotle and the British Raj: A Re-Assessment” (1997) 21 Melbourne U.L. Rev. 65 at 77).

if so, on what basis should this be done (*e.g.* by the type of tortious act/omission, by the type of harm/damage or by the type of defendant)?

Brennan J. was the sole dissenting judge in *Bryan v. Maloney*. Whilst his Honour accepted that there was “no error of principle involved” in using the requirement of proximity as a measure of control upon the test of reasonable foreseeability,<sup>59</sup> he nevertheless rejected proximity as a working criterion of liability on the basis that it was an expression that persistently defied definition. His Honour’s primary concern was that without an *a priori* definition of its constituent elements, the determination of the issue of proximity would simply involve a judicial discretion (for example, a value judgment by the Court on matters of public policy).<sup>60</sup> In our view, although it has been thought impossible to give the expression “proximity” any greater or more precise degree of content than what the courts in the past had already attempted to do, we do suggest below that existing formulations can in fact serve as helpful points of departure towards a more practical approach.<sup>61</sup> What is however more practicable, in trying to address Brennan J.’s concern of an inherent judicial uncertainty in assessing proximity, is for subsequent courts to consider matters of public policy strictly at a separate and distinct stage of the enquiry process (as, for example, in stage two of Lord Wilberforce’s proposition in *Anns*)—a point to which we return below.

### 3. *The Demise of Proximity and the Emergence of a Multi-Factorial Approach*

The subsequent decision of the High Court in *Hill v. Van Erp*<sup>62</sup> probably marked the beginning of the end of the role of proximity as the unifying criterion or touchstone for a duty of care in Australia. Dawson J., for instance, was doubtful that proximity could ever be used as a unifying conceptual determinant in developing areas of the law because of the inevitable impact of (countervailing) public policy considerations as well as the fact that “...nearness and closeness are neither sufficient nor necessary to establish a relationship of proximity in all cases.”<sup>63</sup> Still, his Honour maintained the view that there remained a useful, though more limited role for proximity in the law of negligence—it serves as a “useful means of expressing the proposition that ... reasonable foreseeability of harm may not be enough to establish a duty of care,” that “[s]omething more is required” and that “it is described as proximity.”<sup>64</sup> The requirement of proximity therefore “expresses the result of a process of reasoning rather than the process itself.”<sup>65</sup> Of greater significance, perhaps, is Dawson J.’s observation (as was Toohey J.’s)<sup>66</sup> that there is, in substance, no palpable difference in approach between employing the notion of proximity to establish a duty of care in a novel case and employing the incremental approach advocated by Brennan J. in the *Heyman* decision for the same purpose (the former thus giving normative

<sup>59</sup> *Ibid.* at 653.

<sup>60</sup> *Ibid.*

<sup>61</sup> See *e.g.* Deane J.’s formulation in *Jaensch v. Coey* (*supra* note 43) which was described by McHugh J. in *Hill v. Van Erp* (1997) 188 C.L.R. 159 as the “best known definition of proximity” (at 208). See also text accompanying note 267.

<sup>62</sup> *Supra* note 61.

<sup>63</sup> *Ibid.* at 177. See also the concerns expressed by McHugh J. at 210 and by Gummow J. at 237-238.

<sup>64</sup> *Ibid.* at 177-178.

<sup>65</sup> *Ibid.* at 178.

<sup>66</sup> *Ibid.* at 190.

force to the latter). Indeed, whenever a court is confronted with a novel situation and (in our view) on either approach, “regard should be had in the first place to the established categories which may be helpful by way of analogy in determining whether to recognise a duty of care.”<sup>67</sup>

The utility of the proximity requirement as a universal indicia for the recognition of a duty of care was again called into question in the case of *Pyrenees Shire Council v. Day*.<sup>68</sup> Whilst recognising that proximity may still serve as a general limitation or control upon the unqualified test of reasonable foreseeability, Kirby J. thought it “tolerably clear that proximity’s reign in this Court, at least as a universal identifier of the existence of a duty of care at common law, has come to an end.”<sup>69</sup> His Honour was also forthright in acknowledging that the Australian High Court, unlike the courts in Canada and New Zealand, had been slow to endorse the two stage formulation in *Anns* (preferring instead the incremental development of new categories of duty of care) because of its disinclination “to embark upon the unpredictable policy evaluations envisaged in the second step of Lord Wilberforce’s formulation.”<sup>70</sup> Yet, his Honour pointed out, rather timely in our view, that *Anns* “rightly acknowledged the part which the policy of the law inescapably plays in fixing the outer boundary of liability to an action in negligence.”<sup>71</sup> Ultimately, however, Kirby J. (the lone voice in this respect) was more persuaded to adopt the “three part test” as set out by the House of Lords in *Caparo* to address the duty of care question in Australia. His Honour acknowledged the inevitable overlap and imprecision of the respective criteria which constitute the three parts of the *Caparo* formulation and eventually concluded that “the search in this Court for exact precision and sure predictability by the use of concepts such as ‘foreseeability’, ‘proximity’ and ‘reliance’ should ... be taken to have failed” (because exact precision and certainty were “ultimately unattainable in this area of the law”).<sup>72</sup> What is rather puzzling though is his Honour’s further suggestion (having endorsed the three part *Caparo* formulation) that the outer boundary of liability in negligence be fixed by reference to “a ‘spectrum’ of [proximity] factors” and by “the candid evaluation of policy considerations.”<sup>73</sup> This of course reminds us of the “two stage test” in *Anns* but, as we shall demonstrate below, there may be, in the final analysis, no difference in substance between the two stage formulation in *Anns* and the three part formulation in *Caparo*.<sup>74</sup>

In the subsequent (and fairly lengthy) decision of the High Court in *Perre v. Apand Pty. Ltd.*,<sup>75</sup> Kirby J. noted that it was time for the highest court in Australia to clarify what he called “the present disorder and confusion” in the law of negligence.<sup>76</sup> However, far from achieving this objective, there was, with respect, simply no consensus

<sup>67</sup> *Ibid.* at 178.

<sup>68</sup> (1998) 192 C.L.R. 330 [*Pyrenees*].

<sup>69</sup> *Ibid.* at 414.

<sup>70</sup> *Ibid.* at 413.

<sup>71</sup> *Ibid.* at 417.

<sup>72</sup> *Ibid.* at 419. *Contra* Brennan J.’s views in *Bryan v. Maloney*, *supra* note 55 at 653-655 and see also text accompanying note 60.

<sup>73</sup> *Ibid.*

<sup>74</sup> See *e.g. infra* note 304; see also Lord Nicholls’s observation in *Stovin v. Wise*, *supra* note 53 at 931.

<sup>75</sup> (1999) 198 C.L.R. 180 [*Perre*]; noted, C. Witting, “The Three-stage Test Abandoned in Australia—or Not?” (2002) 118 Law Q. Rev. 214.

<sup>76</sup> *Ibid.* at 264.

amongst their Honours as to the “proper” approach that the Court should adopt in determining the question of a duty of care. McHugh J., for instance, dismissed both the *Anns* and *Caparo* formulations<sup>77</sup> and instead suggested that the law in this area should develop incrementally and cautiously on a case-by-case basis and by analogy with the established categories.<sup>78</sup> Further, his Honour listed five “principles” which he thought were relevant in determining whether a duty of care existed in all cases of liability for pure economic loss—*viz.*, reasonable foreseeability of loss, indeterminacy of liability, autonomy of the individual, vulnerability to risk and knowledge of the risk and its magnitude.<sup>79</sup> Kirby J. was however more receptive to the two English approaches, which he said at least provided the decision-maker with “an approach or a methodology” (of a general or conceptual nature) in determining the existence (or otherwise) of a duty of care.<sup>80</sup> It is clear though that his Honour preferred to adopt the “three part test” in *Caparo*, as was the case in the earlier *Pyrenees* decision. Still, it may be argued that from Kirby J.’s discussion of the role of proximity in the overall duty of care enquiry, his Honour came very close to endorsing, in substance at least, the two stage formulation in *Anns*:

If, on the other hand, proximity were to be confined to its original historical purpose as a measure of ‘nearness and closeness’ between the parties in dispute, *it could yet provide a meaningful gateway*, in addition to reasonable foreseeability of harm, *to afford the starting point* for the allocation of a legal duty of care or exemption from its burden. Then, it would remain necessary ... to weigh candidly the competing *policy considerations* relevant to the imposition of a legal duty of care.<sup>81</sup>

Gummow J., on the other hand, preferred the approach taken by Stephen J. in the *Caltex Oil* case which basically identified a number of “salient features” from the facts of the case at hand that, in combination, gave rise to a relationship of proximity between the parties and hence to a duty of care.<sup>82</sup> Contributing further to the disparity of judgments in the instant case, Gaudron J. (whose approach did not attract the support of the other members of the High Court) identified a novel category of negligence liability for conduct leading to the loss or impairment of a legal right.<sup>83</sup> The decision in *Perre* therefore understandably led one commentator to observe that “while each member of the High Court endeavoured to find the salient features of the case before them, there is now no approach to the duty question that commands the acceptance of a majority of justices of the High Court.”<sup>84</sup>

It was in the decision of *Sullivan v. Moody*<sup>85</sup> that the Australian High Court, in a (rare) unanimous decision, categorically rejected the “three part test” in *Caparo* as

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<sup>77</sup> *Ibid.* at 210-213.

<sup>78</sup> *Ibid.* at 216-217.

<sup>79</sup> *Ibid.* at 220.

<sup>80</sup> *Ibid.* at 274.

<sup>81</sup> *Ibid.* at 284 [emphasis added].

<sup>82</sup> *Ibid.* at 254.

<sup>83</sup> *Ibid.* at 200-201.

<sup>84</sup> A. Baron, “*Bryan v. Maloney* after the death of proximity: time to take one step backward, or a small leap forward” (2003) 19 Building & Construction L.J. 25 at 44.

<sup>85</sup> (2001) 207 C.L.R. 562 [*Sullivan*].

representing the law in Australia.<sup>86</sup> Hitherto, it will be recalled that Kirby J. was the only member of the High Court to have fervently endorsed the *Caparo* formulation. The primary reason given by their Honours for rejecting *Caparo* is the fear that “the matter of foreseeability (which is often incontestable) having been determined, the succeeding questions will be reduced to a discretionary judgment based upon a sense of what is fair, and just and reasonable as an outcome in the particular case.”<sup>87</sup> Insofar as “proximity” was concerned, their Honours noted that the concept “gives little practical guidance” in determining the existence (or otherwise) of a duty of care (especially so in novel cases) because “[i]t expresses the nature of what is in issue, and in that respect gives focus to the inquiry, but as an explanation of a process of reasoning leading to a conclusion its utility is limited.”<sup>88</sup> Furthermore, “[t]he question as to what is fair, and just and reasonable is capable of being misunderstood as an invitation to formulate policy rather than to search for principle.”<sup>89</sup> Adopting the “three part test” in *Caparo* may therefore result in discretionary decision-making and detract from the Court’s ultimate goal of searching for some general principle which can serve as a valuable practical guide in this area of the law. Having rejected *Caparo*, however, it is a pity that the High Court did not offer any alternative approach to resolving the duty of care question in negligence.

Not surprisingly, no views supporting *Caparo* were proffered in *Sullivan’s* case, as Kirby J. did not sit on that particular appeal. It was therefore in *Graham Barclay Oysters Pty. Ltd. v. Ryan*<sup>90</sup> that the learned judge, with great reluctance, conceded that the “three part test” in *Caparo* had been discredited and effectively abolished in Australia. His Honour noted that the alternative approach which has emerged from the decided cases takes into consideration the “salient features” of the case at hand in determining the existence (or absence) of a duty of care.<sup>91</sup> This latter approach however does not provide a “methodology” for the determination of a question as complex as duty of care and also fails to recognise the “dominant role” which policy plays in this area of the law.<sup>92</sup> Nevertheless, in light of the latest developments, Kirby J. was adamant in formulating yet another approach to the duty of care question which is premised, simply, on asking the “ultimate question”—*viz.*, “whether, in all the circumstances, it is such as to make it ‘reasonable to impose upon the one a duty of care to the other.’”<sup>93</sup> Such a unitary formulation ought to take into account (amongst other factors) the “closeness” of the relationship between the parties and so offers “...a return to the substance of Lord Atkin’s speech in *Donoghue v. Stevenson*.”<sup>94</sup> Unsurprisingly, therefore, his Honour candidly acknowledged that the painful search for a universal formula to determine the existence of a duty of care in the law of negligence “may send those who pursue it around in never-ending circles that ultimately

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<sup>86</sup> *Ibid.* at 579.

<sup>87</sup> *Ibid.* at 579.

<sup>88</sup> *Ibid.* at 578-579.

<sup>89</sup> *Ibid.* at 579.

<sup>90</sup> (2002) 194 A.L.R. 337.

<sup>91</sup> This is also the approach taken by Stephen J. in *Caltex Oil* (*supra* note 41 at 576-577) and endorsed by Gummow J. in *Perre v. Apand Pty. Ltd.* (*supra* note 75 at 254).

<sup>92</sup> (2002) 194 A.L.R. 337 at 400.

<sup>93</sup> *Ibid.* at 401.

<sup>94</sup> *Ibid.*



bring the traveller back to the very point at which the journey began.”<sup>95</sup> As such, “after 70 years the judicial wheel has, it seems, come full circle.”<sup>96</sup>

It is perhaps appropriate to conclude our analysis of the Australian position by examining the very recent decision of the High Court in *Woolcock Street Investments Pty. Ltd. v. CDG Pty. Ltd.*<sup>97</sup> Again, one searches in vain for a general, unifying approach to determining a duty of care in this jurisdiction.

In a joint judgment, Gleeson C.J., Gummow, Hayne and Heydon JJ. appeared to have treated the notion of vulnerability of the plaintiff (or lack thereof) as an important consideration in the overall enquiry.<sup>98</sup> Reference was also made to the twin concepts, enunciated in *Bryan v. Maloney*, of assumption of responsibility and known reliance.<sup>99</sup> McHugh J. restated his five “principles” in *Perre*<sup>100</sup> and further considered a host of “other policies and principles,” including the floodgates argument.<sup>101</sup> Such a *multi-factorial* approach (which, in our view, resembles the “salient features” approach considered above) to determining a duty of care appears to conflate considerations of public policy with factors which are more relevant in assessing the degree of proximity in the relationship between the parties (which, as we shall argue, may even be merely *factual* in nature, and no more). Callinan J., on the other hand, appeared to have adopted an approach that is not dissimilar to McHugh J.’s in the instant case. His Honour was of the view that in claims for pure economic loss, “cases will in practice only be resolved by closely and carefully examining the facts to ascertain whether a sufficiency of factors of a sufficient degree of relevance and importance has been demonstrated. It is better I think to acknowledge and apply that reality than to attempt to state an inflexible principle which is bound, at this stage at least, to fail to meet the justice of the cases which are likely to arise in the future.”<sup>102</sup>

Kirby J. was the sole dissenting judge in this appeal. His Honour, who must have been very disappointed over the demise of the *Caparo* approach in Australia, was nevertheless hopeful that this approach may some day be endorsed by the Australian High Court, observing in the process that the *Caparo* formulation, “in various guises, ... continues to be applied in the final appellate courts of most Commonwealth countries.”<sup>103</sup> His Honour ultimately applied McHugh J.’s approach in *Perre* to the facts in the instant case and reached a different conclusion from that of the majority.

It therefore appears, with respect, that the law in Australia today (as regards the recovery in tort for pure economic loss) is no more illuminating than it was some three decades ago. There were glimpses of a clear and practical approach (notably, in *Bryan v. Maloney*), but that development has (unfortunately, in our view) since faded into oblivion. Whilst it is true that we now see the emergence of a multivariate and factual approach to determining duty (which is, of course, a significant contribution

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<sup>95</sup> *Ibid.* at 402.

<sup>96</sup> *Ibid.*

<sup>97</sup> [2004] H.C.A. 16 [*Woolcock*]; now also reported at (2004) 205 A.L.R. 522 and noted by C.L. Saw, G. Chan and A. Phang, “A Retreat from *Bryan v. Maloney* in Australia?” (2004) 63 Cambridge L.J. 549.

<sup>98</sup> *Ibid.* at paras. 23 and 31.

<sup>99</sup> *Ibid.* at paras. 24–26.

<sup>100</sup> See text accompanying note 79.

<sup>101</sup> *Supra* note 97 at para. 74.

<sup>102</sup> *Ibid.* at para. 231.

<sup>103</sup> *Ibid.* at paras. 158–159.

from McHugh J.), it is by no means certain if such an approach will command the acceptance of all the other judges in the Australian High Court. Unfortunately, the very recent decision in *Woolcock* does not provide a clear indication to this effect.

#### D. New Zealand

Since the relatively early decision of *Bowen v. Paramount Builders*,<sup>104</sup> the New Zealand courts have been the most liberal of courts in the Commonwealth to allow actions in negligence (brought by subsequent purchasers against builders as well as, in certain instances, local authorities) for pure economic loss resulting from defective premises.<sup>105</sup> The Courts are generally agreed that in determining whether a duty of care arises in any given situation (especially in a novel situation), regard must be had to all the relevant circumstances of the case as well as to the *ultimate question* as to whether, in light of all these circumstances, it is “just and reasonable” to impose a duty of care on the defendant.<sup>106</sup> Whilst it cannot be denied that the notion of what is “just and reasonable” in the circumstances does indeed lie at the heart of the duty of care enquiry in the New Zealand context, it is equally clear that the judges in this jurisdiction will, *unlike* their English counterparts today, attempt to answer the ultimate question (posed above) from the perspective of two broad fields of inquiry (which, as we shall see shortly, mirror the two stage approach in *Anns*).<sup>107</sup>

In *South Pacific Manufacturing Co. Ltd. v. New Zealand Security Consultants & Investigations Ltd.*,<sup>108</sup> Cooke P. endorsed the view that courts should approach the determination of the duty of care question in negligence by adopting a general framework which focuses on two broad fields of inquiry.<sup>109</sup> The first concerns the *degree of proximity or relationship* between the parties. This is of course not simply a question of foreseeability of harm. Indeed, analogous cases in which the Courts have recognised, or declined to recognise, a duty of care play an important role in the overall assessment of this issue and in ensuring that the law of negligence in New Zealand develops in a cohesive and principled manner. The second focuses on whether there are other *policy considerations* that tend to negative or restrict (or indeed strengthen the existence of) the duty of care in the case at hand. It is

<sup>104</sup> [1977] 1 N.Z.L.R. 394.

<sup>105</sup> See also *Mount Albert Borough Council v. Johnson* [1979] 2 N.Z.L.R. 234 and *Askin v. Knox* [1989] 1 N.Z.L.R. 248.

<sup>106</sup> *Brown v. Heathcote County Council* [1986] 1 N.Z.L.R. 76 at 79; *South Pacific Manufacturing Co. Ltd. v. New Zealand Security Consultants & Investigations Ltd.* [1992] 2 N.Z.L.R. 282 at 305-306 and 317; *Attorney-General v. Carter* [2003] 2 N.Z.L.R. 160 at paras. 22 and 30; *Rolls-Royce New Zealand Ltd. v. Carter Holt Harvey Ltd.* [2004] NZCA 97 at para. 58.

<sup>107</sup> *Quaere* whether the ultimate reference to the notion of what is “just and reasonable” in the circumstances (albeit approached from the analytical framework of two broad fields of inquiry) reflects a deliberate attempt by the New Zealand courts at reconciling the *Caparo* “three part test” with the *Anns* “two stage test”? Based on a holistic assessment of the existing case law, the present authors are of the view that the New Zealand courts could not have intended such a reference (to what is “just and reasonable” in the circumstances) to function in the same way as the “fair, just and reasonable” requirement in (the third part of the test in) *Caparo*.

<sup>108</sup> [1992] 2 N.Z.L.R. 282.

<sup>109</sup> *Ibid.* at 293-294. See also Richardson J.’s judgment in *First City Corporation Ltd. v. Downsvlew Nominees Ltd.* [1990] 3 N.Z.L.R. 265 at 275 as well as Thomas J.’s judgment in *Connell v. Odium* [1993] 2 N.Z.L.R. 257 at 265.

immediately apparent from this analysis that the approach in New Zealand to the duty of care question mirrors that in *Anns*, which has been described by his Honour, in an extra-judicial capacity, as a “convenient basis for organising thinking, with ample inbuilt flexibility at both stages.”<sup>110</sup>

Additionally, in response to criticisms that the first stage of the *Anns* formulation creates a *prima facie* presumption of a duty of care based simply on the reasonable foresight of harm, Cooke P. in *South Pacific* was of the view thus: “I am of the school of thought that has never subscribed to that view, largely because of Lord Wilberforce’s reference to a sufficient relationship of proximity or neighbourhood. It would be naive, and I believe absurd and dangerous, to assert that a duty of care *prima facie* arises whenever harm is reasonably foreseeable.”<sup>111</sup> His Honour also took the opportunity to shatter the myth that the two-stage approach in *Anns* (which is also the approach adopted in New Zealand) does not accord with the incremental approach advocated by some Australian and English judges. In the words of his Honour:

I fully and respectfully agree that in deciding whether or not there is a duty of care in a new situation the Courts should decide gradually, step by step and by analogy with previous cases. *That has invariably been done in New Zealand.* In England *even under Anns the process has been substantially the same*, for Lord Wilberforce’s twofold proposition contained the inbuilt flexibility enabling close consideration to be given to the specific factors that had influenced specific earlier decisions.<sup>112</sup>

In any event, the word “incremental” is in itself problematic because “what is a jump to one person may be quite a small and necessary step to another.”<sup>113</sup> Further, it has also been observed that “[a]lthough English courts have taken incrementalism to represent the law and have proceeded to apply it, no consistent pattern emerges to indicate what the courts understand by the term.”<sup>114</sup>

Therefore, whilst the New Zealand Court of Appeal in *South Pacific* did emphasise that the determination of the duty of care question in any particular case depends ultimately on the principled exercise of judicial discretion and a careful balancing or weighing of all relevant factors in the attempt to answer the “ultimate question,” it also acknowledged (candidly) that the adoption of a general framework or methodology

<sup>110</sup> R. Cooke, “An Impossible Distinction” (1991) 107 Law Q. Rev. 46 at 48. See also, on a more general (yet no less important) level, P. Spiller, “A Commonwealth Judge at Work: Lord Cooke in the House of Lords and Privy Council” (2003) 3 Oxford U. Commonwealth L.J. 29, where the learned author observed (at 42) that “Lord Cooke’s legal researches were carefully balanced by his search for the practical reality and substance of the issues before him rather than for certain answers in legal formulae.” Again, it is observed (in a similar vein, at 43) that “Lord Cooke rejected artificialities and refined linguistics ‘which schoolmen might debate’” and that “he stressed that judges had to reach conclusions in a realistic and common sense way.” These observations are of the first importance in view of the criticisms of the *Anns* approach, particularly in the English context, that focus on vagueness and abstraction. As we argue, however, nothing could be further from the truth.

<sup>111</sup> *Supra* note 108 at 294-295 [emphasis added]. See also *per* Richardson J. *ibid.* at 305-306 and *per* Casey J. *ibid.* at 312.

<sup>112</sup> *Ibid.* at 295-296 [emphasis added]. See also Thomas J.’s judgment in *Connell v. Odlum*, *supra* note 109 at 265. Compare also L.C.H. Hoyano, “Dangerous Defects Revisited by Bold Spirits” (1995) 58 Mod. L. Rev. 887 at 893.

<sup>113</sup> Cooke, *supra* note 110 at 53.

<sup>114</sup> K.M. Stanton, “Incremental Approaches to the Duty of Care” in Nicholas J. Mullany, ed., *Torts in the Nineties* (North Ryde, NSW: LBC Information Services, 1997) 44.

in the enquiry process can help to *organise thinking*<sup>115</sup> or to *focus attention* on the various considerations.<sup>116</sup> In this regard, the present authors are of the view that the Court had, in substance, found solace in the two-stage approach of *Anns*.

The continued endorsement of *Anns* in New Zealand as well as the general departure by the New Zealand courts from English case law (in view of the differing social and historical needs of New Zealand society) did not perturb their Lordships who heard the appeal in the Privy Council decision of *Invercargill City Council v. Hamlin*.<sup>117</sup> Lord Lloyd, in delivering the Board's judgment, took pains to explain that this branch of the law was "especially unsuited for the imposition of a single monolithic solution,"<sup>118</sup> since "more than one view is possible" and that "there is no single correct answer."<sup>119</sup> His Lordship probably best summed up the seemingly irreconcilable state of affairs in the common law world of negligence by remarking thus:

In truth, the explanation for divergent views in different common law jurisdictions (or within different jurisdictions of the United States of America) is not far to seek. The decision whether to hold a local authority liable for the negligence of a building inspector is bound to be based at least in part on policy considerations.<sup>120</sup>

In summary, it would therefore appear that in the New Zealand context, the judicial practice of adopting a normative, two-stage (*Anns*-type) approach—as the preferred analytical model for addressing the duty of care question in negligence—continues to be well and alive today.<sup>121</sup>

## E. Canada

### 1. Introduction

In general, the Canadian courts have favoured the "two stage test" in *Anns*<sup>122</sup> and, in this regard, they have not adopted the "general exclusionary rule" in England in respect of pure economic loss. Nevertheless, there appear to be two aberrations to the general approach in *Anns*. However, it is submitted that these aberrations do not, in the overall analysis, undermine the strong inclination in favour of *Anns* in Canada.

Firstly, the judges differ on the content and emphasis in the *first stage* of the *Anns* test, *viz.*, whether the criterion of (i) factual foreseeability *or* (ii) proximity (ie legal

<sup>115</sup> *Supra* note 108 at 294.

<sup>116</sup> *Ibid.* at 316.

<sup>117</sup> [1996] A.C. 624. The decision of the New Zealand Court of Appeal is reported at [1994] 3 N.Z.L.R. 513.

<sup>118</sup> *Ibid.* at 640.

<sup>119</sup> *Ibid.* at 642.

<sup>120</sup> *Ibid.* at 642.

<sup>121</sup> See *e.g.* *Price Waterhouse v. Kwan* [2000] 3 N.Z.L.R. 39; *Attorney-General v. Carter* [2003] 2 N.Z.L.R. 160; *Rolls-Royce New Zealand Ltd. v. Carter Holt Harvey Ltd.* [2004] NZCA 97. Compare (albeit in the context of negligent misstatements only) A. Barker, "Divining an Approach to the Duty of Care: The New Zealand Court of Appeal and Claims for Negligent Misstatement" (2001) 10 Otago L. Rev. 91. Compare, further, in a more general context, though, by the same author, "The duty of care and the search for certainty" [2003] N.Z.L.J. (February) 44 at 48.

<sup>122</sup> Canadian legal practitioners have also endorsed the *Anns* approach instead of following the English courts: see *e.g.* E.A. Cherniak and K.F. Stevens, "Two Steps Forward Or One Step Back? *Anns* At The Crossroads in Canada" (1992) 20 Can. Bus. L.J. 164.

foreseeability) or both are indeed required to establish a *prima facie* duty of care. The Canadian courts have generally taken the position that factual foreseeability alone is not sufficient. In the most recent case of *Cooper v. Hobart*<sup>123</sup> (discussed below), the Supreme Court of Canada enunciated the criterion of foreseeability supplemented by proximity.<sup>124</sup> The Canadian courts, particularly in *Cooper* and the earlier case of *Canadian National Railway Co. v. Norsk Pacific Steamship Co. Ltd.*,<sup>125</sup> have also taken pains to expound on the meaning and concept of “proximity.” It has been variously described as one pertaining to the relationship between the claimant and the defendant as well as one that exists between the negligent act and the loss. Moreover, “proximity” has been linked with the notion of “policy” and is said to involve factors of reliance, expectations and representations. These various interpretations of “proximity” will be explored in greater detail in the present Part II.E.

Secondly, the Canadian judges generally agree that policy factors would, under the *second stage* of the *Anns* test, serve to negative the *prima facie* duty of care established under the first stage. However, the judges diverge from time to time in the manner in which these policy factors are applied. Indeed, as will be seen below, some judges appeared to have conflated the two stages of the test in its *application* to the facts of the case, notwithstanding that they had explicitly endorsed, in *theory*, the two stage *Anns* approach. Further, as mentioned above, the “policy” considerations (under the second stage) have, on occasion, been linked to “proximity” under the first stage.

## 2. *The Beginnings of Anns in City of Kamloops*

With the “birth” of *Anns* in England, the Canadian courts began to adopt Lord Wilberforce’s “two stage test” and indeed, continued to do so even after the “retreat” from *Anns* in England. Wilson J. (Ritchie and Dickson JJ. concurring) in the Canadian Supreme Court decision of *City of Kamloops v. Nielsen*,<sup>126</sup> applied the “two stage test” in *Anns*. The judges in this case, in granting recovery of economic loss (cost of repairs) arising from the defendant city’s failure to enforce the by-laws in respect of the construction of a house with defective foundations, endorsed the majority judgment in *Junior Books*, regarding the latter as having carried the law “a significant step forward.”<sup>127</sup> Specific reference was also made to Lord Roskill’s enunciation in *Junior Books* of the two stage *Anns* test.<sup>128</sup>

## 3. *The First Stage—the Concept of “Proximity” in Norsk*

The concept of “proximity” was explored in some detail in the Canadian Supreme Court decision of *Norsk*.<sup>129</sup> A railway company (claimant) recovered economic

<sup>123</sup> (2001) 206 D.L.R. (4<sup>th</sup>) 193 [*Cooper*].

<sup>124</sup> This formulation is, however, not new in Canada: see e.g. *Canadian National Railway Co. v. Norsk Pacific Steamship Co. Ltd.* (1992) 91 D.L.R. 289 at 369-370, and discussed *infra* note 156.

<sup>125</sup> (1992) 91 D.L.R. (4<sup>th</sup>) 289 [*Norsk*].

<sup>126</sup> (1986) 10 D.L.R. (4<sup>th</sup>) 641 [*City of Kamloops*].

<sup>127</sup> *Ibid.* at 679.

<sup>128</sup> *Ibid.* at 678.

<sup>129</sup> *Supra* note 125; noted, B.S. Markesinis, “Compensation for Negligently Inflicted Pure Economic Loss: Some Canadian Views” (1993) 109 Law Q. Rev. 5. Compare, though, E.A. Cherniak and E. How, “Policy

losses against the defendants who had negligently damaged a railway bridge owned by a third party. The claimant, though not the owner, was the principal user of the bridge. It also owned the track leading to each end of the bridge. McLachlin J. (L'Heureux-Dube and Cory JJ. concurring) favoured the incremental approach in *City of Kamloops* in finding justifications, on a case-by-case basis, for creating new categories where pure economic loss is recoverable as opposed to the general exclusionary rule in the English case of *Murphy*. The justification rested on the criterion of proximity, in addition to the requirement of foreseeability, *between the negligent act and the loss*.

However, McLachlin J. also separately referred to proximity in the same judgment as “an umbrella, covering a number of disparate circumstances in which *the relationship between the parties* is so close that it is just and reasonable to permit recovery in tort,”<sup>130</sup> thus conflating the two meanings of proximity. Strictly speaking, proximity between the negligent act and the loss (which, as the judge indicated, mirrors the civil law requirement of direct causation)<sup>131</sup> is different from proximity in terms of the closeness of the relationship between the parties. But the judge appeared to have regarded the proximate relationship between the parties as a sub-set of the factor connecting the negligent act to the loss:

A more comprehensive, and I submit objective, consideration of proximity requires that the court review all of the *factors connecting the negligent act with the loss*: this *includes not only the relationship between the parties* but all forms of proximity—physical, circumstantial, causal or assumed indicators of closeness. While it is impossible to define comprehensively what will satisfy the requirements of proximity or directness, precision may be found as types of relationships or situations are defined in which the necessary closeness between negligence and loss exists.<sup>132</sup>

On the other hand, La Forest J. (Sopinka and Iacobucci JJ. concurring) favoured the exclusionary rule for “contractual relational economic losses” subject to certain exceptions such as (1) possessor or proprietary interests; (2) general average cases; and (3) joint venture, which the judge opined are “reasonably well defined and circumscribed.”<sup>133</sup> Whilst McLachlin J. felt that the claimant’s operations were closely allied with the defendants so as to constitute, in effect, a “joint venture,” La Forest J. held on the facts that the parties concerned were not engaged in any “joint venture.” Notwithstanding the difference in views as regards the meaning of “joint venture,” one important point to note is that the two views embodied in the judgments of McLachlin J. and La Forest J. concurred on the applicability of *Anns* in the context of pure economic loss.<sup>134</sup>

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and Predictability: Pure Economic Loss in the Supreme Court of Canada” (1999) 31 Can. Bus. L.J. 209, especially at 229.

<sup>130</sup> *Ibid.* at 369 [emphasis added]. The words “just and reasonable” in McLachlin J.’s definition of proximity above appear to suggest that policy considerations are applicable in a discussion of proximity at the first stage. See also discussion of *Cooper* and *Edwards*, *infra* note 156.

<sup>131</sup> This is similar to the third limb of the common law tort of negligence, namely the requirement of establishing causation (between the breach of duty and the loss suffered by the claimant), though the civil law criteria appear to be more stringent in requiring direct, certain and immediate causation.

<sup>132</sup> *Supra* note 129 at 371 [emphasis added].

<sup>133</sup> *Ibid.* at 355.

<sup>134</sup> *Ibid.* at 377.

#### 4. Factual Foreseeability and Dangerous Defects in Winnipeg

The practice of applying the *Anns* test continued in the Supreme Court of Canada case of *Winnipeg Condominium Corp. No. 36 v. Bird*.<sup>135</sup> As a corollary, it explicitly rejected *D & F Estates*,<sup>136</sup> which was responsible, at least in part, for the demise of *Anns* in England. The Court held that the subsequent purchaser of a building could claim for the cost of repairing defects (pure economic loss) arising from the contractor's negligence. One significant finding was that the defects in question were dangerous.<sup>137</sup> In this regard, the "broad exclusionary rule" against the recovery of pure economic loss as applied in England was again rejected by the Canadian court.

Interestingly, *Winnipeg* "resurrected" Laskin J.'s dissenting view in the pre-*Anns* case of *Rivtow Marine Ltd. v. Washington Iron Works et al.*<sup>138</sup> with respect to the recovery of economic loss on the basis of a "threatened physical harm" from a negligently designed or manufactured product.<sup>139</sup> It is also apposite to note that Laskin J.'s reasoning in *Rivtow* had also received the imprimatur of Lord Wilberforce in *Anns*.

In applying the "two stage test" in *Anns*, however, the Court in *Winnipeg* was, with respect, not entirely clear whether it favoured the criterion of factual foreseeability or proximity under the first stage. The Court seemed, *initially*, to have outlined the issue on the basis of proximity as follows:

Was there a *sufficiently close relationship* between the parties so that, in the reasonable contemplation of Bird [contractor], carelessness on its part might cause damage to a subsequent purchaser of the building such as the Condominium Corporation?<sup>140</sup>

However, the Court referred, subsequently in its judgment, to the terms "reasonably foreseeable"<sup>141</sup> and "reasonable likelihood,"<sup>142</sup> which appear to emphasise the notion of factual foreseeability instead. Further, there was no reference in the judgment to any findings of reliance, assumption of responsibility or reasonable expectation of the parties in order to establish proximity. The criterion of factual foreseeability *per se* was featured again in the Court's concluding remarks as follows:

[C]ontractors (as well as subcontractors, architects and engineers) who take part in the design and construction of a building will owe a duty in tort to subsequent purchasers of the building if it can be shown that it was *foreseeable* that a failure

<sup>135</sup> (1995) 121 D.L.R. (4<sup>th</sup>) 193 [*Winnipeg*]; noted Hoyano, *supra* note 112. Interestingly, the Hong Kong Court of Final Appeal, in *Bank of East Asia Ltd. v. Tsien Wui Marble Factory Ltd.* [2000] 1 HKC 1, managed to avoid deciding whether *Winnipeg* ought to be followed in the Hong Kong context: see especially, *ibid.* at 25; reference may also be made to R. Glofcheski, "Defective Buildings and Defective Law: The Duty of Care in Negligence" (2000) 30 H.K.L.J. 206.

<sup>136</sup> *Supra* note 28.

<sup>137</sup> *Supra* note 135 at 198.

<sup>138</sup> (1973) 40 D.L.R. (3d) 530 [*Rivtow*].

<sup>139</sup> *Ibid.* at para. 70.

<sup>140</sup> *Supra* note 135 at para. 34 [emphasis added].

<sup>141</sup> *Ibid.* at para. 35.

<sup>142</sup> *Ibid.* at para. 36.

to take reasonable care in constructing the building would create defects that pose a substantial danger to the health and safety of the occupants.<sup>143</sup>

##### 5. “Policy” in the First Stage in Winnipeg?

Still on the issue of “content” under the *first* stage of the *Anns* test, the Canadian court in *Winnipeg*, quite surprisingly, resorted to “policy justification” at that particular stage. In allowing recovery for pure economic loss, the Court felt that it would encourage the claimant to mitigate potential losses that may arise from dangerous defects and thereby promote “economically efficient behaviour.”<sup>144</sup> Here, we see the *conflation* between the two stages of the *Anns* test in terms of its application. It may be argued, however, that the above policy factor is, strictly speaking, a “positive” factor inclining towards a finding on the existence of a *prima facie* duty of care and therefore should not be found in the second stage. In other words, the second stage of *Anns* is really intended for (other) policy considerations (such as the problem of indeterminate liability and amount) that serve to “negative” the *prima facie* duty of care. From this perspective, the “policy justification” in *Winnipeg* merely serves to reinforce the position that a *prima facie* duty of care exists.

##### 6. Linking Knowledge, Reliance and Policy in *Hercules*—Conflation of the First and Second Stages

Following quite closely on the heels of *Winnipeg* was another significant decision of the Supreme Court of Canada in *Hercules Management Ltd. v. Ernst & Young*.<sup>145</sup> In this case, the claimant shareholders of two companies brought an action against the defendant accountants in respect of the fall in the value of the former’s shares on the basis that they had relied on the audited reports on the companies negligently prepared by the defendants. As in *Caparo Industries Plc v. Dickman*<sup>146</sup> (where the facts were fairly similar), the Court in *Hercules* held that the claimants could not recover their losses. However, it should be noted that this decision was arrived at by applying the *Anns* approach.

In determining whether there was a *prima facie* duty of care under the first stage of the *Anns* test, the Court felt, unlike in *Winnipeg*, that the issue of reasonable reliance by the claimant on the defendant’s representation was crucial, as opposed to merely examining whether the harm caused was reasonably foreseeable.<sup>147</sup> However, the defendant’s *knowledge* of the identity of the claimant and the use to which the allegedly negligent statements were put were regarded by the Court

<sup>143</sup> *Ibid.* at para. 43 [emphasis added].

<sup>144</sup> *Ibid.* at para. 37.

<sup>145</sup> (1997) 146 D.L.R. (4<sup>th</sup>) 577 [*Hercules*].

<sup>146</sup> *Supra* note 23.

<sup>147</sup> The concepts of foreseeability and reasonable reliance were also utilised by Iacobucci J. in the prior case of *Queen v. Cognos Inc.* [1993] 99 D.L.R. (4<sup>th</sup>) 626 to found ‘proximity’ or a ‘special relationship’ between the parties.



as a “policy-based means by which to curtail liability”<sup>148</sup> under the *second* stage, instead of the first. Reliance and knowledge were also factors to be taken into consideration to establish proximity. Here, we have an *intermingling* of the two steps within the *Anns* framework, so to speak. As will be seen below, this view was not entirely shared by the Supreme Court of Canada in the subsequent cases of *Cooper* and *Edwards* which appeared to treat knowledge of the relationship as properly falling under the *first* stage of *Anns* test. On the facts of the case, the Court in *Hercules* held that the *prima facie* duty of care (founded on foreseeability and reliance) was, however, negated by policy considerations. As a matter of policy, the sole purpose of the audited reports was found to be for the shareholders *as a group* to supervise and oversee the management of a company in accordance with the *Manitoba Corporations Act*,<sup>149</sup> and not for purposes of individual and personal investment of the claimants. These policy considerations are generally consonant with those expressed by the House of Lords in *Caparo*.<sup>150</sup>

#### 7. *Reliance, Duty to Warn of Danger and the Link to Policy in Bow Valley*

In *Bow Valley Huskey v. Saint John Shipping*,<sup>151</sup> the Supreme Court of Canada had to decide whether the claimants’ claim for losses suffered during the period of the repair of a drilling rig as a result of the damage of the rig by the defendant was recoverable. In this instance, the claimants did not own the rig but had a contract with the owner to use it. In applying the *Anns* “two stage test,”<sup>152</sup> the Court held that the *prima facie* duty of care to warn of dangers rested on the reasonable foreseeability by the defendants that the “claimants might suffer loss as a result of use of the product about which the warning should have been made.”<sup>153</sup> More significantly, the Court opined that the concept of reliance was not relevant in a case of a failure to warn, “there being nothing to rely upon.”<sup>154</sup>

The *prima facie* duty for contractual relational economic loss was, however, negated by policy considerations, namely, that the problem of indeterminate liability to an indeterminate class of persons would arise. In discussing the problem of indeterminacy, the Court appeared to have implicitly recognised the notion of reliance when it stated “any person who is contractually dependent on a product or a structure owned by another “relies” on the manufacturer or builder to supply a safe product.”<sup>155</sup> Hence, it is submitted that the Court had not abandoned the concept of reliance (forming part of proximity) in the first stage of the *Anns* test but, in fact, linked the concept to the policy consideration of indeterminate liability under the second stage.

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<sup>148</sup> *Supra* note 145 at paras. 28 and 30.

<sup>149</sup> S.M. 1976, c. 40.

<sup>150</sup> *Per* Lord Oliver of Aylmerton, *supra* note 23 at 654 and *per* Lord Jauncey of Tullichettle at 662 respectively.

<sup>151</sup> (1997) 153 D.L.R. (4<sup>th</sup>) 385 [*Bow Valley*].

<sup>152</sup> *Ibid.* at para. 56.

<sup>153</sup> *Ibid.* at para. 61.

<sup>154</sup> *Ibid.*

<sup>155</sup> *Ibid.* at para. 66.

### 8. Application of *Anns* in *Cooper* and *Edwards*

Finally, in the recent Canadian case of *Cooper*,<sup>156</sup> the claimant investor sued the Registrar of Mortgage Brokers for failing to (i) oversee the conduct of a broker and (ii) notify the investors concerned who had lost money as a result of the broker's acts. The companion case of *Edwards v. Law Society of Upper Canada*<sup>157</sup> concerned the investment of monies by the claimants in gold through a trust fund held in trust by a lawyer. As a result of fraud involved in the gold investments, the claimants lost monies and sued the Law Society of Upper Canada for failing to ensure that the lawyer had operated his trust account in the prescribed manner under the regulations.

In both of the above cases, the same five judges of the Supreme Court of Canada applied the *Anns* two stage approach. Under the first stage, "reasonable foreseeability of the harm must be supplemented by proximity."<sup>158</sup> In respect of the second stage, the Court asked whether the *prima facie* duty of care arrived at under the first stage may be negated by public policy considerations, as in *Anns*. This "two stage" analysis has been confirmed in the subsequent Supreme Court of Canada decision in *Odhavji Estate v. Woodhouse*.<sup>159</sup>

It may, however, be argued that the judgments of the Supreme Court of Canada in *Cooper* and *Edwards* differed from that of Lord Wilberforce in *Anns* in at least two respects.

Firstly, in both these cases of *Cooper* and *Edwards*, the Court opined that the facts of the case must fall within the previously recognised categories of cases establishing a duty of care, similar to the approach adopted in *Norsk* and *City of Kamloops*. Lord Wilberforce in *Anns*, on the other hand, appeared to focus on a single general principle for establishing a duty of care. This perceived difference is, however, more apparent than real. A general principle of law is, after all, arrived at or deduced from an examination of particular cases and refined as part of the common law development. Further, to assist in the incremental development of the law, one would also, of necessity, be required to utilise general legal principles. In this regard, it would therefore be difficult to imagine that Lord Wilberforce had regarded the single general principle of law as an axiom that descended from the sky, as it were, without any recourse to past facts and cases.

Secondly, it may be argued that *Cooper* and *Edwards* differed from *Anns* in that the latter focused on *factual* foreseeability under the first stage of the test (at the expense

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<sup>156</sup> *Supra* note 123; noted, S.G.A. Pitel, "Reformulated *Anns* Test for Canada" (2002) Tort L. Rev. 10 [Pitel, "Reformulated *Anns* Test"]; and, S.G.A. Pitel, "Negligence: Canada Remakes the *Anns* Test" (2002) 61 Cambridge L.J. 252; as well as J. Neyers, "Distilling Duty: The Supreme Court of Canada Amends *Anns*" (2002) 118 Law Q. Rev. 221.

<sup>157</sup> (2001) 206 D.L.R. (4<sup>th</sup>) 211.

<sup>158</sup> *Ibid.* at para. 31.

<sup>159</sup> [2003] S.C.R. 263 at para. 46, though, strictly speaking, this latest case involved a claim for psychiatric damage, not pure economic loss. It is also interesting to note that there appeared to be a reference to the "three part test" in *Caparo* at para. 52, which supports the argument made below that there is no difference in substance between this test and the "two stage test" in *Anns*: see the main text accompanying *infra* notes 304-309.

of proximity or legal foreseeability).<sup>160</sup> Lord Wilberforce's statement in *Anns* has been interpreted in numerous cases as requiring proximity (or legal foreseeability) at the first stage, and not merely "factual" foreseeability. In this regard, there were prior Canadian decisions which also adopted, in addition to foreseeability, the criterion of proximity or reliance or some form of relationship between the parties under the first stage, such as *Bow Valley*, *Hercules* and *Norsk* (discussed above) and which are therefore consistent with *Cooper* and *Edwards*. Hence, this perceived difference is, in our opinion, misconceived.

The two cases raise significant issues with regard to the relationship between proximity and policy considerations. The Court observed that proximity under the first stage of the *Anns* test involves factors arising from the relationship between the claimant and the defendant—including expectations, reliance and representations. At the same time, however, the Court added that proximity involves "questions of policy in the broad sense of the word"<sup>161</sup> or "broad considerations."<sup>162</sup> Policy considerations under the second stage of the *Anns* test, on the other hand, fall *outside* the relationship of the parties. Yet, the Court, in considering whether the *first* stage of the test was satisfied, referred to "other important interests, of efficiency and finally at the expense of public confidence in the system as a whole."<sup>163</sup> These latter interests would appear to be properly *outside* the relationship of the parties and hence be more consonant with policy considerations under the *second* stage, rather than the first stage. This conflation of proximity and policy considerations by the Court, it is submitted, creates confusion.

Under the first stage, the Court also stated that "proximity" in *Cooper* was to be sought in the *statute* under which the Registrar was appointed. It is somewhat novel to look for "proximity" in a statutory instrument that is normally regarded as one significant source for ascertaining "policy." This perhaps reflected the conscious attempt of the Court to co-mingle both the concepts of "proximity" and "policy." The Court opined that the *Mortgage Brokers Act*<sup>164</sup> did not impose a duty of care on the Registrar to investors exclusively, but that it was a duty owed to the public as a whole, and on that basis, the requirement of proximity was not satisfied in *Cooper*. In our view, however, the language of the Court above appears more consonant with public policy considerations derived from a statute rather than the requirement of "proximity" *per se*.<sup>165</sup> We agree with the Court that the relationship between the parties (*i.e.*, the Registrar and the investors) may be derived from an interpretation of the statute based on the *special* facts of the case since the relationship would have no meaning outside of the statute. However, in assessing the relationship of the parties under the statute at the *first* stage, the Court could conceivably have focused on the absence of any expectations, reliance and representations, and thus concluded that a

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<sup>160</sup> See *e.g.* Pitel, "Reformulated *Anns* Test", *supra* note 156.

<sup>161</sup> (2001) 206 D.L.R. (4<sup>th</sup>) 193 at para. 30.

<sup>162</sup> *Ibid.* at para. 39.

<sup>163</sup> *Ibid.* at para. 50. See also R. Brown, "Still Crazy After All These Years: *Anns*, *Cooper v. Hobart* and Pure Economic Loss" (2003) 36 U.B.C. L. Rev. 159 at 182.

<sup>164</sup> R.S.B.C. 1996, c. 313.

<sup>165</sup> The policy considerations expressed in *Cooper* to the effect that the Registrar owes a duty to the public as a whole rather than to individual investors are analogous to the policy considerations expressed in the case of *Hercules*: see text in notes 149 and 150 above.

*prima facie* duty owed to the individual investors did not exist,<sup>166</sup> instead of entering into a discussion of the Registrar's duty to the public.

The Court went on to pronounce that the *prima facie* duty of care, even if it existed, would have been negated by policy considerations (which included the need for the Registrar to perform quasi-judicial functions, "discretionary" public policy-making, the problem of indeterminate liability and the duty of care towards the taxpaying public).<sup>167</sup> The public policy consideration that the Registrar owes a duty to the public as a whole rather than individual investors under the statute would, it is submitted, be more relevant at this *second* stage.

In *Edwards*, the Court stated that the *Law Society Act*<sup>168</sup> was intended for the "protection of clients and thereby the public as a whole," but that that did not translate into a private duty of care owed to a member of the public who deposits money into a solicitor's trust fund.<sup>169</sup> In this case, the claimant was not a client of the lawyer. The intention of the legislature was, it is submitted, clear in negating a duty of care owed to the claimants at the first stage. Hence, consistent with the decision in *Cooper*, the Court in *Edwards* had sought "proximity" at the first stage in the policy or legislative intent of the relevant statute. Hence, the confusion between "proximity" and "policy" evident in the judgment in *Cooper* has similarly "infected" the decision in *Edwards*. The Court observed that there were already existing protections for the clients as members of the public in the *Law Society Act* which provided for a compensation fund to compensate for losses suffered due to the dishonest acts of lawyers as well as insurance to meet clients' claims based on lawyers' negligence. Moreover, the Act already provided statutory immunity for the officials of the Law Society for any neglect or default in the performance or exercise in good faith of any duty or power under the Act. Hence, no *prima facie* duty of care arose in this case. The Court added that even if a *prima facie* duty of care existed, it would have been negated by policy considerations outside the relationship of the parties—a holding that was, again, consistent with the decision in *Cooper*.

It is submitted that it would have been conceptually neater, as in the *Anns* "two stage test," if the Court in both *Cooper* and *Edwards* had sought to disentangle the proximity requirement from policy considerations as far as possible (though it is recognized that there may be overlaps). Notwithstanding the differences in the application of policy factors in *Cooper* and *Edwards*, it is significant to note that the Canadian courts have once again expressly endorsed the general framework set out in *Anns*. As we shall see in Part III below, this general framework is founded on firm theoretical and practical considerations.

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<sup>166</sup> For example, it could be argued that s. 20 of the *Mortgage Brokers Act*, in exempting the Registrar from liability for performance of duties under the statute save for acts done in bad faith, does not give rise to any expectation of liability on the part of the Registrar or that it in fact constitutes a representation as to non-liability save in cases of bad faith. Moreover, the section may serve to dispel any notion of reliance on the part of the investor.

<sup>167</sup> *Supra* note 161 at paras. 52-55.

<sup>168</sup> R.S.O. 1990, c. L.8.

<sup>169</sup> *Supra* note 157 at para. 14.

### F. Singapore

The Singapore courts appear, on balance, to support the “two stage test” in *Anns*. Indeed, as we shall see, this has clearly been the case from a *substantive* perspective. Consistent with the endorsement of the *Anns* formulation, the Courts have also expressly rejected the “exclusionary” approach in the English case of *Murphy*.<sup>170</sup> One other important point to note is that the Singapore courts have, in attempting to define the difficult concept of “proximity,” utilised the notions of *reasonable reliance* by the claimant as well as the *knowledge* and the *assumption of responsibility* on the part of the defendant. Both these notions are complementary and integrated and, as will be argued in Part III below, constitute the best (and most practical) criteria for establishing proximity.<sup>171</sup>

The *Murphy* approach has been categorically rejected in the Singapore Court of Appeal decisions of *Ocean Front*<sup>172</sup> and *Eastern Lagoon*,<sup>173</sup> which involved claims for pure economic losses in the context of real property (specifically, defective buildings, similar to the factual matrix in *Murphy*). In the case of *Ocean Front*, the management corporation (claimant) sued the defendant developers for the faulty construction of common property that had resulted in the claimant’s pure economic losses. The case of *Eastern Lagoon*, on the other hand, involved a claim for pure economic losses by the claimant (again, a management corporation) against the defendant architects in respect of the latter’s design and supervision in the construction of a condominium.

Insofar as consideration of the *Anns* formulation is concerned, it is significant that these two Singapore cases adopted the “two stage test” of proximity qualified by policy considerations. In *Ocean Front*, the Court held that there was sufficient proximity between the management corporation and the developer as their relationship was “as close it could be short of actual privity of contract.” This closeness of relationship (or “proximity”) was based on various factors which included, *inter alia*, the *knowledge* of the developers that if they were negligent in the construction of common property, the management corporation would be saddled with the resulting defects *and* the fact that the developers had *undertaken obligations* (*i.e.*, had assumed responsibility) to construct the common property in a good and workmanlike manner. Hence, a duty of

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<sup>170</sup> *Supra* note 1.

<sup>171</sup> See Part III below.

<sup>172</sup> *RSP Architects Planners and Engineers v. Ocean Front Pte. Ltd.* [1996] 1 S.L.R. 113; noted, D.S.L. Ong, “Defects in Property Causing Pure Economic Loss: The Resurrection of *Junior Books* and *Anns*” [1996] Sing. J.L.S. 257 (and, for a note by the same author on the decision at first instance, see “Defects in Property Causing Pure Economic Loss” [1995] Sing. J.L.S. 256); A.M. Netto and A. Christudason, “*Junior Books* Extended” (1999) 15 Construction L.J. 199; I.N. Duncan Wallace, “*Junior Books* Extended: A Short Commentary” (1999) 15 Construction L.J. 218; and K.K. Lau, “Defective Buildings—Claim for Economic Loss Against Developers: *Ocean Front v. MCST 1272*” (1996) Asia Bus. L. Rev. 57 (April 1996, No. 12).

<sup>173</sup> *RSP Architects Planners & Engineers (Raglan Squire & Partners FE) v. Management Corporation Strata Title Plan No. 1075* [1999] 2 S.L.R. 449; noted, D.S.L. Ong, “The Test of Duty for Defects in Property Causing Pure Economic Loss” [1999] Sing. J.L.S. 667 [Ong, “Test of Duty”]. See also generally M.R. Pillay, “Building Consultants’ Exposure and Liability under Singapore Law—From *Ocean Front* to *Hong Huat*” (2001) Sing. Ac. L.J. 358 and D. Sim, “Expanding tort claims in construction cases: Time to contract?” (2003) 11 Tort L. Rev. 38.

care existed on the facts. The Court then proceeded to consider whether there were any policy considerations that negated such a duty of care. At this second stage of the enquiry, the Court decided on the facts that the amount recoverable (namely, the costs of repair and of making good the defects), the time span<sup>174</sup> and the class of persons were not indeterminate. Thus, although there was no explicit endorsement of the *Anns* formulation by the Court in *Ocean Front*, it had in *substance*, as can be seen from the discussion above, applied the two stage *Anns* test.

The *Eastern Lagoon* case is, however, slightly more problematic. In *Eastern Lagoon*, the Court appeared to have expressly rejected the *Anns* formulation in *form*. However, it is submitted that, upon closer examination, the Court had, in fact, endorsed the “two stage test” of *Anns* in *substance*.<sup>175</sup> In this case, the Court opined that the defendant architects owed a duty of care to the management corporation. Apart from the fact that the management corporation was a statutory creation and successor to the developers in respect of the common property, the Court also noted that the defendant architects had *assumed the responsibility* of professional competence towards the developers. At the same time, the developers had *relied* on the architects to exercise reasonable care and skill in the design and supervision of the condominium construction.<sup>176</sup> Hence, the Court concluded that there was sufficient proximity between the management corporation and the architects.

Moving on to the policy considerations, the Court in *Eastern Lagoon* cited the Australian decision of *Bryan v. Maloney*<sup>177</sup> and referred to the greater scale of investment involved in the purchase of a piece of real property by an individual as well as the greater permanence of the structure, both as compared to a chattel. This is particularly true in the context of Singapore where land is scarce and expensive.<sup>178</sup> Hence, these policy considerations did *not* negative the *prima facie* duty of care. As can be seen, the Court in *Eastern Lagoon* had, in *substance*, applied the “two stage test” in *Anns* (notwithstanding its apparent disavowal of *Anns*, as mentioned above).

More recently, the Singapore Court of Appeal in *Man B & W Diesel SE Asia Pte. Ltd. v. P.T. Bumi International Tankers*<sup>179</sup> had to consider whether the sub-contractors (appellants) for the supply and manufacture of ship engines owed a duty of care to the shipowner (respondents) for loss of hire and the costs of a new engine (that is, pure economic losses) arising from the engine defects. In this case, the shipowner had contracted with the main contractor to build the ship. The main contractor had, in turn, sub-contracted the supply and manufacture of the ship engines to the sub-contractors.

The Court at first instance, relying on *Ocean Front* and *Eastern Lagoon*, decided, at the first stage, that there was sufficient proximity between the shipowner and the

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<sup>174</sup> See the *Singapore Limitation Act* (Cap. 163, 1996 Rev. Ed. Sing.).

<sup>175</sup> [1999] 2 S.L.R. 449 at paras. 29-31. A similar position was adopted in the very recent Court of Appeal decision in *United Project Consultants Pte Ltd v. Leong Kwok Onn (trading as Leong Kwok Onn & Co.)* [2005] 4 S.L.R. 214 at paras. 36-38.

<sup>176</sup> *Supra* note 173 at 469.

<sup>177</sup> *Supra* note 55.

<sup>178</sup> *Supra* note 173 at 470.

<sup>179</sup> [2004] 2 S.L.R. 300 [*Man B & W Diesel*]. For related costs proceedings, see the High Court decision in *P.T. Bumi International Tankers v. Man B & W Diesel SE Asia Pte. Ltd. (No. 2)* [2004] 3 S.L.R. 69 and the Court of Appeal decision in *Man B & W Diesel SE Asia Pte. Ltd.* [2004] 3 S.L.R. 267.

manufacturer of the engines and therefore, a duty of care existed.<sup>180</sup> The Court had also remarked on the “quite striking” similarities between the facts in *Junior Books* and the case at hand.<sup>181</sup> This concept of proximity was, in the main, grounded in the notions of *reasonable reliance* (upon the special expertise of the manufacturer) and the manufacturer’s *knowledge* (of the shipowner’s requirements). Moreover, with regard to the supplier, the Court opined that the supplier had, through active marketing, *assumed responsibility* to deliver the engines sufficient for the ship owner’s requirements. Again, we see the twin notions of *assumption of responsibility* as well as *knowledge* and *reasonable reliance* being applied by the Singapore courts to establish proximity at the first stage. With respect to the second stage, the Court held that there were no policy considerations that negated the *prima facie* duty of care. There was no indeterminacy in terms of amount, time or class of claimants; further, it was noted that the custom-made and expensive ship engine should be distinguished from the “everyday consumer product.”<sup>182</sup>

The Singapore Court of Appeal, however, subsequently reversed the decision of the Court at first instance and held that no duty of care existed on the facts. Significantly, the Court of Appeal sought to distinguish the concept of proximity in *Junior Books* (which was relied on by the Court at first instance) in its application to the facts, instead of rejecting the concept itself. The Court of Appeal held that there was *no reliance* by the ship owner on the manufacturers and suppliers respectively. Moreover, there was *no assumption of responsibility* by the manufacturers and suppliers of the engines. In arriving at this decision, the Court of Appeal noted that the shipowner had, in entering into the main contract, looked to the main contractor (instead of the suppliers and manufacturers) for redress. Moreover, the Court of Appeal felt that the ship owner had, by doing so, limited its legal recourse to the sub-contractors should the engines be defective. Although the Court of Appeal differed from the Court at first instance in this present case with respect to the interpretation of the main contract provisions, it should nevertheless be noted that the Courts have consistently applied the same concept of proximity based on the notions of *reasonable reliance* and *assumption of responsibility*.

With special regard to the two stage *Anns* test, the Singapore Court of Appeal’s interpretation of the *Ocean Front* case is instructive. It stated that the Court in *Ocean Front* had “preferred the approach taken by the House of Lords in *Anns* rather than in *Murphy* and also by the Courts in Australia and Canada. It basically adopted the two-step test advanced by Lord Wilberforce in *Anns*.”<sup>183</sup> It is perhaps somewhat unfortunate that the Court of Appeal did not take the opportunity at this juncture to clarify its own statement in *Eastern Lagoon* which had expressly rejected *Anns*. Be that as it may, it is submitted that the above interpretation of *Ocean Front* is sufficient to suggest that the *Anns* formulation is indeed alive and well in Singapore.

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<sup>180</sup> [2003] 3 S.L.R. 239.

<sup>181</sup> *Ibid.* at para. 33.

<sup>182</sup> *Ibid.* at para. 28. The court at first instance also dealt with at least two other important issues, namely (1) whether the main contract between the ship owner and the ship contractor had precluded the ship owner from suing the manufacturer and supplier in tort; and (2) whether the principles in *Ocean Front* and *Eastern Lagoon* (which applied to defective buildings) could be extended to defective chattels.

<sup>183</sup> *Supra* note 179 at para. 29.

The Singapore courts have also adopted the “three part test” in *Caparo*<sup>184</sup> in various local cases.<sup>185</sup> It is submitted, however, that there is no inconsistency here as the *Caparo* approach is substantially similar to the *Anns* formulation—a major point which is dealt with in more detail below.<sup>186</sup> In this regard, the Singapore Court of Appeal in the *Man B & W Diesel* case had referred to the element of “just and reasonable” in the context of the “three part test.”<sup>187</sup> The factor of policy considerations in *Anns*, it is submitted, is the counterpart of the element of “just and reasonable” in *Caparo*—a point we also deal with in more detail below.<sup>188</sup>

In the recent decision of *The “Sunrise Crane”*,<sup>189</sup> the Court of Appeal again applied the *Caparo* approach<sup>190</sup> in the context of *physical damage* to a steel tanker owned by the respondent (‘the Pristine’) arising from the transfer of contaminated nitric acid from the vessel owned by the appellant (‘the Sunrise Crane’) to the Pristine. The majority of the Court of Appeal held that the respondent could claim against the appellant in negligence for failing to inform the Pristine of the nature of the cargo prior to the transfer of the contaminated cargo. In so deciding, the majority of the Court of Appeal relied heavily on the fact, *inter alia*, that a “very dangerous substance” was involved.<sup>191</sup> More importantly, for purposes of this article, the Court of Appeal took pains to distinguish the *Man B & W Diesel* case (which involved pure economic losses) from the present decision (which involved direct physical damage to property). In respect of the former, the law is more restrictive in imposing a duty of care.<sup>192</sup> Further, consistent with the theses in this article, the dissenting judge (Prakash J.) had remarked that applying the *Caparo* test and the “two stage test” in *Ocean Front* (which, as we have argued, is similar to the *Anns* formulation) would lead to the same results.<sup>193</sup>

### G. Malaysia

The approaches adopted by the Malaysian courts for determining the existence of a duty of care in pure economic loss cases have been less than consistent. The Courts have vacillated on various occasions between the pro-*Murphy* and anti-*Murphy* camps (though there was also some “interstitial” support for the *Caparo* “three part test,” as discussed below). The current legal position as embodied in the recent Court of

<sup>184</sup> *Supra* note 23.

<sup>185</sup> See e.g. *Ikumene Singapore Pte. Ltd. v. Leong Chee Leng* [1993] 3 S.L.R. 24; *Standard Chartered Bank v. Coopers & Lybrand* [1993] 3 S.L.R. 712; *Pang Koi Fa v. Lim Djoe Phing* [1993] 3 S.L.R. 317; *Mohd bin Sapri v. Soil-Build (Pte.) Ltd.* [1996] 2 S.L.R. 505; *D v. Kong Sim Guan* [2003] 3 S.L.R. 146; and *TV Media Pte. Ltd. v. De Cruz Andrea Heidi* [2004] SGCA 29 (now reported at [2004] 3 S.L.R. 543).

<sup>186</sup> See the discussion in Part III.F, below.

<sup>187</sup> *Supra* note 179 at paras. 46 and 53.

<sup>188</sup> See the discussion in Part III.D.1, below.

<sup>189</sup> [2004] SGCA 42 (now reported at [2004] 4 S.L.R. 715).

<sup>190</sup> *Ibid.* at para. 14.

<sup>191</sup> *Ibid.* at paras. 30 and 38-41.

<sup>192</sup> *Ibid.* at paras. 36-37. See also the Court of Appeal decision in *TV Media Pte. Ltd. v. De Cruz Andrea Heidi*, *supra* note 185 at para. 48. Unfortunately, the Court of Appeal in *The “Sunrise Crane,” supra* note 189 seemed (at para. 41) to have conflated the issue of the existence of the duty of care with that of the standard of care.

<sup>193</sup> *Supra* note 189 at para. 81. See also Part III.F, below.



Appeal decision of *Arab-Malaysian Finance Bhd. v. Steven Phoa Cheng Loon*<sup>194</sup> appears to be based solely upon the very wide notion of “reasonably foreseeability” and is (in our view, unnecessarily) conflated with the issue of remoteness of damage in the tort of negligence. With the notable exception of the case of *Dr Abdul Hamid Abdul Rashid v. Jurusan Malaysia Consultants*<sup>195</sup> (discussed below), it is submitted, with respect, that there could be more discussion of the underlying rationale and policies in determining the existence of a duty of care in pure economic loss cases in the Malaysian context. Further, the concept of “proximity” or the particular relationship between the claimants and defendants has not been examined at length by the Courts. It is also significant to note that the “two stage test” in *Anns* (which we find to be useful and practical) has not been explored in any detail.

Our brief discussion in this Part II.G begins with the earlier Malaysian decisions which generally endorsed the approach in *Murphy* in disallowing claims for pure economic losses in negligence. The decision in *Kerajaan Malaysia v. Cheah Foong Chiew*<sup>196</sup> was one such case. It was held by the Court, on the basis of *Murphy*, that the claimants’ losses in repairing the defective buildings to make them safe for occupation (pure economic losses) were irrecoverable as against the defendant consultants who were responsible for superintending and supervising the construction of the building.

Following the decision in *Kerajaan Malaysia*, the Malaysian High Court in *Teh Khem On v. Yeoh & Wu Development Sdn. Bhd.*,<sup>197</sup> which concerned claims in negligence by the purchasers of a house against the architects and engineers, similarly adopted the decisions in *Murphy* as well as *D & F Estates*. As a result, the Court denied the claim for the recovery of pure economic losses. In a similar vein, Peh F.C.J. in *Teh Khem On* described *Anns* as a “highly controversial” decision which was “seriously disputed and dissented from” in the subsequent cases of *D & F Estates* and *Murphy*.<sup>198</sup> Unfortunately, apart from the general reference to the potential indeterminacy of liability and the caution against judicial legislation, the endorsement of *Murphy* and *D & F Estates* by the judge was not based on a closer examination of the underlying rationale or policy reasons as applied to the Malaysian context. In this regard, it is also pertinent to state at this juncture that whilst Peh F.C.J. noted there were many cases which permitted recovery for pure economic losses in negligence, the judge decided (without providing any reasons) that “[t]his is neither the place nor the time to discuss all of them.”<sup>199</sup>

However, in a significant turnaround from the earlier decisions, the Malaysian High Court in the subsequent case of *Dr Abdul Hamid*<sup>200</sup> rejected the English

<sup>194</sup> [2003] 1 M.L.J. 567.

<sup>195</sup> [1997] 3 M.L.J. 546 [*Dr Abdul Hamid*].

<sup>196</sup> [1993] 2 M.L.J. 439 [*Kerajaan Malaysia*]; noted, C.G.S. Tan, “Pure Economic Loss in Malaysia: Following English Law by Default?” (1995) 44 I.C.L.Q. 192. See also generally, Norchaya Taib, *Law of Torts in Malaysia*, 2d. ed. (Petaling Jaya, Selangor : Sweet & Maxwell Asia, 2003) at 85-137.

<sup>197</sup> [1995] 2 M.L.J. 663 [*Teh Khem On*].

<sup>198</sup> *Ibid.* at 676-677.

<sup>199</sup> *Ibid.* at 676. Interestingly, the learned judge, in deciding that the architects and engineers should not be awarded costs against the purchasers, took into consideration, *inter alia*, the significant shifts (or “revolution” as the judge described it) in the law on negligence from *Anns* (which supported the purchasers’ position at the time of the suit) to the position reflected in *D & F Estates* and *Murphy* (which subsequently aided the defence of the architects and engineers at the time when judgment was rendered in respect of *Teh Khem On*).

<sup>200</sup> *Supra* note 195.

approach in *Murphy*. This case involved claims for pure economic losses arising from the collapse of a house by the owners (claimants) against several defendants which included, amongst others, the engineering firm in respect of the construction of the house and the town council which approved the building plans. The Court provided a comprehensive and useful survey of the legal developments in this vexed area of negligence from various jurisdictions: England, New Zealand, Canada, Australia, Singapore and, of course, Malaysia. More importantly, the learned judge, Foong J., also took pains to explore the rationale and policy reasons for and against recovery of pure economic losses.

Foong J. finally decided against following *Murphy*. The Court reasoned that there was no real concern that liability in pure economic loss cases will be of an indeterminate amount. Such amount would usually be limited to the expenses and costs involved in repairing, making good or replacing the defective product, or the costs that may be involved in ensuring the original condition of the defective product. In terms of limiting the indeterminacy in the class of potential claimants, attention was drawn to the Australian High Court decision in *Bryan v. Maloney*<sup>201</sup> which referred to the relationships between the builder and first owner and the builder and subsequent owner as characterised by “the *assumption of responsibility* on the part of the builder and the likely *reliance* on the part of the owner.”<sup>202</sup>

Foong J. also took cognisance of the “value” of inhibiting carelessness and the potential improvements in the standard of manufacturing and construction in Malaysia.<sup>203</sup> The learned judge then proceeded to note that the decision in *Murphy* might have been a reflection of the policy in the United Kingdom consistent with its *Defective Premises Act 1972* (which legislation is not applicable in the Malaysian context). His Honour remarked that if the English decision of *Murphy* were followed in Malaysia, subsequent purchasers would be left without relief against errant builders, architects, engineers and related personnel.<sup>204</sup> Moreover, there was no fear that the floodgates would be opened to the detriment of the Malaysian local authorities in respect of any negligence in granting approvals or inspecting building works. Relevant Malaysian statutory provisions existed to protect the local authorities from such suits.<sup>205</sup> Finally, the Court also remarked that this principle for the recoverability of pure economic losses in respect of negligence claims was not confined to cases involving defective buildings and structures. We can see from the discussion above that the Court had explored both the doctrinal developments in England and the Commonwealth as well as relevant policy considerations in respect of negligence claims for pure economic losses.

However, before the dust from *Dr Abdul Hamid* could settle, the High Court decision in *Pilba Trading & Agency v. South East Asia Insurance Bhd.*<sup>206</sup> had shifted into reverse gear. In *Pilba Trading*, the owner of a damaged car (appellant)

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<sup>201</sup> *Supra* note 155.

<sup>202</sup> *Supra* note 200 at 564 [emphasis added]. See also the recent Malaysian Court of Appeal decision of *Sri Inai (Pulau Pinang) Sdn. Bhd. v. Yong Yit Swee* [2003] 1 M.L.J. 273 at 281 which had also referred to the imposition of a duty of care on the basis of an *assumption of responsibility* to perform professional services on the part of a defendant for a claimant who *relies* on the services provided.

<sup>203</sup> *Supra* note 200 at 564.

<sup>204</sup> *Ibid.* at 565.

<sup>205</sup> *Malaysian Street, Drainage and Building Act 1977*, s. 95.

<sup>206</sup> [1998] 2 M.L.J. 53 [*Pilba Trading*].

claimed against its insurer (respondent) for expenses incurred by the appellant in hiring alternative transport (pure economic losses) arising from the long delay in repairing the car due to the negligence of the respondents. The Court referred to the *Anns* formulation and the subsequent turning of the tide against *Anns* as reflected in the cases of *Leigh & Silavan Ltd. v. Aliakmon Shipping Co. Ltd.*,<sup>207</sup> *Yuen Kun Yeu v. Attorney-General of Hong Kong*<sup>208</sup> followed by *Murphy*. In the circumstances, the Court was reluctant to extend the law of negligence to cases of pure economic losses. It was a pity that no concrete reasons were provided in this regard save for the Court's general reference to the "possibility of indeterminate liability" and the need to exercise caution against extending "public policy."<sup>209</sup> Neither was the decision in *Dr Abdul Hamid* referred to.

Very shortly following the decisions in *Dr Abdul Hamid* and *Pilba Trading*, the High Court in the subsequent case of *Uniphone Sdn. Bhd. v. Chin Boon Lit*<sup>210</sup> was tasked to determine whether a duty of care was owed to the claimant in respect of a negligent publication of an article in a newspaper by the defendant. The Court in this instance applied the "three part test" in *Caparo* (namely, foreseeability of damage, proximity of relationship and whether it would be fair, just and reasonable to impose such a duty) to determine the existence of a duty of care.<sup>211</sup> This decision, which adopted an approach substantially consistent with the *Anns* formulation that we favour,<sup>212</sup> cuts (unfortunately, in our view) a lone figure in the context of Malaysian court decisions in this area of negligence. Unfortunately, there was little reasoning by the Court in *Uniphone* for adopting the *Caparo* approach and no reference to either the decision in *Dr Abdul Hamid* or *Pilba Trading*.

It is now appropriate for us to examine the *current* approach in Malaysia. The decision of *Dr Abdul Hamid* has been recently overruled by the Malaysian Court of Appeal in the case of *Arab-Malaysian Finance Bhd. v. Steven Phoa Cheng Loon*.<sup>213</sup> In this latter case, the residents of apartment blocks (claimants) sued the defendants for pure economic losses on the grounds that the claimants' apartments had become worthless as a result of the collapse of a neighbouring block arising from the negligence of the defendants (which included the owner of the neighbouring block, the engineer, architects and the local authority).

The Court at first instance (Foong J. in *Steven Phoa Cheng Loon v. Highland Properties Sdn. Bhd.*)<sup>214</sup> largely premised the existence of a duty of care upon the reasonable foreseeability of harm on the part of the defendants, notwithstanding that the case involved a claim for the recovery of pure economic losses. Neither the *Anns* formulation nor the *Murphy* "exclusionary" approach was referred to in the judgment, though the judge's lament that the English courts had reverted back to the "old concept that pure economic loss cannot be claimed" appears to be at least an implied disapproval of *Murphy*.<sup>215</sup> At the same time, Foong J. relied on

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<sup>207</sup> *Supra* note 26.

<sup>208</sup> *Supra* note 24.

<sup>209</sup> *Supra* note 206 at 61-62.

<sup>210</sup> [1998] 6 M.L.J. 441 [*Uniphone*].

<sup>211</sup> *Ibid.* at 446.

<sup>212</sup> See Part III.F, below.

<sup>213</sup> *Supra* note 194.

<sup>214</sup> [2000] 4 M.L.J. 200.

<sup>215</sup> *Ibid.* at 244.

his own decision and reasons in *Dr Abdul Hamid* that pure economic losses were recoverable.<sup>216</sup>

Some of the defendants, however, appealed to the Malaysian Court of Appeal against Foong J.'s decision. With regard to the issue of pure economic losses, the Court of Appeal, after quoting a passage from Lord Oliver in *Murphy*, observed as follows:

[I]t is not the nature of the damage in itself, whether physical or pure financial loss, that is determinative of remoteness. The critical question is whether the scope of the duty of care in the circumstances of the case is such as to embrace damage of the kind which, a plaintiff claims to have sustained, whether it be pure economic loss or injury to person and property.<sup>217</sup>

It is submitted that by doing so, the Court of Appeal had unnecessarily conflated the issue of duty of care with the issue of remoteness of damage.

Moreover, the Court of Appeal opined that the relevant question to ask was this: was pure economic loss reasonably foreseeable by the defendants? It proceeded to indicate that the Court at first instance was wrong to allow pure economic losses "as a matter of policy" without considering the above question on reasonable foreseeability. In the light of the general confusion in England and the Commonwealth relating to the determination of duty of care in respect of pure economic losses (and in particular the "vacillation" in Malaysia), it was somewhat surprising to note the Court of Appeal's categorical criticism of the Court at first instance for having altered "well-established law."<sup>218</sup> It is also unfortunate that the Court of Appeal did not discuss the potential difficulties of basing a claim for pure economic losses on the sole basis of this wide and general notion of "reasonable foreseeability."

Consistent with the above approach, the Court of Appeal proceeded to overrule the case of *Dr Abdul Hamid* which was (as mentioned above) relied upon by Foong J. in *Steven Phoa Cheng Loon v. Highland Properties Sdn. Bhd.* In this regard, the Court of Appeal also took the opportunity, without providing specific reasons, to overrule the decision in *Pilba Trading & Agency v. Southeast Asia Insurance Bhd.* The Court went on to hold that a duty of care existed—it was within the reasonable foresight of the defendants that in the event of a landslide, economic losses would result. Further, it was more than a mere probability that the value of the property would be affected by the landslide arising from the negligence of the defendants.

The current Malaysian position is thus a relatively straightforward one: the premising of liability for economic loss upon the broad criterion of "reasonable

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<sup>216</sup> *Ibid.* at 244-245. It should be noted, however, that the learned judge did refer (at 262-263) to the "three criteria" of "foreseeability," "proximity of relationship between the parties" and "the reasonableness or otherwise of imposing such a relationship"—which appears reminiscent of the "three part test" laid down in the *Caparo* case, *supra* note 36, although as we argue below, the *Anns* "two stage test" and the *Caparo* "three part test" are similar in substance, although the former is to be preferred (see text accompanying note 309).

<sup>217</sup> *Supra* note 194 at 585.

<sup>218</sup> *Ibid.*

foreseeability.” As we shall see, there are serious difficulties with such an approach—particularly in the context of recovery for pure economic loss.<sup>219</sup> The preferable approach, in our view, is to adopt the “two stage test” in *Anns* instead.<sup>220</sup>

#### H. Concluding Remarks

Despite its clear rejection in England, the “two stage test” formulated by Lord Wilberforce in *Anns*<sup>221</sup> has been embraced in New Zealand as well as—albeit in slightly modified forms—in both Canada and Singapore. Indeed, until recently, this test was also, in substance at least, the leading one in Australia as well. It has also been embraced not so very long ago by the Malaysian courts as well. It is significant, in our view, that the apparent departures in both Australia and Malaysia have not really embodied the English position; more importantly, perhaps, we have seen that the suggested approaches in both these jurisdictions tend (by their very broadness) to conflate the descriptive with the prescriptive<sup>222</sup>—a result that, with respect, is undesirable since the focus ought to be on formulating a theoretically coherent *as well as* practically workable set of *normative* principles that will *guide* the Court in its ascertainment as to whether or not a duty of care exists on the facts at hand. We have also seen that although the House of Lords has *rejected* the formulation in *Anns*, the latest formulation (as represented by the “three part test”)<sup>223</sup> is, in *substance*, the same as the *Anns* formulation.<sup>224</sup>

Quite apart from precedent, however, we would suggest that there are very persuasive reasons of principle why the “two stage test” in *Anns* ought to be adopted. This is the task of the next Part of this article. Indeed, we also hope to demonstrate that this test is best applied in its *original* form and, to this end, will attempt to demonstrate why the modified versions of the test (adopted in both Canada and Singapore) are not as satisfactory as they could otherwise be. Needless to say, if our arguments are persuasive, it would follow that the English (as well as Australian and Malaysian) positions ought to change accordingly.

### III. OF THEORY AND PRACTICE: THE ANNS FORMULATION REVISITED

#### A. Introduction

If one examines the formulation by Lord Wilberforce in *Anns*<sup>225</sup> closely, there are (as we have seen) two main limbs. Indeed, the learned Law Lord himself referred to his formulation as comprising “two stages.”<sup>226</sup>

<sup>219</sup> See Part III.C.1, below. And compare the reference to the incremental approach by Brennan J. in the *Sutherland Shire Council* case, *supra* note 39 in the Malaysian Court of Appeal decision of *Sri Inai (Pulau Pinang) Sdn. Bhd. v. Yong Yit Swee*, *supra* note 202 at 286. However, this reference was a fleeting one only.

<sup>220</sup> See generally Part III, below.

<sup>221</sup> See *supra* note 4.

<sup>222</sup> See text accompanying note 97 and note 212, respectively.

<sup>223</sup> See *supra* note 36.

<sup>224</sup> And for more detailed arguments, see text accompanying note 309.

<sup>225</sup> See *supra* note 4.

<sup>226</sup> See *ibid.*

The first pertains to whether or not, “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*.”<sup>227</sup>

The second is related to the first, for “[i]f the first question [*i.e.* the first limb, above] 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 persons to whom it is owed or the damages to which breach of it may give rise.”<sup>228</sup>

As we have seen in the preceding Part II of this article, this formulation has in fact been at least the starting point in a great number of Commonwealth jurisdictions—with the exception of England.<sup>229</sup> Indeed, the formulation held the field for many years in England itself before its ultimate rejection in *Murphy*. In this Part, we proceed to analyse the more general (in particular, conceptual) aspects of the two limbs of this formulation in the light of the various analyses in the specific cases canvassed in the previous Part. We hope, in the process, to demonstrate that Lord Wilberforce’s formulation in *Anns* is, by far, the best guide we presently have on offer.

### B. *The General Advantage of the Anns Formulation*

It might be appropriate to set out first what, in our view, is the greatest advantage of the formulation in *Anns*. Contrary to Professor Dworkin’s view,<sup>230</sup> we commence with the premise that *policy* is *necessarily* a part of the entire process of ascertaining whether or not there should be recovery in any given situation in negligence for pure economic loss. Dworkin, of course, is concerned that legal reasoning in the *Courts*—as opposed to the deliberations of the legislature—are grounded solely on grounds of *principle*, and not policy. In this, he defends a conception of *individual rights* theory that is contrasted with the policy that is grounded in a (quite contrasting) utilitarian worldview, the latter of which is (in Dworkin’s view) only utilised justifiably by a legislature which has been democratically elected by the people in

<sup>227</sup> See *ibid.* [emphasis added].

<sup>228</sup> See *ibid.* [emphasis added].

<sup>229</sup> And, more recently (and unfortunately, in our view) perhaps in Malaysia and Australia as well. However, as we have seen, the approaches adopted in both these latter jurisdictions also differ from that adopted in England.

<sup>230</sup> See generally, R.M. Dworkin, *Taking Rights Seriously*, rev. ed. (Cambridge: Harvard University Press, 1978) [Dworkin, *Rights*], especially c. 2 and 4. See also generally, by the same author, *A Matter of Principle* (Cambridge, Mass.: Harvard University Press, 1985) and *Law’s Empire* (Cambridge, Mass.: Belknap Press, 1986). Dworkin, as we shall see in a moment, focuses on *principle* instead of policy insofar as judicial decisions are concerned. Compare, however, G.C. Christie, “The Uneasy Place of Principle in Tort Law” in D.G. Owen, ed., *Philosophical Foundations of Tort Law* (Oxford: Clarendon Press, 1995) at 113-130.

The most oft-cited *case law* which illustrates this contrast between principle on the one hand and policy on the other is the decision of the House of Lords in *McLoughlin v. O’Brian* [1983] 1 A.C. 410, where Lord Scarman adopts (at 430) the view closest to that of Dworkin, whilst Lord Edmund Davies espoused a quite different view (at 428).

the given society.<sup>231</sup> Indeed, as we shall argue below, Lord Wilberforce's second limb in his formulation in *Anns* is premised upon *communitarian* concerns, although (as we shall argue) the *first* limb of this formulation is not wholly inconsistent with Dworkin's individual rights theory by any means.<sup>232</sup> However, we would like, at this particular juncture, to reiterate that the approach in *Anns* (contrary to Dworkin's views) is not only desirable but also necessary.

In the first instance, the distinction drawn between principle on the one hand and policy on the other is, with respect, rather blurred and, on occasion at least, wholly untenable. Even Dworkin's argument that, in the celebrated New York Court of Appeals decision of *Riggs v. Palmer*,<sup>233</sup> principle prevailed over rule illustrates the argument just made. On the facts, the Court held that a grandson, who had murdered his grandfather in order to expedite the receipt of the benefits as one of the inheritors named in the latter's will, could not in fact receive his share. In this particular case, Dworkin argues that the *principle* that no person ought to profit from his or her own wrong *superseded* the *rule* to the effect that the person named in a will ought to be able to inherit his or her share of the deceased's estate.<sup>234</sup> It might be argued that the principle that no person ought to profit from his or her own wrong could equally well be characterised as an argument of policy. Why, to take but one strand of argument, does it not redound to the benefit of *society as a whole* that the Courts confirm the policy that no person ought to profit from his or her own wrong. Such a *policy* would surely conduce to the overall benefit of society as a whole—preventing an undermining of its social bonds and reaffirming what is (arguably at least) what is one of the key moral precepts in the *community at large*. Dworkin might of course argue that the *moral underpinnings* of such a proposition are not justified in a *societal* (as opposed to an individual) context.<sup>235</sup> Whilst this argument appears persuasive at first blush, it is submitted, with respect, that it does not really advance the overall enterprise at all. It is further submitted that the key issue here is, indeed, one of *moral justification*. However, this issue applies *equally* to an individual rights theory *and* a communitarian theory (such as utilitarianism) alike. It is significant, in our view, that Dworkin does in fact refer to *community standards* as a basis for *principles*.<sup>236</sup>

We would also argue that, even if Dworkin's argument from principles were accepted, a *limitation* (along the lines of the second limb in Lord Wilberforce's formulation in *Anns*) would *still* be required. The presence of the first limb alone would result in far too wide an area of liability and might, on occasion, even suggest indeterminate liability. This is of course wholly unworkable and control mechanisms are

<sup>231</sup> Very telling, in our view, is the very title of Dworkin's first book, entitled *Taking Rights Seriously*, *supra* note 230.

<sup>232</sup> See Part III.C.2, below, entitled "The Focus on The Individual."

<sup>233</sup> 115 N.Y. 506 (1889), 22 N.E. 188 (1889).

<sup>234</sup> See Dworkin, *Rights*, *supra* note 230 at 37. See also the interesting discussion in C. Tapper, "A Note on Principles" (1971) 34 Mod. L. Rev. 628.

<sup>235</sup> See *supra* note 231.

<sup>236</sup> See *e.g.* Dworkin, *Rights*, *supra* note 230, especially at 126; Cooke, *supra* note 110 at 70; Sir A. Mason, "The Recovery and Calculation of Economic Loss" in c. 1 of Mullany, *supra* note 114, especially at 33; and A. Kramer, "Proximity as principles: Directness, community norms and the tort of negligence" (2003) 11 Tort L. Rev. 70. See also *e.g. per* Brennan J. in *Hawkins v. Clayton* (1988) 78 A.L.R. 69 at 80 and *per* Casey J. in the *South Pacific* case, *supra* note 108 at 312. And compare generally John Bell, *Policy Arguments in Judicial Decisions* (New York: Oxford University Press, 1983) at c. I and especially, c. III.

therefore of the essence—as indicated right at the outset of the present article. However, what would *this* limitation look like? Indeed, as we shall attempt to demonstrate below, the *first* limb of Lord Wilberforce’s formulation *already* takes into account the *individual relationship* between the parties themselves.<sup>237</sup> But, if this is so, the result is—as already mentioned—still too wide to be either theoretically acceptable or practically workable: a point which we elaborate upon below when considering in detail the possible elements that comprise the first limb itself.<sup>238</sup> At this juncture, it suffices for our present purposes to note that invoking limitations based on policy (which is the very essence of the *second* limb of Lord Wilberforce’s formulation) would be not only desirable but also necessary. The key difficulty here—common, in fact, to *all* attempts at line-drawing—is whether or not judges would wade into a sea of subjectivity. Although this is a much larger issue requiring at least monographic treatment, we do attempt—if only briefly—to address objections from subjectivity or relativity below.<sup>239</sup>

In a related vein, we would also argue that communitarian concerns of policy cannot be divorced from the individual rights of the parties themselves. Indeed the very concept of tort law in general and the duty of care in particular were developed in order to ensure—in no small measure—that parties that do *not* have a *pre-existing legal relationship* with each other (for example, by way of a contract) will nevertheless have recourse in appropriate circumstances *and consistent with prevailing societal mores and norms*. Hence, to argue that the societal context is irrelevant or immaterial is wholly unrealistic as the law of tort regulates the sphere of civil wrongs amongst members of society who (as we have just seen) do not otherwise have a pre-existing legal relationship with each other. Further, the decisions of the Courts in this particular sphere must also necessarily impact on societal norms and resources as well.

There is yet another reason why Lord Wilberforce’s formulation is attractive. Given the fact that policy may (as we have just seen) generally be perceived to be rather vague or even subjective, the introduction of it at a separate stage (here, in the second limb) does ensure that any potential difficulties are at least minimized.

In summary, we argue that there is much merit in Lord Wilberforce’s formulation in *Anns*—the chief of which is to integrate the concept of policy into the entire process of deliberation but in such a manner as to keep that very concept as separate as is possible. There remain, as we have mentioned, possible difficulties and objections that we now proceed to address as we analyse the various limbs in the formulation as well as their relationships to other alternative approaches and arguments.

### C. *The Formulation in Anns—The First Limb*

#### 1. *The Elements Considered*

A close perusal of the first limb<sup>240</sup> reveals that there are at least *two* interpretations that can be adopted, and which are reflected in the literature itself. The *first*

<sup>237</sup> See text accompanying note 277.

<sup>238</sup> See *ibid.*

<sup>239</sup> See text accompanying notes 279-284.

<sup>240</sup> And see *supra* notes 4 and 227.



interpretation is that this particular limb relates *only* to the very *factual* issue of *reasonable foreseeability*.<sup>241</sup> In other words, is it reasonably foreseeable, having regard to the *facts*, that the defendant ought to have known that the claimant would have suffered damage as a result of his (the defendant's) carelessness? If we adopt this approach, then the first limb becomes wholly *descriptive* in nature. The result is that we cannot look to it for any normative (or *prescriptive*) guidance whatsoever. Indeed, if this approach were adopted, it would not really be stating anything at all. This is simply because such an approach would *necessarily* be adopted in any event *inasmuch as the Court concerned would—regardless of the actual concept of duty of care adopted—have to first decide whether or not it was reasonably foreseeable (on the established facts) that the claimant could have suffered damage as a result of the defendant's carelessness*. In other words, reasonable foreseeability in its most factual and literal sense is a *threshold* procedure which is so very necessary (and which has been described as being “undemanding” in nature)<sup>242</sup> that, without satisfying it, *no further* investigation by the Court is indeed possible.

There is, however, a *second* possible interpretation: that the first limb encompasses not only a literal or factual conception of reasonable foreseeability but also a *legal* conception as well. Much has, indeed, been made (particularly in England) of the concept of *proximity*. Although, as we shall see, this concept is itself extremely problematic, it is submitted that, if it is to find a “place” at all within the larger concept of the duty of care, it ought to be located within this *first* limb of Lord Wilberforce's formulation in *Anns*. The concept of proximity, whilst relevant to the factual situation concerned itself, is clearly not—in and of itself—factual but is, rather, *legal* in nature. We will indeed suggest that this concept is, in effect, a *legal* conception of reasonable foreseeability and can—despite its many difficulties—thus aid possibly in the laying down of legal criteria as between *the parties* themselves. This would be an appropriate juncture to turn to a brief consideration of the concept of proximity itself.

Despite the fact that the present English position places great emphasis on the concept of proximity (which is one of the three main components of the “three part test” laid down—most notably—in the House of Lords decision of *Caparo*<sup>243</sup>), the English courts have been conspicuously vague in elucidating the concept itself. In the *Caparo* case itself, for instance, Lord Bridge of Harwich expressed the view that “the concepts of proximity and fairness...are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope.”<sup>244</sup> And,

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<sup>241</sup> And see generally D. Howarth, “Negligence After *Murphy*: Time to Re-think” (1991) 50 Cambridge L.J. 58. Reference may also be made to the present Malaysian position and (possibly) the present Australian position as well: see text accompanying notes 194 and 41, respectively. Compare also Witting, *supra* note 75, where the concept of *proximity* is also viewed as being *descriptive*—an approach that is contrary to that argued in the present article.

<sup>242</sup> See the Australian High Court decision in *Wyong Shire Council v. Shirt* (1980) 146 C.L.R. 40 at 44.

<sup>243</sup> *Supra* note 23. See also text accompanying note 35. And, for recent decisions, see *e.g.*, *Binod Sutradhar v. Natural Environment Research Council* [2004] EWCA Civ 175 [*Binod*].

<sup>244</sup> *Ibid.* at 618.

in the very same case, Lord Roskill observed—in a similar vein—thus:

Phrases such as ‘foreseeability’, ‘proximity’, ‘neighbourhood’, ‘just and reasonable’, ‘fairness’, ‘voluntary acceptance of risk’, or ‘voluntary assumption of responsibility’ will be found used from time to time in the different cases. But, as your Lordships have said, such phrases are not precise definitions. At best they are but labels or phrases descriptive of the very different factual situations which can exist in particular cases and which must be carefully examined in each case before it can be pragmatically determined whether a duty of care exists and, if so, what is the scope and extent of that duty.<sup>245</sup>

In the (also) House of Lords decision of *Alcock v. Chief Constable of South Yorkshire Police*,<sup>246</sup> Lord Oliver of Aylmerton observed that “in the end, it has to be accepted that the concept of ‘proximity’ is an artificial one which depends more upon the Court’s perception of what is the reasonable area for the imposition of liability than upon any logical process of analogical deduction.”<sup>247</sup>

The abovementioned observations are, with respect, puzzling, to say the least. The general consensus appears to be that the concept of proximity is merely a label, without any substantive content in itself. However, even a label ought to have at least some symbolic effect and furnishes—to that extent at least—some measure of substantive content. If this is indeed not the case, then the entire concept must perforce be wholly redundant and ought to be removed altogether. In this regard, the ostensibly minimal function performed by the concept of proximity appears to be this: that it is itself a control mechanism of sorts and that it seeks to emphasise that the presence of mere reasonable foreseeability in a *factual* sense constitutes too wide a field for liability, particularly in the context of pure economic loss. To this end, the concept of proximity focuses on the *closeness of the relationship between the parties themselves*. This must, in turn, entail that the concept is necessarily *legal*—as opposed to being *factual*—in nature. If it is merely *factual* in nature, then it becomes just an alternative method of stating the requirement of reasonable foreseeability in a *factual* sense. This would, of course, render the concept of proximity totally redundant. The signal difficulty, however, is to discern what, then, is the *legal* meaning of proximity. Merely to state that it is *the law’s* (or *the Court’s*) view of whether or not the relationship between the parties is sufficiently close (which is, as we have seen, the present approach) is hardly helpful. At most, it can be stated that this is a *legal* conception of the concept of reasonable foreseeability—as opposed to the *factual* conception which, as we have seen, spreads the potential net of liability far too widely. However, it still remains to be ascertained *how* the Courts will be able to determine whether or not the relationship between the parties concerned is—in law—sufficiently close in order that a *prima facie* duty of care ought to arise. In this regard, the following observations by Deane J. in the Australian High Court decision of *Heyman*<sup>248</sup> should be noted and, which because of their importance, are quoted

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<sup>245</sup> *Ibid.* at 628.

<sup>246</sup> [1992] 1 A.C. 310.

<sup>247</sup> *Ibid.* at 411. See also, by the same Law Lord, in the *Caparo* case, *supra* note 23 at 633.

<sup>248</sup> *Supra* note 39.

in full:

The requirement of proximity is directed to *the relationship between the parties* in so far as it is relevant to the allegedly negligent act or omission of the defendant and the loss or injury sustained by the plaintiff. It involves *the notion of nearness or closeness and embraces physical proximity* (in the sense of space and time) between the person or property of the plaintiff and the person or property of the defendant, *circumstantial proximity* such as an over riding relationship of employer and employee or of a professional man and his client and what may (*perhaps loosely*) be referred to as *causal proximity* in the sense of the closeness or directness of the causal connection or relationship between the particular act or course of conduct and the loss and injury sustained. It may reflect *an assumption by one party of a responsibility* to take care to avoid or prevent injury, loss or damage to the person or property of another or *reliance* by one party upon such care being taken by the other in circumstances where the other party knew or ought to have known of that reliance. *Both the identity and the relative importance of the factors which are determinative of an issue of proximity are likely to vary in different categories of case.* That does not mean that there is scope for decision by reference to idiosyncratic notions of justice or morality or that it is a proper approach to treat the requirement of proximity as *a question of fact to be resolved merely by reference to the relationship between the plaintiff and the defendant in the particular circumstances.* The requirement of a relationship of proximity *serves as a touchstone and control of the categories of case in which the common law will adjudge that a duty of care is owed.* Given the general circumstances of a case in a new or developing area of the law of negligence, the question what (if any) combination or combinations of factors will satisfy the requirement of proximity is *a question of law to be resolved by the processes of legal reasoning, induction and deduction.* *On the other hand the identification of the content of that requirement in such an area should not be either ostensibly or actually divorced from notions of what is 'fair and reasonable' ... or from the considerations of public policy which underlie and enlighten the existence and content of the requirement.*<sup>249</sup>

There have, indeed, even been suggestions that there is at least an overlap between the concept of proximity on the one hand and the other element of “just and reasonable” on the other. In the House of Lords decision of *Stovin v. Wise*,<sup>250</sup> for example, Lord Nicholls of Birkenhead observed thus:

The *Caparo* tripartite test elevates proximity to the dignity of a separate heading. This formulation tends to suggest that proximity is a separate ingredient, distinct from fairness and reasonableness, and capable of being identified by some other criteria. This is not so. Proximity is a slippery word. Proximity is not legal shorthand for a concept with its own objectively identifiable characteristics. *Proximity is a convenient shorthand for a relationship between two parties which makes it fair and reasonable one should owe the other a duty of care.* This

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<sup>249</sup> *Ibid.* at 497-498 [emphasis added].

<sup>250</sup> *Supra* note 53.

is only another way of saying that when assessing the requirement of fairness and reasonableness regard must be had to the relationship between the parties.<sup>251</sup>

As the element of “just and reasonable” is, in our view, relevant to the second limb of the formulation in *Anns* (which deals with policy), we will discuss this particular issue in greater detail below.<sup>252</sup> It will suffice, for our present purposes, to note that, once again, the concept of proximity is not only perceived as being highly problematic but also as having virtually no substantive content at all, except insofar as it is subsumed within the broader element of “just and reasonable.” It will be suggested below that this latter approach (embodied within the quotation above) tends, with respect, to conflate the two limbs of the formulation in *Anns*, and that this is undesirable as it conduces towards confusion rather than clarity.<sup>253</sup>

To complicate matters further, there is also a possible linkage between reasonable foreseeability in its more literal sense and the concept of policy itself.<sup>254</sup> Indeed, there is also a possible linkage between reasonable foreseeability and proximity as well.<sup>255</sup> In this regard, it could, of course, be argued that no complications need necessarily arise simply because the *factual* matrix contained within the concept of reasonable foreseeability in its more literal sense is *necessarily* part of the process of the reasoning of the Court itself as the relevant law must of course be applied to the facts of the case concerned. In other words, any finding of proximity in the legal sense of the word would *presuppose* a finding of reasonable foreseeability in the literal and factual sense in the first instance—although the converse does not necessarily follow. On both theoretical and practical levels, however, the question remains: what *is* proximity and how is the concept to be applied in practice? In this regard, the observations by Deane J. above<sup>256</sup> are useful, although (as we shall see) they do not furnish a definitive set of guidelines by any means.

Deane J.’s observations, it will be recalled, are intended to aid the Court in ascertaining whether or not there ought—in *law*—to be found that *closeness of relationship between the parties*, which (in turn) justifies the Court in holding that a duty of care is therefore owed by the defendant to the claimant. One obvious guideline is that of *physical* proximity. It is no surprise, therefore, that the learned judge lists this factor first.<sup>257</sup> However, mere physical closeness does not necessarily—in and of itself—lead to the conclusion that a duty of care exists. This is probably, *a fortiori*, the case insofar as pure economic loss is concerned, for it is clear that such loss can—and is often—caused without the parties being in physical proximity with each other as such.

The learned judge proceeds to speak of “*circumstantial* proximity such as an overriding relationship of employer and employee or of a professional man and his

<sup>251</sup> *Ibid.* at 932 [emphasis added]. See also *per* Clarke L.J. in *Binod*, *supra* note 243, especially at paras. 33-34.

<sup>252</sup> See text accompanying note 279.

<sup>253</sup> See text accompanying note 288.

<sup>254</sup> See *per* Lord Nicholls of Birkenhead, delivering the judgment of the Board in the recent Privy Council decision (on appeal from the Court of Appeal of the British Virgin Islands) in *The Attorney General v. Craig Hartwell* (Privy Council Appeal No 70 of 2002) (reported at [2004] UKPC 12) at para. 25. It should be noted that there is here a reference to “legal policy,” as to which see *infra* note 280.

<sup>255</sup> Kennedy L.J., in *Binod*, *supra* note 243, accepted (at para. 24) that “there is a *close link* between foreseeability and proximity as tests for the existence of a legally enforceable duty” [emphasis added].

<sup>256</sup> See *supra* note 249.

<sup>257</sup> See *ibid.*

client.”<sup>258</sup> This form of proximity is of special importance where the claimant and the defendant are not in *physical* closeness to each other at the material time when the circumstances giving rise to the alleged duty of care arose. However, once again, the mere (albeit non-physical) relationship between the parties need not, *per se*, give rise to a duty of care without more. Further, whether or not legal effect is to be given to a particular relationship still has to be justified on a persuasive and logical set of criteria, which raises precisely the question we are presently attempting to answer.

Deane J. also refers to “what may (*perhaps loosely*) be referred to as *causal* proximity in the sense of the closeness or directness of the causal connection or relationship between the particular act or course of conduct and the loss and injury sustained.”<sup>259</sup> It is, however, submitted that such (causal) proximity is not conclusive either; indeed, one could state that such “causal proximity” is—looked at from at least one perspective—*literally necessary* if there is to be any liability in the first instance. One could go even further, and argue that this particular category of proximity does not really relate to the concept of the duty of care in the first instance but is, rather, what connects (as it were) the breach of an existing duty of care to the damage that has been sustained as a result of that breach. In other words, if the defendant’s act has *not caused* the damage that the claimant has suffered, there can be no liability. However, this does not really aid the Court in ascertaining whether or not there is a duty of care in the first place which the defendant’s act has presumably breached.

It appears, therefore, that whilst each category or aspect of proximity briefly described above is—in some way—related to the ascertainment of whether or not a duty of care exists in a given fact situation, none is conclusive. The equally—if not more—difficult question is this: is any category more important than the other and, if so, why? It is submitted that none is obviously more important than the other. Deane J. himself observed that “[b]oth the identity and the relative importance of the factors which are determinative of an issue of proximity *are likely to vary in different categories of case.*”<sup>260</sup>

It is submitted that the above attempt at defining the concept of proximity by reference to its various aspects is, nevertheless, one that seeks to give *substance* to the concept itself—in particular, *legal* substance. This is borne out by Deane J.’s eschewing of any “reference to idiosyncratic notions of justice or morality”<sup>261</sup> as well as his emphatic declaration to the effect that it is wrong to treat the concept of proximity “as a *question of fact* to be resolved *merely* by reference to the relationship between the plaintiff and the defendant in *particular circumstances.*”<sup>262</sup> What emerges from this dual characterisation of proximity is, first, that that concept *does* (as we have already argued) possess a *normative* dimension, which is premised on *objective morality* (and *not* arbitrary—or, as the learned judge put it, “idiosyncratic”—notions of justice).<sup>263</sup> Secondly, and this is a closely related point (also considered above), proximity is *not* a concept that is *coterminous* with the *factual* notion of reasonable

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<sup>258</sup> See *ibid.* [emphasis added].

<sup>259</sup> See *ibid.* [emphasis added]. See also “*Norsk*, *supra* note 125; and compare *Arab-Malaysian Finance Bhd. v. Steven Phoa Cheng Loon*, *supra* note 194.

<sup>260</sup> See *supra* note 249 [emphasis added].

<sup>261</sup> See *ibid.*

<sup>262</sup> See *ibid.* [emphasis added].

<sup>263</sup> See *supra* notes 249 and 261.

foreseeability.<sup>264</sup> Indeed, a mere appeal to the facts—and the facts alone<sup>265</sup>—is tantamount to attempting to derive an “ought” from an “is”: something which the Scottish philosopher, David Hume, pointed out that we cannot possibly do<sup>266</sup> and this must surely be correct, at least insofar as pure reason and logic are concerned.

However, given the fact that none of the different aspects of proximity mentioned by Deane J. is conclusive and given the fact that there is no guidance as to how precisely these aspects would interact with each other in the practical sphere, we appear to be back to “square one,” so to speak—at least insofar as practical application is concerned. It is nonetheless submitted, at this juncture, that there is a particular sentence in the learned judge’s observations quoted earlier that might aid us in a more practical manner, and which (because of its importance) bears repeating:

[Proximity] may reflect *an assumption* by one party of a responsibility to take care to avoid or prevent injury, loss or damage to the person or property of another *or reliance* by one party upon such care being taken by the other in circumstances where the other party *knew or ought to have known* of that reliance.<sup>267</sup>

Indeed, both the concept of the assumption of responsibility as well as that of reasonable reliance embodied in the above quotation are well-established not only in the sphere of liability for economic loss for negligent misstatements<sup>268</sup> but also in construction cases.<sup>269</sup> There is, admittedly, some controversy—insofar as liability for negligent misstatements are concerned—as to whether or not the basis of legal liability is the reasonable reliance by the claimant on the misstatement concerned *or* the voluntary assumption of responsibility by the defendant who made the misstatement. There is authority both for the former<sup>270</sup> as well as the latter.<sup>271</sup> We would submit, however, that this controversy is unnecessary and leads, as a consequence,

<sup>264</sup> See text accompanying note 240.

<sup>265</sup> See *supra* note 262.

<sup>266</sup> See *e.g.* B. Stroud, *Hume* (London: Routledge & Kegan Paul, 1977), especially at c. III and IV.

<sup>267</sup> See *supra* note 249 [emphasis added]. Compare also *per* Gaudron J. in *Romeo v. Conservation Commission of the Northern Territory* (1997) 151 A.L.R. 263 at 282 (dissenting, albeit not on this point).

<sup>268</sup> The seminal decision being, of course, that of the House of Lords in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465 [*Hedley Byrne*].

<sup>269</sup> See *e.g.* the seminal Australian High Court decision of *Bryan v. Maloney*, *supra* note 55. Though compare the (also) recent Australian High Court decision of *Woolcock Street Investments Pty. Ltd. v. CDG Pty. Ltd.*, *supra* note 97.

<sup>270</sup> See *e.g. per* Lord Reid, Lord Morris of Borth-y-Gest and Lord Hodson in the *Hedley Byrne* case, *supra* note 268 at 483, 496 and 514, respectively; *per* Lord Templeman in *Smith v. Eric S. Bush* [1990] 1 A.C. 831 [*Smith v. Bush*] at 848; and *per* Lord Slynn of Hadley in *Spring v. Guardian Assurance Plc* [1995] 2 A.C. 296 at 332; compare *per* Lord Browne-Wilkinson in *White v. Jones* [1995] 2 A.C. 207 at 272, as well as (especially) at 272-273 where there was, instead, more of a focus on assumption of responsibility.

<sup>271</sup> See *e.g. per* Lord Morris of Borth-y-Gest and Lord Devlin in the *Hedley Byrne* case, *supra* note 268 at 494-495, 497, 502-504 as well as 528-530, respectively; *per* Lord Keith of Kinkel, delivering the judgment of the Board in the Privy Council decision of *Yuen Kun Yeu v. Attorney-General of Hong Kong*, *supra* note 24 at 192; *per* Lord Templeman and Lord Jauncey of Tullichettle in *Smith v. Bush*, *ibid.* at 847 and 870, respectively; *per* Lord Goff of Chieveley and Lord Browne-Wilkinson in *Henderson v. Merrett Syndicates Ltd.* [1995] 2 A.C. 145 at 181 and 205, respectively; *per* (especially) Lord Goff of Chieveley in *White v. Jones*, *ibid.* at 268 (see also *per* Lord Browne-Wilkinson, *ibid.* at 272-273); and *per* Lord Goff of Chieveley in *Spring v. Guardian Assurance Plc*, *ibid.* at 316; *contra per* Lord Griffiths in *Smith v. Bush*, *ibid.* at 862 and *per* Lord Roskill in the *Caparo* case, *supra* note 23 at 628.

to artificiality and inefficiency. We would further submit that *both* bases are not only to be ascertained on an objective basis but are also *complementary and integrated*. Indeed, authority for *both* bases can be located in the *Hedley Byrne* case<sup>272</sup> itself. More importantly, there is, in the final analysis, *no real conflict* between both bases. The rationale of reasonable *reliance* centres on the *claimant's* perspective, whilst the rationale of *voluntary assumption* of responsibility centres on the *defendant's* perspective (the defendant having *made* the alleged misstatement in the first instance). In summary, *both* perspectives are, at bottom, *two different (yet inextricably connected) sides of the same coin and ought therefore to be viewed in an integrated and holistic fashion*. It therefore should not be surprising in the least that courts and judges frequently refer to *both* bases in the same case or judgment, respectively.<sup>273</sup> What is particularly significant for the purposes of the present article is this: the (complementary) concepts of both reasonable reliance as well as voluntary assumption of responsibility appear to the present writers to constitute the best—and most practical—criteria for establishing whether or not there is proximity between the claimant and the defendant from a legal standpoint. To this end, the various aspects of proximity (physical, circumstantial and causal) are *factors* that are to be taken into account as the Court considers whether, in any given case, there has been both reasonable reliance and voluntary assumption of responsibility—all viewed from a holistic and integrated perspective.<sup>274</sup> It might, however, be argued that—situations of negligent misstatement apart—in many situations, there might not be *actual or factual* reliance and/or assumption of responsibility as such. It is submitted that this is too narrow an approach to take, especially having regard to the fact that the concept of proximity itself is (as we have argued) not merely factual but is, rather, *legal* in nature. In other words, there will be situations where, notwithstanding the absence of actual reliance and/or assumption of responsibility, the court concerned will nevertheless hold that there ought, *in law*, to be found reliance as well as assumption of responsibility on the basis of what, respectively, a reasonable claimant and a reasonable defendant ought to contemplate in the specific category of case as well as the specific facts present, with broader policy factors also coming possibly into play at the second stage of the inquiry in accordance with the “two stage test” in *Anns*

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<sup>272</sup> See generally, *supra* notes 270 and 271.

<sup>273</sup> See *e.g.* *per* Lord Morris of Borth-y-Gest in the *Hedley Byrne* case, *supra* note 268, especially at 502-503; *per* Lord Templeman in *Smith v. Bush*, *supra* note 270 at 847-848; and *per* Lord Goff of Chieveley in *Spring v. Guardian Assurance Plc*, *supra* note 270 at 318 and 319 (this aforementioned reference being particularly significant in view of the fact that Lord Goff had consistently focused on the concept of voluntary assumption of responsibility). And, in the context of *construction*, reference may be made to the Australian High Court decision of *Bryan v. Maloney*, *supra* note 55. Finally, in the recent House of Lords decision of *Williams v. Natural Life Health Foods Ltd.* [1998] 1 W.L.R. 830, Lord Steyn observed (at 836) that “[i]f reliance is not proved, it is not established that the assumption of personal responsibility had causative effect”; indeed, the learned Law Lord appeared to suggest that it was precisely because the element of reliance was present that the criticism of the requirement of the voluntary assumption of responsibility from the perspective of fiction or artificiality had been misplaced (see *ibid.* at 837). Reference may also be made to the Singapore position: see text accompanying note 171.

<sup>274</sup> In the Singapore context, at least, a situation which was “short of actual privity of contract” (akin to that in the *Junior Books* case, *supra* note 19) would, in our view, satisfy these criteria in an *a fortiori* fashion (see also text accompanying note 181). Compare also R. Kidner, “Resiling from the *Anns* principle: the variable nature of proximity in negligence” (1987) 7 L.S. 319.

which we of course support.<sup>275</sup> Our proposal does not, of course, do away with all the uncertainties. However, it does furnish us with a more concrete and practical way forward. More importantly, it infuses content into what would otherwise be an empty concept, the emptiness of which would serve to obfuscate rather than enlighten judges, lawyers and students in this already rather confused (and confusing) area of tort law.

At this juncture, it is important to analyse the first limb in *Anns* from the no less important perspective of justice and fairness. To put it another way, it is important that the doctrinal clarification hitherto proposed ought to be consistent with—and (more importantly) support as well as complement—the overarching need to arrive at a fair and just decision in each and every case at hand.<sup>276</sup> The issue that then arises is this: what aspect(s) of justice and fairness is the *first* limb in *Anns* aiming at? It is submitted, in this regard, that this first limb is directed at achieving justice and fairness on an *individual*—as opposed to a communitarian or societal—level, and it is to this argument that our attention must now turn.

## 2. *The Focus on the Individual*

Assuming that the elements in the first limb of the *Anns* test can be clarified, its *broader* rationale and purpose ought (as already mentioned) to be borne in mind. As alluded to at the end of our discussion in the preceding Part III.C.1, the main purpose underlying this particular limb is to focus on *the individual*—in particular, the specific legal relationship between the parties as embodied within the concept of proximity which was also considered in some detail above. Where, in other words, a relationship of proximity has been established in law, there arises a *prima facie* duty of care owed by the defendant to the claimant and which simultaneously constitutes the latter's *individual right vis-à-vis* the former. The claimant can thus enforce this duty of care

<sup>275</sup> And see *e.g.* per Mason C.J., Deane and Gaudron JJ. in *Bryan v. Maloney*, *supra* note 55 at 627-628. It is admitted that there might actually, on this suggested approach, be an interaction between both limbs in the “two stage test” (recalling that we are here concerned only with the first limb). However, as we argue below, whilst this is probably the case in practice, *commencing* on such a premise is actually undesirable from the perspective, *inter alia*, of clarity: see the main text accompanying below, notes 293-294. To return to the approach suggested in the main text, for contrary perspectives, compare J. Stapleton, “Duty of Care and Economic Loss: A Wider Agenda” (1991) 107 L.Q.R. 249, especially at 284 and K. Barker, “Unreliable Assumptions in the Modern Law of Negligence” (1993) 109 Law Q. Rev. 461, especially at 463, where the narrower view of both concepts is adopted, but where no satisfactory approach is, with respect, laid down. Compare also per Smith J. in the recent Supreme Court of Victoria decision of *Moorabool Shire Council v. Taitapanui* [2004] VSC 239, especially at paras. 78-79, where the learned judge perceptively distinguished between the concept of “known reliance” that was adopted by the majority in *Bryan v. Maloney*, *supra* note 55 (which, as will be recalled, complements the concept of “assumption of responsibility” and, when both perspectives are considered holistically, constitutes the approach which we endorse in the main text of this article) and the wider, communitarian concept of “general reliance” that was rejected by a majority of judges in *Pyrenees Shire Council v. Day*, *supra* note 68 (which concept arguably falls for consideration under the second stage of the *Anns* formulation). And for an approach which emphasizes the concept of reasonable expectations instead, see K. Amirthalingam, “The Shifting Sands of Negligence: Reasonable Reliance to Legitimate Expectations” (2003) 3 Oxford U. Commonwealth L.J. 81. It is submitted, however, that the concepts of voluntary assumption of responsibility and reliance, mooted as they are in their present form, are more specific and practical.

<sup>276</sup> And see generally (from the perspective of contract law) A. Phang, “On Architecture and Justice in Twentieth Century Contract Law” (2003) 19 J. Contract L. 229.



against the defendant as an individual right, although the defendant might possibly be able to escape liability by claiming that such an *individual* right has been *overridden* by persuasive reasons of *policy* embodied within the *second* limb of the *Anns* test (which is considered below). Such an overriding mechanism (in the second limb of *Anns*) operates when *societal considerations* are so important that the individual right *prima facie* accruing (by law) to the claimant under the first limb in *Anns* must, on *balance*, nevertheless be overridden.

It should be noted, however, that the establishment of a *prima facie individual* right under the first limb of *Anns* is significant inasmuch as it emphasizes *the importance of individual rights generally* in the first instance. This is consistent with the general liberal approach embodied within many legal cultures today which emphasizes the importance of the individual and—to that extent—is also consistent with Dworkin's individual rights theory.<sup>277</sup> More specifically, an individual right which is based on a finding of both reasonable reliance by the claimant and the voluntary assumption of responsibility by the defendant creates a *moral* obligation on the part of the defendant—which moral obligation is embodied in a legal duty of care which it (the defendant) ought not to breach, lest liability in damages results.

The emphasis on individual rights also constitutes, in our view, a weighty—albeit inconclusive<sup>278</sup>—bulwark against the otherwise potential (if not actual) coercive effect of the overriding preference(s) of the majority in a given society, where they are not justified.

It is, however, admitted that whilst the *theoretical* thrust of the first limb in *Anns* is not only desirable but also imperative, the *practical* difficulties cannot be ignored. In particular, while the ideal is to balance individual rights against majoritarian preferences, *how* is this to be effected *in practice*? Sceptics would argue that one necessarily—and ultimately—falls on one side of the extreme or the other. Is such scepticism justified? Are courts forever doomed to be trapped either by the Scylla of individual rights or the Charybdis of communitarian goals? Is there no “middle-ground”? As we shall see, there are—necessarily—no definitive answers. At this juncture, however, we would emphasize that the very presence of this first limb in *Anns* is significant inasmuch as it constitutes a constant reminder to courts, lawyers and students alike that individual rights are important, even if the successful application of such rights might—on occasion at least—prove difficult when balanced against competing majoritarian goals. One cannot—and must not—underestimate both the psychological as well as theoretical and practical effects that arise as a result of stating legal ideals clearly and emphatically. In other words, what appears (traditionally, at least) as form nevertheless contains—and impacts upon—substance as well. As already mentioned, however, because individual rights do not operate in a vacuum, one ignores—at one's peril—the existence of competing majoritarian goals that are embodied (in the main) in *policy* considerations

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<sup>277</sup> See *supra* notes 230 and 231.

<sup>278</sup> Because of the constraints embodied within the second limb of the *Anns* test. Compare also *per* Richardson J. in the *South Pacific* case, *supra* note 108 at 306, where the learned judge observed that “proximity reflects a balancing of the plaintiff's moral claim to compensation for avoidable harm and the defendant's moral claim to be protected from an undue burden of legal responsibility.” It is submitted, however, that protection of the defendant's moral claim involves (primarily) *societal* issues that are best dealt with under the *second limb* in the *Anns* formulation.

which are the focus of the *second* limb in the *Anns* test, to which our analysis must now turn.

#### D. The Formulation in *Anns*—The Second Limb

##### 1. The Nature of this Limb

The second limb in the *Anns* test is clearly based on *policy*. The immediate problem that arises—at least under English law—is one that is (in many ways) encapsulated within Dworkin’s views briefly canvassed above.<sup>279</sup> Policy has popularly been viewed as falling within the purview of the legislature. Where courts do have to deal with policy, this must be confined within a very narrow compass. Illustrations of such an approach abound in the case law itself.<sup>280</sup> However, whilst the Courts have been careful—even conservative—insofar as the concept of public policy is concerned, it is clear that this concept can be neither denied nor ignored. At the most basic level, the law (and its application) cannot (and ought not to) be divorced

<sup>279</sup> See text accompanying note 230.

<sup>280</sup> See *e.g.*, in the context of contract law, *per* Burroughs J. in *Richardson v. Mellish* (1824) 2 Bing. 229, where the learned judge viewed (at 252) public policy as “a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law.” And Lord Davey, in *Janson v. Driefontein Mines Ltd.* [1902] A.C. 484, observed (at 500) that “[p]ublic policy is always an unsafe and treacherous ground for legal decision”. And compare *per* Judge John Mowbray Q.C. in *Sutton v. Sutton* [1984] Ch. 184 at 195 (“I mount the unruly horse of public policy with trepidation...”); *per* Lord Pearce in *Esso Petroleum Co. Ltd. v. Harper’s Garage (Stourport) Ltd.* [1968] A.C. 269 at 324 (“Public policy, like other unruly horses is apt to change its stance ... ”); *per* Sachs L.J. in *Shaw v. Groom* [1970] 2 Q.B. 504 at 523 (“Public policy has been often spoken of as an unruly horse: all the more reason then why its riders should not themselves in these changing times wear blinkers, be oblivious to the scene around, and thus ride for a fall. Sound policy must be flexible enough to take into account the circumstances of its own generation.”); and *per* Browne-Wilkinson J. in *Coral Leisure Group Ltd. v. Barnett* [1981] I.C.R. 503 at 507 (“This does not mean that rules of public policy are fixed for ever. But any variation in the rules to meet changing attitudes and standards of society will require either the intervention of Parliament or of the higher courts to declare what the new public policy is.”). Lord Denning M.R., however, was much more sanguine when he remarked in *Enderby Town Football Club Ltd. v. Football Association Ltd.* [1971] Ch. 591 at 606-607, thus: “With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles. It can leap the fences put up by fictions and come down on the side of justice ... ”

Reference may also be made, in the context of the duty of care itself, to Bell, *supra* note 236 at c. III. See also generally P.H. Winfield, “Public Policy in the English Common Law” (1928-1929) 42 Harv. L. Rev. 76; W. Gellhorn, “Contracts and Public Policy” (1935) 35 Colum. L. Rev. 679; Dennis Lloyd, *Public Policy—A Comparative Study in English and French Law* (London: University of London, Athlone Press, 1953); J. Shand, “Unblinkering the Unruly Horse: Public Policy in the Law of Contract” (1972) 30 Cambridge L.J. 144; C.R. Symmons, “The Function and Effect of Public Policy in Contemporary Common Law” (1977) 51 Austl. L.J. 185; and R.A. Buckley, *Illegality and Public Policy* (London: Sweet & Maxwell, 2002), c. 6.

There is a further related issue inasmuch as Lord Millett recently distinguished, in the House of Lords decision of *McFarlane v. Tayside Health Board* [2000] 2 A.C. 59 at 108, between “legal” policy on the one hand and “public” policy on the other. It is respectfully submitted, however, that this is not a meaningful distinction. Indeed, if the former refers, in effect, to the concept of legal rules and principles, then we are really back to where we had begun inasmuch we have argued that the line between principle and policy is rather blurred (see text accompanying note 233). If, on the other hand, it is argued that “legal” policy refers to factors residing in and to be considered in the *extra-legal* context, what then is the difference between “legal” policy and “public” policy since both would, *ex hypothesi*, involve extra-legal factors?

from its broader societal context. It is true that societal factors and context are less significant in certain areas of the law compared to others. However, where an area such as the law of tort is concerned, we have seen that it is imperative that societal standards and mores be taken into account. More specifically, public policy and societal concerns are particularly crucial insofar as liability in negligence for pure economic loss is concerned and—to this extent—the argument by Dworkin considered earlier cannot (with respect) stand.<sup>281</sup> At the most general level, there is the policy consideration that the spreading of too large a net of liability<sup>282</sup> might hinder unduly the smooth functioning of commerce (this has often been characterised as the “floodgates” argument). On the other hand, there is also the *countervailing* policy consideration to the effect that a claimant who has suffered a wrong (here through the defendant’s negligence) ought to be entitled to recover damages. Indeed, as we saw in the preceding Part III.C.2, this aforementioned (individual) right is precisely what the *first* limb in *Anns* was intended to vindicate. At this juncture, it is significant to note that there has, once again, been a blurring of the line between policy on the one hand and individual rights on the other.<sup>283</sup> However, even if we classify the justification of the claimant’s case under the first limb in *Anns* as falling under the rubric of individual rights, it is clear that there is, as just mentioned, a countervailing *policy* goal that *cannot* be ignored. Indeed, the Courts are—whether conscious of the fact or not—constantly involved in a balancing exercise that seeks to locate a just and fair result between the competing interests of the individual on the one hand and the society on the other. This, however, raises another (and related) difficulty.

The competing demands embodied in *societal* goals *presupposes* that there are *community standards* to begin with. This raises the perennial spectre of *subjectivity or relativity*, which is a difficulty that applies (by its very nature) across *every* sphere of the law (and, indeed, even to the consideration as well as application of the *first* limb in *Anns*, which was discussed in the preceding Part III.C.2). This particular difficulty is obviously beyond the purview of the present article; indeed, any meaningful treatment of such a basic problem would require a monograph or even a series of monographs.<sup>284</sup> However, the difficulty is so central to the law in general and our inquiry in particular that it cannot simply be ignored. Whilst we do not propose any solution to the problem of subjectivity or relativity in the present article, we do want to emphasise that in any (and, indeed, every) consideration of whether or not a duty of care ought to be imposed in the context of pure economic loss, the Courts *must necessarily* be cognisant that there will almost invariably be a tension between individual rights on the one hand and societal goals on the other, which cannot be

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<sup>281</sup> See generally text accompanying note 230.

<sup>282</sup> Compare the famous—and oft-cited—words of Cardozo C.J. in *Ultramares Corporation v. Touche* (1931) 174 N.E. 441 at 444, there would be the danger of “liability in an indeterminate amount for an indeterminate time to an indeterminate class”. There are of course other “control devices” as well, such as the concept of remoteness of damage as well as the various limitation periods stipulated under statute: see *per* Schiemann L.J. in the English Court of Appeal decision of *Bellefield Computer Services Ltd. v. E. Turner & Sons Ltd.* [2000] B.L.R. 97 at 100.

<sup>283</sup> And see generally text accompanying notes 232–236.

<sup>284</sup> One of the present writers has attempted a response in the context of the law of contract: see Phang, *supra* note 276 and, by the same author, “Security of Contract and the Pursuit of Fairness” (2000) 16 *J. Contract L.* 158. However, it should be noted that the other writers do not (unambiguously at least) endorse his views. Reference should also be made to the thought-provoking inaugural lecture by André Tunc, “Tort Law and the Moral Law” (1972) 30 *Cambridge L.J.* 247.

resolved without the invocation of objective standards. It is possible, of course, that there may be situations where the vindication of individual rights does not conflict with the relevant societal goals. It is important to emphasise, at this juncture, that broader *policy* goals and considerations are not necessarily confined to the more general problem of “floodgates” alone. Much will depend on the specific context in question. For example, in the context of construction law, the Court would need to take into account the prevailing expectations of all the parties concerned—for example, the expectation of *purchasers* that they would obtain proper value for what is probably the largest financial outlay they are likely to make in their respective lifetimes for an item (here, a home) that is so very basic to human survival and even enjoyment *as well as* the expectation of *vendors* that prevailing industry practice is both relevant and applicable. These considerations are by no means exhaustive. One must also allow for the fact that even these considerations might be modified or even differ radically in different jurisdictions. This might conceivably exacerbate the problem from subjectivity or relativity briefly alluded to above. However, it is precisely because conditions might vary from context to context and, in particular, from jurisdiction to jurisdiction that we are unable—within the more modest parameters of the present article in any event—to proffer an even-close-to conclusive solution to the problem of subjectivity and relativity. At the expense of repetition, however, it does not follow, therefore, that the Courts are thereby released from their responsibility to balance competing considerations in the tension that often arises from the conflict or clash between individual rights and societal goals.

What, then, about the *existing law*? Not surprisingly, perhaps, there are more than vague indications within the present case law which support the arguments made thus far in the present Part III.D. We refer, in particular, to the concept of “fair, just and reasonable” which is the third part in the “three part test” first clearly laid down in the *Caparo* case.<sup>285</sup> Its very nature does suggest immediate difficulties—especially that of definition.<sup>286</sup> It is suggested that this criterion or concept might best be viewed *as a facet of public policy*. Although it might be argued that the idea of fairness embodied in this concept might also refer to the more *specific* situation between the *individual parties* themselves, it is submitted that this would have already been covered under the first two parts of the “three part test” *or* the first limb in *Anns*, depending on which approach one endorses.<sup>287</sup> The important point for our present

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<sup>285</sup> See *supra* note 36.

<sup>286</sup> In the English Court of Appeal decision of *James McNaughton Paper Group Ltd. v. Hicks Anderson & Co.* [1991] 2 Q.B. 113 at 123-124, Neill L.J. stated that this particular concept (which he referred to as one of “fairness”) “is elusive and may indeed be no more than one of the criteria by which proximity is to be judged.” Lord Nicholls of Birkenhead, in the House of Lords decision of *Stovin v. Wise*, *supra* note 53 was a little more optimistic, although the learned Law Lord, too, saw problems with the concept; he observed (at 933) thus:

The basic test of fair and reasonable is itself open to criticism for vagueness. Indeed, it is an uncomfortably loose test for the existence of a legal duty. But no better or more precise formulation has emerged so far, and a body of case law is beginning to give the necessary further guidance as courts identify the factors indicative of the presence or absence of a duty.

<sup>287</sup> We argue below that there is in fact no substantive difference between both these approaches: see text accompanying notes 304-309. And for eminent academic support for the argument just made to the effect that the third part of the “three part test” in *Caparo* is best viewed as a facet of public policy, see J.G. Fleming, *The Law of Torts*, 9th ed., (Sydney: LBC Information, 1998) at 153-154.

purposes is that it is more than arguable that the existing case law (even in the *English* context) embodies reference to the broader and more general *policy* factors that need (as argued above) to be taken into account by the Courts as they decide whether or not to impose a duty of care not to cause pure economic loss to the claimant in the various fact situations that come before them.

## 2. *The Focus on the Wider Community/Society and the Law*

If broader societal goals and considerations must (as we have already argued) necessarily be taken into account, what is the best way of incorporating a consideration of these elements? Indeed, this issue is absolutely essential, for, even taking into account the potential problem of subjectivity or relativity, it is still essential to locate some legal *structure* that would accommodate a consideration of these elements by the Courts.

We have seen that, although the *Canadian* courts generally do consider policy factors, they have tended to do so in the context of *both* of the limbs in *Anns*.<sup>288</sup> It is submitted, with respect, that such an approach ought *not* to be followed. We would advocate, instead, a return to a “pure” *Anns* approach and place—in the process—policy considerations within the *second limb* of that particular test. This was indeed, literally, what Lord Wilberforce himself intended when formulating this test.<sup>289</sup> Such an approach would in fact conduce towards more clarity overall. We have already seen that both scholars<sup>290</sup> and courts<sup>291</sup> are already uncomfortable with the consideration of policy, not least because of the at least potential (if not actual) problem of subjectivity or relativity.<sup>292</sup> Under these circumstances, it would merely exacerbate these existing problems to consider policy under both of the limbs in *Anns*. It would be preferable to confine the consideration of policy within one element of the test. Indeed, this is the case even insofar as the “three part test” is concerned.<sup>293</sup>

As we shall see (in the next Part III.E), it is true that one cannot—in *actual application or practice*—wholly delimit or confine the consideration of policy to only one of the elements in the legal test adopted. *However*, it is submitted that one should nevertheless attempt to confine policy within a manageable compass. If, in other words, one begins with the premise that policy necessarily “seeps” into every part of the legal test adopted, the process would be made *that much more difficult—if policy were incorporated right from the outset*. Indeed, one also cannot underestimate the enormous (and detrimental) *psychological* impact that might result if policy factors were indeed considered right at the outset—which impact would necessarily have a detrimental effect on the substantive reasoning process and final outcome as well. It is therefore submitted that all considerations of policy ought to be confined—as Lord Wilberforce laid down in *Anns*—to the *second limb* of his formulation in that case.

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<sup>288</sup> See generally text accompanying note 161.

<sup>289</sup> See *supra* notes 4 and 228.

<sup>290</sup> In particular, Dworkin: see text accompanying note 230.

<sup>291</sup> See text accompanying note 280.

<sup>292</sup> See text accompanying note 284.

<sup>293</sup> Provided one accepts that the third criterion of “fair, just and reasonable” incorporates considerations of policy: and see text accompanying note 285.

We would also suggest that this proposed approach is preferable for another reason. Although wider societal and policy factors necessarily impact on the decision of the Court in this area of tort law, one must not forget that the Court is, in the final analysis, adjudicating as to which *individual* party ought to prevail. It is therefore preferable, in logic and principle, for the Court to consider the factors that affect the *individual* parties *prior to* the broader societal and policy factors. Again, as we shall see in a moment, such an approach cannot be applied dogmatically—if nothing else, because life is rather more complicated and messier than we would like it to be. However, as already argued in a similar context, one should not exacerbate matters by commencing with an approach that does not even anticipate the practical difficulties of application in the first place, let alone endorsing an approach which (potentially at least) leads to precisely the contrary result.

#### E. *The Interaction between the First and Second Limbs in Anns*

Notwithstanding the elegance of doctrinal structures, the process of *application* invariably demonstrates that the law—and, in particular, its application—is somewhat grittier than both lawyers and courts would desire. This truth is nowhere better demonstrated in the context of the present article than in the fact that despite the doctrinal separation of both limbs in the *Anns* test, there would, at the level of application, nevertheless be an interaction between them. This is only to be expected since the Court concerned has to base its final decision on a *holistic* consideration of *both* limbs as applied to the facts of the case itself. In any event, both individual as well as societal factors will invariably *interact* with each other. However, as we have argued earlier, this does not mean that both sets of factors should therefore be intentionally introduced right at the outset at the doctrinal or structural level. To do so would, as we have sought to explain, only exacerbate the situation and engender unnecessary difficulties as well as complications. This is why we are, with respect, not in favour of the approach adopted by the Canadian courts.<sup>294</sup> Indeed, it is submitted that the preferable approach is to commence with a doctrinal structure that will *minimise* any uncertainty, even though a certain measure of uncertainty and interaction amongst the various factors is inevitable. To this end, the nature of the first limb in *Anns*, coupled with a *separate* consideration of broader policy factors only later under the *second* limb of this case, constitutes (in our view) the best way forward.<sup>295</sup>

#### F. *The Relationship between the Formulation in Anns and the other Tests*

The issue remains as to whether or not the formulation in *Anns* represents—in both form as well as substance—an improvement over the other tests currently on offer. We have seen that the formulation in *Anns* has in fact been rejected in its own country of origin (*viz.*, England), although it continues (as we have already seen) to exist—in various forms—in other Commonwealth jurisdictions. Before proceeding to consider this issue in a little more detail, our basic thesis can be simply stated: *there is, in*

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<sup>294</sup> See text accompanying note 156.

<sup>295</sup> Compare, in this respect, the judicial approach in New Zealand which appears to endorse this position (and see Part II.D, above).

*substance, no difference between the formulation in Anns and the other tests (in particular, the “three part test”), although the manner in which the formulation in Anns has been framed does reduce any unnecessary uncertainty and confusion and is (to that extent) the best test to adopt.*

Given the present situation across the Commonwealth, it is submitted that the principal comparison would be between the formulation in *Anns* and the “three part test.”<sup>296</sup> Before proceeding to compare these two tests, however, a brief comparison with a few other tests from a historical perspective might be appropriate.

We have already seen that, on one view at least, the “neighbour principle” first laid down by Lord Atkin in *Donoghue v. Stevenson*<sup>297</sup> could be viewed as embracing literal—and *factual*—foreseeability only. It is submitted that such an approach is unhelpful for the reasons already stated. Indeed, in its focus on only the descriptive, such a formulation (whilst looking to the *individual* relationship between the parties themselves) *lacks the normative force* so essential as a prerequisite to *any* legal rule or principle. Further, such an approach or formulation is, in any event, unsuitable to aid the Court in determining liability for pure economic—as opposed to purely physical<sup>298</sup>—damage or loss. In summary, this particular test is more the analogue of the *first* limb in *Anns*, *albeit without the necessary normative dimension*. Further, it does *not* take into account the *wider societal context*, which (as we have already argued) cannot be ignored from the perspectives of both justice as well as reality.<sup>299</sup>

There is, on the other hand, a pure “public policy test,” perhaps most famously embodied in the observations of Lord Denning M.R. in the English Court of Appeal decision of *Spartan Steel & Alloys Ltd v. Martin & Co. (Contractors) Ltd.*<sup>300</sup> The reader would notice, at this juncture, that this particular test is the *complete opposite* of the one briefly mentioned in the preceding paragraph. It is, admittedly, of a normative cast. However, it is centred wholly upon *policy*. Whilst the rights of the individuals would necessarily be decided in the process, this approach tends to suggest that this would be accomplished by focusing more on the *societal or communitarian* considerations or factors instead of factors relating to the individual parties themselves. In summary, this particular test is more the analogue of the *second* limb in *Anns*. However, it does *not* take into account the normative arguments relating to the *individual parties* themselves and, to that extent, is incomplete.

There was, prior to *Anns*, an apparent attempt to combine both the tests just considered. This has been referred to by one writer as the “foreseeability including policy test” or the so-called “composite test.”<sup>301</sup> It is submitted, however, that a central difficulty with this particular test is the fact that public policy would probably not only infuse but also (by its very nature and tendency) become the predominant (if not sole) element in this test, thus bringing us (in substance at least) back to Lord Denning M.R.’s test briefly considered in the preceding paragraph.

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<sup>296</sup> As to which see generally text accompanying note 35.

<sup>297</sup> See *supra* note 8.

<sup>298</sup> Although even this distinction between pure economic and physical damage or loss can, on occasion at least, be rather artificial. Indeed, it is now generally accepted that there can be liability for economic loss consequent upon physical injury. At this juncture, the distinctions become even finer—and even blurred.

<sup>299</sup> See generally text accompanying note 278.

<sup>300</sup> See *supra* note 12 at 37 and accompanying text.

<sup>301</sup> See generally K.F. Tan, “Three-Part Test”, *supra* note 9 at 229-230.

The central difficulty just mentioned in the preceding paragraph does not, however, emerge (or, if it does, is heavily constrained) by the application of the “two stage test” embodied in Lord Wilberforce’s formulation in *Anns*, which is (of course) the test we endorse in the present article. We have already discussed, in some detail, the advantages of such an approach and will therefore not repeat them again,<sup>302</sup> save to emphasise that this particular test adopts an *integrated and holistic* approach by considering both individual *as well as* communitarian or societal factors in a manner that does *not unnecessarily conflate* the two. This test also minimises the opportunities for public policy factors to “run wild,” so to speak, since, as we have seen, the Court has to focus on the individual rights of the respective parties first. This is particularly important in the light of the rather conservative attitude towards public policy adopted by the (at least English) judges.<sup>303</sup>

How, then, does the “two stage test” in *Anns* compare with what is the current test in the English context, *viz.*, the “three part test”? It will be recalled that the latter test comprises—as its very nomenclature suggests—three elements, all of which are essential: *foreseeability of damage*; *proximity or neighbourhood*; and that the situation must be one where the Court considers it *fair, just and reasonable* that a duty of care should be imposed on the defendant.<sup>304</sup>

If, as appears to be the case, the *first* element (in the “three part test”) of foreseeability refers to a *factual or literal* conception (as opposed to a *legal* one), then it is, arguably, redundant inasmuch as the most basic threshold requirement in order for liability to be even possible must surely be that there was factual or literal foreseeability in the first instance. Indeed, it is precisely because the Court will virtually always find that there is such foreseeability<sup>305</sup> that *legal control mechanisms* are required in order to prevent the “floodgates” of liability from opening.<sup>306</sup> Presumably, the *second* element of *proximity* is intended to provide just such a control mechanism. We have, in fact, already argued that the concept of proximity must necessarily be a *legal* conception that therefore has *normative force*.<sup>307</sup> At this point, however, it is vitally significant, in our view, to note that this particular element is, indeed, *coterminous with the first limb in the Anns test*.

Turning to the *third* element of “fair, just and reasonable,” we have already argued that this particular element is, in effect, *another way of stating the (second) policy limb in the Anns test*.<sup>308</sup>

In summary, it would therefore appear that there is, *in substance, very little (if any) difference between* the “two stage test” in *Anns* (which we endorse) and the “three part test” (which represents the current English position).<sup>309</sup> Indeed, in the House of Lords decision of *Stovin v. Wise*, Lord Nicholls of Birkenhead was of the view that “[t]he difference is perhaps more a difference of presentation and emphasis

<sup>302</sup> See generally text accompanying note 230.

<sup>303</sup> See *supra* note 280.

<sup>304</sup> See also *supra* note 36.

<sup>305</sup> See also text accompanying note 242.

<sup>306</sup> See also text accompanying note 34.

<sup>307</sup> See generally text accompanying note 240.

<sup>308</sup> See generally text accompanying note 285.

<sup>309</sup> Compare also K.F. Tan, “Of Duty” (1996) 112 Law Q. Rev. 209, especially at 213-214 as well as, by the same author, *supra* note 9 at 247. Reference may also be made to Ong, “Test of Duty,” *supra* note 173 at 671, where, however, a slightly different approach is proposed.



than substance.”<sup>310</sup> In the same case, Lord Hoffmann thought that both tests were different ways of approaching the same issue: the “two stage test” in *Anns* “involves starting with a *prima facie* assumption that a duty of care exists if it is reasonably foreseeable that carelessness may cause damage and then asking 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 arise,’” whereas the “three part test” approaches “the question the other way around, starting with situations in which a duty has been held to exist and then asking whether there are considerations of analogy, policy, fairness and justice for extending it to cover a new situation.... *It can be said that, provided that the considerations of policy etc. are properly analysed, it should not matter whether one starts from one end or the other.*”<sup>311</sup> It is submitted, with respect, that Lord Hoffman’s attempted rationalisation of the distinction between the “two stage test” and “three part test,” whilst ingenious, is not wholly convincing. Insofar as the former test is concerned, it is not reasonable foreseeability alone (not, at least, in the literal sense) that suffices to fix *prima facie* liability. The legal requirement of *proximity* must *also* be satisfied. It is true that the learned Law Lord may have included this aforementioned requirement (of proximity) in his statement of principle, although the literal language utilised is, again with respect, somewhat ambiguous. Insofar as the latter test (“three part test”) is concerned, it is submitted that it is equally the case that a court would *first* take into account, *even under the “two stage test,”* situations in which a duty of care has *already* been held to exist;<sup>312</sup> insofar as the element of “fair, just and reasonable” is concerned, it is submitted that just as the (second) policy limb in *Anns* was indeed couched in the form of a constraining factor on the first limb, the third element under the “three part test” probably serves the same function (of limitation). Indeed, given the natural tendency of the Courts not to extend policy unnecessarily, it is quite possible—or even probable—that the third element of “fair, just and reasonable” under the “three part test” would operate (as we have just argued) much as the second limb in *Anns* under the “two stage test” would. It would appear, therefore, that there is—in *virtually all* senses—a virtual coincidence between the “two stage test” in *Anns* and the “three part test.” It is submitted, however, that there is at least one significant difference that renders the “two stage test” *preferable* to the “three part test”: it is simpler and clearer and this would redound to the benefit of both lawyers and judges alike insofar as analysis as well as application are concerned. Such a benefit is underscored by the fact that this is a particularly difficult and complex area of tort law. The principal difference insofar as the elements are concerned is the fact that the “two stage test” in *Anns* does not—unlike the “three part test”—incorporate the element of factual or literal foreseeability. It is submitted that such an approach conduces towards clarity by doing away with an element that is assumed to be necessarily basic and purely descriptive in the first instance; indeed, to the extent that this particular element *lacks normative force*, it should *not*, logically, be incorporated as part of a *legal* set of criteria in the first instance. Once again, therefore, our basic thesis—to the effect that the test

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<sup>310</sup> See *supra* note 53 at 931.

<sup>311</sup> *Ibid.* at 949 [emphasis added].

<sup>312</sup> Compare also text accompanying notes 66 and 67.

in *Anns* is the most efficient, effective and persuasive—is reinforced: notably, by a comparison with the very approach or test which *rejected* it!

More recently, the High Court of Australia has categorically rejected the “three part test” in *Caparo* as well as the doctrine of proximity as a “conceptual determinant.”<sup>313</sup> Instead, in its decision in *Perre v. Apand Pty. Ltd.*,<sup>314</sup> the High Court listed five factors which were to aid the Court in ascertaining whether or not a duty of care existed, and this was reaffirmed very recently by the same court.<sup>315</sup> However, these factors are—for the most part—rather general and vague and they tend to focus merely on the *factual* context. Once again, the very significant problem of the *absence* of a *normative* foundation rears its ugly head. And, because of this very important weakness, it is submitted that the preferable approach is still that advocated by Lord Wilberforce in *Anns*.

#### G. Concluding Remarks

Our arguments thus far point to one inexorable conclusion—that, whilst there will always exist uncertainty (a point, incidentally, that is true, to a greater or lesser extent, with respect to every area of the law), the best way forward is always that which conduces towards clarity in both theory and application. Looked at in this light, the “two stage test” formulated by Lord Wilberforce in *Anns* is, in all respects, truly the best approach. Even in England, where it has been rejected, its replacement (the “three part test”) is not only the same in substance but is also less clear from a conceptual perspective (which leads, in turn, to possible difficulties in the sphere of application). We have further argued that the modifications made to Lord Wilberforce’s formulation in other Commonwealth jurisdictions which have otherwise retained the “two stage test” are unsatisfactory for the reasons canvassed above.<sup>316</sup> In this respect, the New Zealand courts (and, to some extent at least, the Singaporean courts), which have retained the formulation in *Anns* in its original form,<sup>317</sup> have adopted what is—in our view—the best approach towards the vexed (and vexatious) problem of liability in tort for pure economic loss arising from negligent conduct.

#### IV. CONCLUSION

Although the High Court of Australia in *Perre v. Apand Pty. Ltd.*<sup>318</sup> did not adopt the “two stage test” formulated by Lord Wilberforce in *Anns*,<sup>319</sup> the following general observations by McHugh J. are (in our view) very appropriate inasmuch as they capture (to a large extent) the spirit underlying the present article:

If negligence law is to serve its principal purpose as an instrument of corrective justice, the principles and rules which govern claims in negligence must be *as*

<sup>313</sup> See *e.g. Sullivan v. Moody*, *supra* note 85 and accompanying text.

<sup>314</sup> *Supra* note 75.

<sup>315</sup> See the *Woolcock* case, *supra* note 97. And for a rendition of these factors, see *supra* note 79.

<sup>316</sup> See text accompanying note 41 (with regard to Australia); *supra* note 122 (with regard to Canada); and *supra* note 170 (with regard to Singapore and Malaysia).

<sup>317</sup> See text accompanying notes 107 and 170, respectively.

<sup>318</sup> *Supra* note 75.

<sup>319</sup> As to which see *supra* note 4.

*clear and as easy of application* as is possible. Ideally, arguments about duty should take little time with need to refer to one or two cases only instead of the elaborate arguments now often heard, where many cases are cited and the argument takes days....<sup>320</sup>

Indeed, as we have argued in some detail above, both precedent and (more importantly) principle support the case for a return to *Anns*. The complexity and confusion in the existing law are to be regretted. Indeed, even where jurisdictions have adopted the formulation in *Anns*, there have been modifications that have (as we have seen) generated more difficulties than solutions. The ultimate goal of the law is the attainment of justice and fairness. The means utilised to achieve this goal should be as clear and simple as possible—without lapsing into the simplicity of content that would then necessarily erode the persuasiveness of that very means itself. To this end, we have sought to demonstrate that the “two stage test” formulated by Lord Wilberforce in *Anns* meets all these criteria. It is certainly superior to all the other tests or approaches on offer. Indeed, we have seen that many of these tests are themselves simply a restatement (in substance) of the formulation in *Anns*, but which lead to more confusion at the levels of both concept as well as application. It is true that even the formulation in *Anns* will not constitute a panacea. However, given the inherent intractability of many of the issues centring around the duty of care in the context of recovery for pure economic loss, this formulation furnishes the Courts with the best opportunity for resolving the fact situations with which they are faced. Indeed, the element of uncertainty will always be present at the level of application of the law and, to that extent, judicial discretion is both necessary and welcome. Such uncertainty and discretion can, however, be reduced to a minimum by the best set of criteria available. In the context of the present area of tort law, the formulation in *Anns* is precisely the set of criteria that will aid both in clearing the existing confusion and laying the foundation for a more principled application and development of the law.

#### POSTSCRIPT

In the very recent decision of the House of Lords in *Commissioners of Customs and Excise v Barclays Bank plc*,<sup>321</sup> it was unanimously decided that a bank, upon receiving notification of a freezing injunction granted to a third party against the bank’s customer, does not owe a duty of care to the third party to comply with the terms of the injunction. The majority of the Law Lords (with the possible exception of Lord Hoffman) appeared to have endorsed and applied the “three-part test” of foreseeability, proximity and fairness in *Caparo* (although the limitations of this particular test were also generally acknowledged). Further, in negating the existence of a duty of care, their Lordships seemed to attach great (albeit not conclusive) significance to the absence of a voluntary assumption of responsibility on the part of the bank and an absence of reasonable reliance by the third party. This view is consistent with our thesis that these complementary and integrated twin concepts are key to ascertaining proximity between the parties under the “two stage test” in *Anns*.

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<sup>320</sup> *Supra* note 75 at para. 91 [emphasis added].

<sup>321</sup> [2006] UKHL 28