# TORT OR CONTRACT: THE QUESTION OF RECOVERY FOR ECONOMIC LOSS

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## I. INTRODUCTION

In the law of torts independent paths are being followed by two issues which are inextricably intertwined. The first issue, and of late the more prominent, is that of overlaying contract with the tort regime so as to allow recovery in tort, although the duty of care may spring from a contractual relationship. The second, and seemingly more complex question, is that of extending recovery in tort to allow claims in negligence for pure economic loss.[1] Both issues are topical and have received individual attention and comment.[2]

It is the purpose of this paper to determine whether there is an underlying connection between these two issues when both are raised in the same factual context. As will be seen, an analysis of these two issues when occurring together leads to the conclusion that in Canadian law

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[1] Economic loss or financial loss here refers to pure economic loss, which is to be distinguished from economic loss that is consequential upon physical damage. Pure economic loss is that loss which is unrelated to physical damage, be it to persons or property. The general rule is that the scheme of recovery in tort law does not include claims in negligence for pure economic loss. On the other hand, economic loss claims that are consequential upon physical damage (*e.g.*, a wage loss claim in a personal injury action) are recoverable in tort if not too remote. This article is concerned only with pure economic loss.

[2] On economic loss, *see* Atiyah, *Negligence and Economic Loss*, 83 L.Q.R. 248 (1967); Harvey, *Economic Losses and Negligence: The Search for a Just Solution*, 50 CAN. B. REV. 580 (1972); Stevens, *Negligent Acts Causing Pure Financial Loss: Policy Factors at Work*, 23 U. TORONTO L.J. 431 (1973); Solomon & Feldthusen, *Recovery for Pure Economic Loss: The Exclusionary Rule*, in STUDIES IN CANADIAN TORT LAW 167 (L. Klar ed. 1977); Jolowicz, *The Law of Tort and Non-Physical Loss*, 12 J. SOC. PUB. T.L. 91 (1973); Alexander, *The Law of Tort and Non-Physical Loss Insurance Aspects*, 12 J. SOC. PUB. T.L. 119 (1973); Cane, *Physical Loss, Economic Loss and Products Liability*, 95 L.Q.R. 117 (1979); Schwartz, *Jurisprudential Developments in Manufacturers' Liability for Defective Products Where the Only Damage is Economic Loss*, 4 CAN. BUS. L.J. 164 (1980).

On tort or contract, *see* Poulton, *Tort or Contract*, 82 L.Q.R. 346 (1966); Considine, *Some Implications From Recent Cases on the Differences Between Tort and Contract*, 12 U.B.C.L. REV. 85 (1978); Irvine, *Contract and Tort Troubles Along the Border*, 10 C.C.L.T. 281 (1980); Fridman, *The Interaction of Tort and Contract*, 93 L.Q.R. 422 (1977); Morgan, *The Negligent Contract-Breaker*, 58 CAN. B. REV. 299 (1980).

(presently on a markedly different trajectory from that of England)[3] they reflect common concerns and indeed may even be said to be one and the same. This assessment is supported by two related conclusions drawn from Canadian jurisprudence: first, that the impediment to recovery for economic loss in tort, when that issue arises in a situation where the defendant is performing contractual obligations, is properly seen as being one of maintaining a demarcation between the realms of tort and contract; second, that physical loss claims are capable of alternative pleading in tort or contract and should not be considered to be a matter of concern or contention in the tort-contract debate.

Initially, the scope of the economic loss issue will be limited to one involving the claims in which the defendant's duty of care in tort is related to the performance of his contractual obligations. Cases dealing with economic loss so circumscribed fall into two factual groupings, described hereafter under the headings of "privity" and "non-privity". The non-privity cases (*e.g.*, those in which there is no direct contractual link between the litigants) will be analysed to demonstrate that Canadian law, due to the essentially contractual nature of the defendant's obligation, does not recognize the tortious duty of care where financial loss is claimed.

In the Supreme Court decision *Rivtow Marine Ltd. v. Washington Iron Works*,[4] the most salient case in this respect, the recovery for economic loss in the non-privity relationship is shown to be clearly linked to the tort-contract division in the privity relationship. This nexus is developed primarily through the concept of the "independent tort" — an ambiguous concept which in Canadian law appears to take on varying connotations in accordance with the nature of the loss.

A second aspect of the non-privity cases concerns the rationales that might explain why contract should so limit the tortious duty of care in claims involving economic loss. In Canadian law, this question translates into one of determining the scope of *Rivtow Marine*: does the decision apply merely to its own specific facts (a claim for cost of repairs in a product liability case) or does the reasoning extend to preclude all claims for economic loss that are related to the performance of contractual obligations?

Two models will be advanced. One model views the contract as affecting the character of the duty of care in tort, an example of which may be found in the reasons of Stamp L.J. in *Dutton v. Bognor Regis Urban District Council*.[5] The alternate model describes the contractual limitation on economic loss claims in tort in terms of the character of the loss, suggesting that the core of contractual loss is what is described as an "expectation loss".[6] It is suggested that the law of torts is inappropriate

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[3] Developed at length in Irvine, *id.*; Morgan, *id.*

[4] [1974] S.C.R. 1189, 40 D.L.R. (3d) 530 (1973).

[5] [1972] 1 Q.B. 373, [1972] 1 All E.R. 462 (C.A. 1971).

[6] Developed in Cane, *supra* note 2.

to compensate unrealized expectations, which can only be adjusted through the contractual regime. The former model, explained in terms of the effect of contract upon the character of the duty, tends to preclude recovery for all financial loss of contractual origin. The latter model, based on expectation losses, applies in the main to limit recovery for economic loss where the claim arises in product liability cases.

The apparent scope of *Rivtow Marine* in conjunction with the conclusions drawn from the non-privity sector will then be considered in the context of the privity cases. In a privity situation, the plaintiff is claiming recovery for economic loss in tort for what is tantamount to a breach of the defendant's contractual obligation. When the results that flow from the non-privity sector are brought to bear on the privity fact situation, the conclusions suggest that contractual physical loss claims are recoverable in tort, meaning that the tort-contract issue translates into that of the recovery for economic loss. The paper will conclude with an analysis of physical loss claims to determine whether there has been the same impediment to recovery in tort where the defendant's negligence was connected with the performance of contractual obligations, but the loss suffered was physical rather than economic in character.

## II. Economic Loss

One of the difficulties presented in discussing claims for economic loss in tort is that the subject matter comprises a variety of different fact situations that appear to have little correlation save the nature of the loss.[7] This indeed may lie at the heart of the problem that courts are encountering in formulating a consistent explanation as to why claims for economic loss require special consideration in the law of torts.[8] Lord Denning's reflections on the subject perhaps express the difficulties inherent in the issue of recovery for economic loss when viewed in all of its manifestations:

> The more I think about these cases, the more difficult I find it to put each into its proper pigeon-hole. Sometimes I say: 'There was no duty.' In others I say: 'The damage was too remote.' So much so that I think the time has come to discard those tests which have proved so elusive. It seems to me better to consider the particular relationship in hand, and see whether or not, as a matter of policy, economic loss should be recoverable.[9]

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[7] Categories of economic loss claims might include losses suffered by reason of damage to property in which the plaintiff has no proprietary interest, losses suffered from the death or injury of another, and losses suffered by reason of incorrect information or advice. For further discussion *see* Jolowicz, *supra* note 2. A fourth category, losses suffered by a negligent breach of contractual obligation, is primarily the subject matter of this paper, and is recognized at least in the product liability cases *See* Schwartz, *supra* note 2; Solomon & Feldthusen, *supra* note 2, at 186

[8] This theme is developed in part by Solomon & Feldthusen, *supra* note 2, at 185.

[9] Spartan Steel & Alloys Ltd. v. Martin & Co., [1973] 1 Q.B. 27, at 37, [1972] 3 All E.R. 557, at 567 (C.A. 1972).

The analysis which follows generally accords with the attitude of Lord Denning on the subject. While not delving too deeply into policy,[10] it nevertheless avoids a review of the full gamut of economic loss cases by segregating those claims for economic loss in tort that are related to the performance of the defendant's contractual obligations. These cases will be given separate consideration, based on the theory that the impediment to recovery for economic loss is related to the pre-existing contractual liabilities underlying the dispute. Accordingly, when mention is hereafter made of economic loss, it is intended to refer to those claims for economic loss in which the defendant's negligence also constitutes a breach of or is related to the performance of the defendant's contractual obligations.

As has previously been suggested, these economic loss cases are of two forms. One form occurs when the parties are in a direct contractual relationship, such that A's negligence causes harm to B while also constituting a breach of A's contractual duty to B. This class of case is that which is normally described in the "tort-contract" debate. The other form of economic loss case occurs when the litigants lack privity, but A's negligence causes harm to the plaintiff C, while also constituting a breach of or relating to the performance of A's contract with B. These latter cases are usually described as "economic loss" cases, but of course one might also include under this rubric those claims for economic loss arising in the tort-contract (privity) context.

## III. Non-Privity Cases

The issue in the non-privity cases is usually described as one that pertains to recovery for economic loss caused by the negligence of the defendant, with whom the plaintiff lacks privity. The issue has arisen frequently in contracts for the sale of goods or buildings,[11] and to date, most analysis of economic loss in the non-privity area has been carried out from the perspective of the product liability situation.[12] The typical example is described above where the issue is whether C may recover from A, and if not, whether A's contractual duty to B as regards the

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[10] *See* McCrea v. White Rock, [1975] 2 W.W.R. 593, 56 D.L.R. (3d) 525 (B.C.C.A. 1974), for an adverse comment on policy formulations. Few cases have attempted an analysis of the economic loss question in terms of the underlying policies. The Supreme Court of Canada in *Rivtow Marine*, *supra* note 4, at 1215, 40 D.L.R. (3d) at 547 (Ritchie J.), avoided the "sometimes winding paths leading to the formulation of a 'policy decision' ".

[11] It is now commonly accepted that the principles governing recovery for economic loss from builders are similar to those for recovery from manufacturers for defective chattels: Cane, *supra* note 2, at 117; *Dutton*, *supra* note 5, at 414, [1972] 1 All E.R. at 489 (Stamp L.J.). *But see* the comment of Sachs L.J., at 403, [1972] 1 All E.R. at 481, suggesting the contrary.

[12] Cane, *supra* note 2; Schwartz, *supra* note 2.

supply of the product somehow prevents C from obtaining redress. The impact of the contract on recovery in the non-privity area was described most aptly, once again by Lord Denning, in the decision of *Dutton v. Bognor Regis Urban District Council* as follows:

> In the 19th century, and the first part of this century, most lawyers believed that no one who was not a party to a contract could sue on it or anything arising out of it. They held that, if one of the parties to a contract was negligent in carrying it out, no third person who was injured by that negligence could sue for damages on that account. The reason given was that the only duty of care was that imposed by the contract. It was owed to the other contracting party, and to no one else.[13]

Where the loss was physical, the issue was described as "the privity of contract fallacy".[14] Prior to *Donoghue v. Stevenson*[15] it was generally thought that the line of cases beginning with *Winterbottom v. Wright*[16] effectively nonsuited C because the matter was contractual and C lacked privity with the defendant. *Donoghue v. Stevenson* was said to put an end to this fallacy by demonstrating that the duty of care A owed to C arose independently of any obligation in contract.[17] However, the question remaining unresolved was whether C was precluded from obtaining redress from A where his loss was purely economic, for example, where he advanced a claim for the cost of repairing a shoddily manufactured product.

In England, the question has not directly arisen for recent consideration, although the House of Lords in *Anns v. Merton London Borough Council*[18] has seen fit to allow a claim for economic loss that arises when the plaintiff takes steps to effect repairs to a badly constructed building, so as to prevent injury or remove risks to the safety or health of persons. This result is in contrast to the Canadian position, where it is clear, following the majority decision in *Rivtow Marine*, that the plaintiff cannot recover for his loss whether physical danger is involved or not. A further question arising from the *Rivtow Marine* decision is whether the contractual relationship between the manufacturer and the distributor explains why the manufacturer is excused from liability in tort to the plaintiff purchaser. Given that the *Rivtow Marine* decision is central to the matters here under consideration, it is appropriate to analyze the case in some depth. However, before considering the *Rivtow Marine* decision, a few prefatory remarks will be made on the "independent tort" — a concept which is prominent in

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[13] *Supra* note 5, at 392, [1972] 1 All E.R. at 471.

[14] *See* P. WINFIELD, TEXTBOOK OF THE LAW OF TORT 662 (4th ed. 1948).

[15] [1932] A.C. 562, [1932] All E.R. Rep. 1 (H.L.).

[16] 10 M. & W. 109, at 115, 152 E.R. 402, at 405 (Ex. 1842).

[17] *Supra* note 15, at 596, [1932] All E.R. Rep. at 19, 25; *Dutton*, *supra* note 5, at 393, [1972] 1 All E.R. at 471.

[18] [1978] A.C. 728, [1977] 2 All E.R. 492 (H.L. 1977)

*Rivtow Marine* and which serves to connect both the tort overlay cases and the economic loss decisions of the type here under review.

### A. *The Independent Tort*

It is common ground that no alternative claim may be advanced in tort for a claim arising in the contractual setting, unless the duty arises independently of contract. Greer L.J. described the test in the English Court of Appeal decision of *Jarvis v. Moy, Davies, Smith, Vandervell & Co.* as follows:

> The distinction in the modern view, for this purpose, between contract and tort may be put thus: where the breach of duty alleged arises out of a liability independently of the personal obligation undertaken by contract, it is a tort, and it may be a tort even though there may happen to be a contract between the parties, if the duty in fact arises independently of that contract.[19]

However, stating that the duty of care must arise independently of contract does not adequately describe the issue, because the concept of independence is somewhat protean in makeup, assuming different connotations according to the inclination of the judge to allow or refuse alternative claims in tort. In those cases where contractual duties are thought to exclude a duty of care, an independent tort is one that arises from an obligation that is substantively different from that required by the contract. Expressed in this fashion, the question before the court is whether "[t]he complaint that is made against [the defendants] is of a failure to do the very thing which they contracted to do".[20]

In Canadian law, this test has been broadened somewhat so as to define an independent tort as one "unconnected with the performance of any contract either express or implied".[21] This test was first formulated by Pigeon J. in *J. Nunes Diamonds Ltd. v. Dominion Electric Protection Co.*,[22] in which subsequent oral representations were found to have altered the nature of the bargain by adding to the defendant's obligations. The case has been the subject of criticism,[23] and it is perhaps arguable that the representations therein were advanced outside the four corners of any contractual obligation. Nevertheless, the Court was obviously concerned with the sanctity of the contract and the ease with which oral representations made in the course of performance of a contract could create additional (and probably uninsured) obligations. As a result a

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[19] [1936] 1 K.B. 399, at 405, 105 L.J.K.B. 309 (C.A.).

[20] Bagot v. Stevens Scanlan & Co., [1966] 1 Q.B. 197, at 204, [1964] 3 All E.R. 577, at 580 (Diplock L.J.); *Jarvis*, *id.* at 405.

[21] *Rivtow Marine*, *supra* note 4, at 1214, 40 D.L.R. (3d) at 546 (Ritchie J.).

[22] [1972] S.C.R. 769, 26 D.L.R. (3d) 699.

[23] Symmons, *The Problem of the Applicability of Tort Liability to Negligent Mis-statements in Contractual Situations: A Critique on the Nunes Diamonds and Sealand Cases*, 21 McGILL L.J. 79 (1975). However, in support of the decision, *see* Irvine, *supra* note 2, at 283.

broader test, one based on mere connection with the performance of the contract, was formulated. This test was further confirmed in *Rivtow Marine*,[24] in which the defendant's contractual obligations, although not directly in issue, were still found relevant so as to preclude the plaintiff's claim for economic loss. As will be seen, the link between *Nunes Diamonds* and *Rivtow Marine* is of considerable significance to the matters considered herein.

The foregoing definitions of an independent tort are to be contrasted with those definitions in which independence is determined not by reference to the substance of the obligations, but rather in terms of the origin of the duty. In this category of cases, negligence *per se* is seen as independent of contract because the source of the duty arises by operation of law, without regard to the contract. The test is sometimes expressed in terms of whether it is necessary for the plaintiff to rely upon and prove a contract in order to maintain his action successfully.

> The rule of law on the subject, as I understand it, is that, if in order to make out a cause of action it is not necessary for the plaintiff to rely on a contract, the action is one founded on tort; but, on the other hand, if, in order successfully to maintain his action, it is necessary for him to rely upon and prove a contract, the action is one founded upon contract.[25]

In modern times, negligence as an independent tort itself was bolstered by the reasoning of Lord Macmillan in *Donoghue v. Stevenson*, as the following excerpt illustrates:

> It humbly appears to me that the diversity of view which is exhibited in such cases as *George v. Skivington*, L.R. 5 Ex. 1, on the one hand and *Blacker v. Lake & Elliot, Ltd.*, 106 L.T. 533, on the other hand — to take two extreme instances — is explained by the fact that in the discussion of the topic which now engages your Lordships' attention two rival principles of the law find a meeting place where each has contended for supremacy. On the one hand, there is the well established principle that no one other than a party to a contract can complain of a breach of that contract. On the other hand, there is the equally well established doctrine that negligence apart from contract gives a right of action to the party injured by that negligence — and here I use the term negligence, of course, in its technical legal sense, implying a duty owed and neglected. *The fact that there is a contractual relationship between the parties which may give rise to an action for breach of contract, does not exclude the co-existence of a right of action founded on negligence as between the same parties, independently of the contract, though arising out of the relationship in fact brought about by the contract.* Of this the best illustration is the right of the injured railway passenger to sue the railway company either for breach of the contract of safe carriage or for negligence in carrying him. And there is no reason why the same set of facts should not give

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[24] *Rivtow Marine*, *supra* note 4, at 1214, 40 D.L.R. (3d) at 546.

[25] Turner v. Stallibrass, [1898] 1 Q.B. 56, at 58, 67 L.J.Q.B. 52, at 53-54 (Smith L.J.), applied in Jackson v. Mayfair Window Cleaning Co., [1952] 1 All E.R. 215, at 217, [1952] 1 T.L.R. 175, at 176-77 (Barry J.).

> one person a right of action in contract and another person a right of action in tort.[26]

Thus, Lord Denning, with some justification, could conclude that "[s]ince the decision of *Donoghue v. Stevenson* in 1932, we have had negligence established as an independent tort in itself".[27]

However, definitions of an independent tort in terms of the origin of the duty are obviously fundamentally opposed to those expressed in cases such as *Nunes Diamonds*, where independence was defined in terms of the substance of the obligation. An example of the complications that may arise from a failure to distinguish clearly between the two definitions is perhaps evident in the decision of *Canadian Western Natural Gas Co. v. Pathfinders Surveys Ltd.*[28] The majority of the Alberta Court of Appeal ruled that the tort of negligence, although involving a breach of the very thing contracted to do — the laying out of a survey for the construction of a pipeline — was an independent tort, presumably to satisfy the test enunciated by the Supreme Court in *Nunes Diamonds*.

> The English authorities referred to above support the conclusion that the duty of care set out in *Donaghue* [*sic*] *v. Stevenson* and *Anns* case is not a contractual duty nor does it arise by virtue of there having been a contract between the parties or between one of the parties and another. The duty arises from proximity and neighborhood. . . . This is a duty independent of contract and the neighbors referred to include 'those whom he intends to consume his products' whether they purchased the product from the manufacturer or others.[29]

One of the questions to be considered in this paper is whether there is a correlation between the different definitions of independence described above and the nature of the loss. It is submitted that the answer to this query suggests such a correlation does indeed exist, and that it is possible to reconcile the foregoing definitions on the basis that the independent tort precluding the establishment of a duty of care arises only in cases where the claim is one for financial loss. This conclusion may be drawn from the *Rivtow Marine* decision.

### B. *Rivtow Marine Ltd. v. Washington Iron Works*

In *Rivtow Marine*, the plaintiff's claim was for the financial loss incurred in repairing a crane designed and manufactured by the defendant Washington Iron Works. The crane formed part of a barge purchased by

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[26] *Supra* note 15, at 609-10, [1932] All E.R. at 25 (Macmillan L.J.) (emphasis added). *See also* Lord Atkin's comments to the same effect, at 596-97, [1932] All E.R. Rep. at 19.

[27] Scruttons Ltd. v. Midland Silicones Ltd., [1962] A.C. 446, at 488, [1962] 1 All E.R. 1, at 19.

[28] 21 A.R. 459, 12 Alta. L.R. (2d) 135 (C.A. 1980).

[29] *Id.* at 477-78, 12 Alta. L.R. (2d) at 151.

the plaintiff from a third person (Yarrows), against whom the action was discontinued before trial.[30] The crane was negligently manufactured with defects that eventually manifested themselves in the form of structural cracks. A similar crane on a competitor's barge had collapsed killing a worker, and this mishap alerted the plaintiff to the problem, whereafter he discovered the cracks and removed the barge and crane from service in order to effect the repairs. The plaintiff's claim for damages fell under three headings: (a) cost of repairs of the crane; (b) a normal loss of profits while the crane was being repaired; and (c) additional loss of profits brought about by the repairs of the crane in the plaintiff's high season. The Court found these additional costs could have been avoided had the defendant (and co-defendant's sale representative) given the plaintiff a timely warning when the defects first became known to them. By a majority of seven to two, the Supreme Court of Canada allowed the plaintiff to recover on his claim for the additional loss of profits, *i.e.* head (c) above, but not the cost of repairs or the normal loss of profits.

In the portion of the reasons where the majority rejected the plaintiff's claim for cost of repairs to the crane and the normal loss of profits while undergoing repairs, the Court largely adopted the reasoning of Mr. Justice Tysoe, who had delivered the unanimous decision of the British Columbia Court of Appeal.[31] The substantive portion of the Court of Appeal's reasons, and Mr. Justice Ritchie's comments dismissing this portion of the plaintiff's claim were as follows:

> In my opinion the law of British Columbia as it exists today is that neither a manufacturer of a potentially dangerous or defective article nor other person who is within the proximity of relationship contemplated in *McAlister (Donoghue) v. Stevenson*, is liable in tort, as distinct from contract, to an ultimate consumer or user for damage arising in the article itself, or for economic loss resulting from the defect in the article, but only for personal injury and damage to other property caused by the article or its use. It is my view that to give effect to the claims of Rivtow it would be necessary to extend the rule of liability laid down in the *Donoghue* case beyond what it now is. I do not feel that this Court would be justified in extending it so that it covers the character of damage suffered by Rivtow. I think that, if that is to be done, it must be left to a higher Court to do it.
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> Mr. Justice Tysoe's conclusion was based in large measure on a series of American cases, and particularly *Trans World Airlines Inc vs Curtiss-Wright Corp.*, where it is pointed out that *the liability for the cost of repairing damage to the defective article itself and for the economic loss flowing directly from the negligence, is akin to liability under the terms of an express or implied warranty of fitness and as it is contractual in origin cannot be enforced against the manufacturer by a stranger to the contract*. It was, I think, on this basis that the learned trial judge disallowed the appellant's claim for repairs and for such economic loss as it would, in any event, have

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[30] 74 W.W.R. 110, at 112 (B.C.S.C. 1970).

[31] [1972] 3 W.W.R. 735, 26 D.L.R. (3d) 559 (B.C.C.A.).

> sustained even if the proper warning had been given. I agree with this conclusion for the same reason. . . .[32]

Ritchie J. viewed the defendant's liability as essentially contractual in nature and akin to the warranty of fitness. Because this liability was "contractual in origin", the plaintiff could not succeed against the defendant with whom he lacked privity. It is apparent that, in terms of a "*prima facie* duty" as described by Lord Wilberforce in the *Anns* decision,[33] sufficient proximity and neighborhood existed between the defendant and the plaintiff. The duty was negatived because the liability was of the type that would arise on a contract between the defendant and the immediate purchaser. Contractual liability for this type of loss precludes any duty of care in tort despite the fact that the same contractual liability for physical damage would not prevent the tortious claim. Because this type of economic loss is contractual in origin, it is subject to claims only in contract; thus privity is a prerequisite to bringing suit. The underlying premise for this type of liability, *i.e.* for failure to provide a chattel that was fit for its intended purpose, is that the domains of contract and tort are mutually exclusive, meaning in effect that tort recovery may not be used to overlay the defendant's contractual liability. By this line of reasoning, one begins to recognize the link between the economic loss issue and the tort-contract issue under debate in privity cases.

This conceptual link was further developed in that portion of the majority's reasons which awarded the plaintiff damages for his additional loss of profits incurred, because of the failure of the defendant manufacturer (and the co-defendant sales representative) to provide the plaintiff with a timely warning of the defects. To recover for the additional cost of repairs, the plaintiff faced three hurdles. First, he had

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[32] *Supra* note 4, at 1206-07, 40 D.L.R. (3d) at 541-42 (emphasis added).

[33] [T]he position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those 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 person to whom it is owed or the damages to which a breach of it may rise: see *Dorset Yacht* case [1970] A.C. 1004, *per* Lord Reid.

*Anns*, *supra* note 18, at 751-52, [1977] 2 All E.R. at 498-99 (Wilberforce L.J.). Expressed in these terms, the *prima facie* duty is rarely a factor in the contractual setting. The contractual relationship provides sufficient foresight to fix liability where the defendant's conduct is related to the performance of the contract.

to establish that the defendants owed him a duty of care to warn him of the dangerous defect when first known to them; on this point the plaintiff ultimately succeeded.[34] Next, the plaintiff had to convince the Court that economic loss due to negligence was recoverable in tort. This required an extension of general economic loss principles in view of those opinions that regarded the *Hedley Byrne & Co. v. Heller & Partners Ltd.*[35] decision as merely stating an exception to the general rule against recovery for economic loss.[36] The majority, however, dispatched this issue in the plaintiff's favour by adopting as Canadian law the proposition stated in *Ministry of Housing & Local Government v. Sharp* that the establishment of a duty of care no longer should depend on whether the loss is physical or financial.

> So far, however, as the law of negligence relating to civil actions is concerned, the existence of a duty to take reasonable care no longer depends upon whether it is physical injury or financial loss which can reasonably be foreseen as a result of a failure to take such care.[37]

The apparent result is that if the duty is found owing, economic loss will be recoverable so long as it is the "direct and demonstrably foreseeable result of the breach of that duty".[38] This proposition, stated perhaps too broadly if taken at face value,[39] is probably the most significant in the decision in terms of the broad economic loss question in Canada.

Having established a duty to warn and eliminated any impediment in terms of the character of loss, the plaintiff claiming against the manufacturer had still to distinguish the claim for the additional loss of profits from that for the cost of repairs and the normal loss of profits. Both types of loss were economic in character and at first blush appeared "contractual in origin" and connected with the defendant manufacturer's contract. However, the majority of the Supreme Court ruled that the claim for the additional loss caused by the defendant's failure to provide a timely warning was not contractual in origin, and in so doing adopted,

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[34] Reliance was placed on pre-Donoghue v. Stevenson cases which established a manufacturer's duty, independent of contractual obligations, to warn his customers of known dangers. *E.g.*, George v. Skivington, 39 L.J. Exch. 8, L.R. 5 Ex. 1 (1869), referred to in the judgment of Ritchie J. in *Rivtow Marine*, *supra* note 4, at 1201-02, 40 D.L.R. (3d) at 538.

[35] [1964] A.C. 465, [1963] 2 All E.R. 575 (H.L. 1963).

[36] This was the conclusion of Tysoe J.A. in the Court of Appeal, *supra* note 31; of Atiyah, *supra* note 2; and, even after *Rivtow Marine*, of the Court in Bethlehem Steel Corp. v. St. Lawrence Seaway Auth., [1978] 1 F.C. 464, 79 D.L.R. (3d) 522 (Trial D. 1977).

[37] [1970] 2 Q.B. 223, at 278, [1970] 1 All E.R. 1009, at 1027 (C.A.) (Salmon L.J.).

[38] *Rivtow Marine*, *supra* note 4, at 1215, 40 D.L.R. (3d) at 547

[39] It has been suggested that the remarks of Ritchie J. apply only to product liability cases and were not intended to overrule such cases as Cattle v. Stockton Waterworks Co., 44 L.J.Q.B. 139, 10 Q.B. 453 (1875): *see* Solomon, *supra* note 2, at 180.

but distinguished in the following fashion, the test stated by Pigeon J. in *Nunes Diamonds*:

> The case [*Hedley Byrne*] was recently distinguished in this Court in *J. Nunes Diamonds Ltd. v. Dominion Electric Protection Co.*, [1972] S.C.R. 769, 26 D.L.R. (3d) 600, where Pigeon J., speaking for the majority of the Court, said at p. 777:
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> > Furthermore, the basis of tort liability considered in *Hedley Byrne* is inapplicable to any case where the relationship between the parties is governed by a contract, unless the negligence relied on can properly be considered as 'an independent tort' unconnected with the performance of that contract. . . . This is specially important in the present case on account of the provisions of the contract with respect to the nature of the obligations assumed and the practical exclusion of responsibility for failure to perform them.
>
> In the present case, however, I am of [*sic*] opinion that the failure to warn was 'an independent tort' unconnected with the performance of any contract either express or implied.[40]

The significant point to note in comparing the results obtained by the plaintiff in *Rivtow Marine* for the different heads of damage is that, while the Supreme Court extended the ambit of recovery in economic loss cases and rejected Tysoe J.A.'s statement that "personal injury or damage to property caused by the use of a dangerous or potentially dangerous article is the very gist of any action in tort against the negligent manufacturer",[41] it nevertheless maintained the dichotomy of the economic and physical nature of the loss where the liability is contractual in origin. The *Donoghue v. Stevenson* decision, when placed alongside that in *Rivtow Marine*, demonstrates this point. In the former case, the majority dismissed any contractual impediment to recovery where the loss was physical in kind, whereas in *Rivtow Marine*, the contractual origin or nature of the loss remained a factor where the loss was economic in kind. It is not simply that economic loss is not recoverable (the unanimous decision of the Court was to the opposite effect). Rather, the *ratio* of the case appears to be that no duty of care is owed in tort for economic loss that is contractual in nature or origin.

By an extension of this analysis, the two aspects of the independent tort described previously can be seen to co-exist in the non-privity field. Moreover, each applies according to the nature of the loss claimed. The meaning attributed to the independent tort by Pigeon J. in *Nunes Diamonds* and applied by Ritchie J. in *Rivtow Marine* considers whether the tort is related to the performance of a contractual term, as contrasted with the meaning given by Lord Macmillan in *Donoghue v. Stevenson*[42] where the damage flowing from the negligent act was physical in kind. In *Donoghue*, the fact that the duty of care was connected with the performance of the defendant's contractual obligation was disregarded

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[40] *Supra* note 4, at 1213-14, 40 D.L.R. (3d) at 546.
[41] *Supra* note 31, at 758, 26 D.L.R. (3d) at 575.
[42] *Supra* note 15, at 609-10, [1932] All E.R. Rep. at 25.

because his negligence causing physical loss was independent of any contractual obligation owed. From these observations, one is forced to conclude that the Supreme Court's restrictive concept of an independent duty seems relevant only where the loss is merely economic in kind.

This conclusion is reinforced by the earlier decision of the Supreme Court in *Alliance Assurance Co. v. Dominion Electric Protection Co.*[43] The Court was called upon to consider whether the defendant owed the plaintiff a duty of care under Quebec quasi-delictual (tort) law for damage caused by failure to turn off a water sprinkler. Pigeon J. on behalf of the Court treated the question in the context of both privity and non-privity situations, as there was some question whether the plaintiff, through subrogated rights, had contractual privity with the defendant. The contract may have required the defendant to maintain surveillance of the sprinkler system; however, the contract also contained an exemption clause that limited the defendant's liability in contract. The only issue, therefore, was whether the plaintiff had a quasi-delictual claim. The Court ultimately dismissed the claim on the ground that the duty to turn off the water sprinkler was solely contractual in origin and not subject to a claim by the plaintiff in tort. In refusing the claim, however, Pigeon J. distinguished the situation of the dangerous manufacture of goods as follows:

> Many cases were cited respecting the responsibility of the manufacturer of a dangerous product towards persons who did not contract with him. In such cases, the source of the responsibility is the breach on [*sic*] the duty lying upon the manufacturer not to put such things on the market and this duty is independent of his contractual obligation, as vendor: *Ross v. Dunstall*. . . . Examples could be multiplied and in every case where quasi-delictual responsibility has been held to exist, it will be found that its basis is the existence of a duty other than one deriving solely from a contractual obligation.[44]

Pigeon J. was later to broaden this statement in *Nunes Diamonds*, holding that the alleged misrepresentation could be categorized as a duty other than one deriving solely from a contractual obligation, and reverting to the independent tort test formulated in terms of the connection of the duty with the performance of the contract. But it is apparent from the *obiter* comments in the *Alliance* case that Pigeon J. regarded the duty of care in physical damage product liability cases, although related to the performance of a contract, as nevertheless, arising independent of the contract in the same fashion as described by Lord Macmillan in *Donoghue v. Stevenson*. Looking ahead for a moment, it can obviously be argued that the same dichotomy of definitions of an independent tort based upon the nature of the loss should apply to the privity cases, where recovery in tort is seen to turn on whether or not the tort is independent of the contract.

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[43] [1970] S.C.R. 168 (1969).

[44] *Id.* at 174.

A further conclusion following from the reasoning in *Rivtow Marine* is that the issue of recovery for economic loss in the non-privity fact situations seems linked to the demarcation between the fields of tort and contract in the privity fact situation. The economic loss claim for the cost of repairs and the normal loss of profits was refused because it was contractual in origin, whereas the claim for the additional loss of profits was allowed, although for the same character of loss, because it was founded on a duty unconnected with the performance of any contract. The contract referred to by the majority is the privity contract between the defendant and his immediate purchaser, for it is the defendant's contractual duty in terms of an express or implied warranty of fitness that precludes operation of the defendant's tortious duty of care. It would necessarily follow that the defendant could not be subject to suit by Yarrows in tort for the same loss because, if the immediate purchaser were able to bring suit against the defendant manufacturer in tort for this nature of loss, there would be no logical reason to deny the plaintiff a similar right to recover. Ritchie J. could not, in such circumstances, describe the defendant's liability as merely "contractual in origin". Besides, the majority referred to the "independent tort" test in the tort-contract context of the *Nunes Diamonds* decision and applied it to resolve the question of recovery for economic loss in the non-privity fact situation. This strongly suggests that the relationship in the privity context is intertwined with the issue of recovery for economic loss in the non-privity situation.

In denying recovery for economic loss claimed by a subsequent purchaser, the majority in *Rivtow Marine* was essentially upholding the demarcation of the boundary between tort and contract. Seen in this light, the decision suggests that the threshold issue in Canadian law on the question of recovery for economic loss connected with the performance of a contract is properly characterized in terms of the division between tort and contract. The question that remains is the meaning to be attributed to liability which is "contractual in origin". Does the rationale apply to all claims for economic loss that are connected with the performance of a contract? Or is it limited to the specific facts of the *Rivtow Marine* case, there being a claim for economic loss arising in the product liability situation?

### C. *Sealand Pacific*

In attempting to establish the scope of the *Rivtow Marine* decision, one must also consider the British Columbia Court of Appeal decision in *Sealand of the Pacific v. Robert C. McHaffie Ltd.*[45] Despite neither reference to *Rivtow Marine* nor much attention to the nature of the loss, the *Sealand* case is still of interest because recovery for contractual

[45] [1974] 6 W.W.R. 724, 51 D.L.R. (3d) 702 (B.C.C.A.).

economic loss was denied in a claim unrelated to the sale of a chattel. The British Columbia Court of Appeal was called upon to determine whether an employee could be sued in tort for negligent misstatements made in the course of carrying out contractual duties that his employer owed the plaintiff. The plaintiff had contracted with the defendant corporation which employed the co-defendant naval architect to provide advice on the use of materials for a floating oceanarium. The advice was bad, and the plaintiff incurred financial loss in replacing the improperly specified materials. The plaintiff claimed successfully in contract against the corporation, but had his claims in tort dismissed against both the corporation and its employee. The court applied the *Nunes Diamonds* decision, based on facts closely resembling those before it in *Sealand*, to the claim against the company in tort. More significant, however, was the court's ruling that the employee's duty of care in tort was not independent of the contract. The court concluded that any duty regarding the giving of advice was not that of the employee, but rather was the company's responsibility under its contract with the plaintiff.

> An employee's act or omission that constitutes his employer's breach of contract may also impose a liability on the employee in tort. However, this will only be so if there is breach of a duty owed (independently of the contract) by the employee to the other party. Mr. McHaffie did not owe the duty to Sealand to make inquiries. That was a company responsibility. It is the failure to carry out that corporate duty imposed by contract that can attract liability to the company. The duty in negligence and the duty in contract may stand side by side but the duty in contract is not imposed upon the employee as a duty in tort.[46]

There are some difficulties with this reasoning if taken strictly at face value. In the first place, it is somewhat doubtful that a professional architect owes no duty to make inquiries simply because responsibility lies with the company pursuant to a contract with the plaintiff. The general principles of neighbourhood and proximity would seem to make it difficult to refute the plaintiff's claim of a *prima facie* duty of care: the defendant employee ought to have foreseen that his negligence was likely to cause loss to the plaintiff. In considering the *Sealand* case, however, one should perhaps bear in mind that, where there is the suggestion that the employee owes no duty of care in tort to carry out his employer's contractual responsibility with the plaintiff, a distinction should be made between the rationale that denies the existence of the duty of care on the basis that the liability is contractual in origin and the rationale that would deny recovery in tort on the basis that the scope of the tortious duty is limited by the nature of the contractual task facing the defendant. In the latter case, one is saying that *the contract affects the defendant's standard of care*. An example of such a situation is seen in the Supreme Court of Canada's decision in *Cominco Ltd. v. Bilton*.[47] As in *Sealand*,

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[46] *Id.* at 728, 51 D.L.R. (3d) at 706.

[47] [1971] S.C.R. 413, 15 D.L.R. (3d) 60 (1970).

the plaintiff was claiming against the employee of a corporation with which it had a contract. The contract was for the carriage of goods and the plaintiff sought recovery for his loss due to the alleged negligent mooring of a vessel by the defendant employee. The majority accepted the minority conclusion that the defendant employee owed a duty of care to the plaintiff in terms of proximity and neighbourhood, yet found nevertheless that he was not negligent because the contractual task to which he was held by his employer affected the standard of care (or "scope of duty", to use the Supreme Court's terminology) against which the defendant's actions were measured. The distinction on this point is demonstrated by comparing the reasoning of the judge in the Exchequer Court with that of the majority in the Supreme Court. The Exchequer Court found the defendant negligent, but ruled that no duty of care was owed in law for a claim involving damage to goods unless a collision had occurred, whereas the Supreme Court unanimously rejected the trial judge's conclusions and found a duty of care in law. As mentioned above, however, the majority went on to hold that the defendant's contractual obligations determined his standard of care and that, in the circumstances, he was not negligent.

A case such as *Cominco*, which integrates the contract into the standard of care, presents one means to attack the reasoning that would support separate spheres of tort and contract. In such an analysis, the domains of tort and contract are not regarded as entirely disjunctive, but are capable of coherent integration so as to allow the contractual nature of the relationship to impinge on the standard of care owed by the defendant in tort. It is perhaps of interest to note that, if its intimations in the *Anns* decision are to be given any weight,[48] the House of Lords may be inclining toward this line of reasoning. In Canadian law and particularly in *Rivtow Marine*, however, the duty of care is negated by the defendant's pre-existing contractual liability for this type of loss, and this result should not be confused with the question of the contract's effect on the standard of care. That is, in both *Rivtow Marine* and *Sealand Pacific* the Court was not saying that the contractual obligations

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[48] "But leaving aside such cases as arise between contracting parties, when the terms of the contract have to be considered (see Voli v. Inglewood Shire Council . . . , *per* Windeyer J.). . . ." *Anns*, *supra* note 18, at 759, [1977] 2 All E.R. at 504. Windeyer J. stated.

> First, neither the terms of the architect's engagement, nor the terms of the building contract, can operate to discharge the architect from a duty of care to persons who are strangers to those contracts. Nor can they directly determine what he must do to satisfy his duty to such persons. That duty is cast upon him by law, not because he made a contract, but because he entered upon the work. Nevertheless his contract with the building owner is not an irrelevant circumstance. It determines what was the task upon which he entered. If, for example, it was to design a stage to bear only some specified weight, he would not be liable for the consequences of someone thereafter negligently permitting a greater weight to be put upon it.

Voli v. Inglewood Shire Council, 110 C.L.R. 74, at 85 (Aust. H.C. 1963).

of the employee or his employer affected the question of whether the defendant was negligent, *i.e.* whether he met the standard of care imposed by law. Rather, it was saying that, even though the defendant may have been negligent, the law was not prepared to recognize a duty of care in tort for the nature of the loss because of its contractual origins.

A second concern raised by *Sealand Pacific* is that of determining which contract the Court of Appeal found relevant or, at least, to negative the duty of care owed by the employee. Mr. Justice Seaton appeared to suggest that the employee owed no duty of care if he was performing his employer's contractual duty. This implies that it was the contract between the employer and the plaintiff which was relevant for the purposes of ascertaining whether the employee's duty could be said to be "independent". But the jurisprudence is clear that parties cannot limit the liability of a third person through their contract;[49] and it seems unlikely, therefore, that the law should recognize a theory that limits an employee's duty of care by the terms of the contract that his employer maintains with the plaintiff.

A more logical approach would be that found in the *Rivtow Marine* decision. Because of the nature of the liability, the matter is essentially contractual in kind; to obtain recovery from the defendant, one must have contractual privity with him. This implies that the defendant employee owes no duty of care in tort to anyone for this type of liability, neither to the plaintiff nor to his own employer. The distinction in the *Rivtow Marine* decision is that one can look to the implied warranty of fitness found in the contract of sale of the chattel to support the conclusion that the liability is contractual in origin. By analogy, although admittedly with some interpolation, it would seem from the example in the *Sealand* case that where an employee, or for that matter an independent contractor, is performing a contractual duty his liability is strictly contractual if the loss is economic and relates back to the express or implied duties under the contract of employment. In this fashion, the *Sealand* case might be cited as an example of the rationale developed in the *Rivtow Marine* decision applied to contracts for the supply of services, including those to furnish advice. It is obviously an example of the independent tort test developed in the privity area being applied to defeat a claim for economic loss in the non-privity area.

The *Sealand* case was later distinguished by the British Columbia Court of Appeal in *District of Surrey v. Carroll-Hatch & Associates Ltd.*[50] In this action, the plaintiff had launched suit against both an architect with whom it had a contract and a sub-contractor engineering firm with whom it had no privity. The plaintiff alleged that the

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[49] *Scruttons Ltd., supra* note 27; New Zealand Shipping Co. v. A.M. Satterthwaite & Co., [1975] A.C. 154, [1974] 1 All E.R. 1015 (P.C. 1974) (N.Z.); Canadian Gen. Elec. Co. v. Pickford & Black Ltd., [1971] S.C.R. 41, at 43, 14 D.L.R. (3d) 372, at 373-74 (1970).

[50] [1979] 6 W.W.R. 289, 101 D.L.R. (3d) 218 (B.C.C.A.).

non-privity defendant had failed to provide a warning of the inadequacies of a soil test. The plaintiff's building ultimately suffered serious structural defects because the foundation had not been constructed so as to accommodate the type of soil that existed on the site. The defendant argued that the *Sealand* case should apply to defeat the plaintiff's claim. The Court of Appeal rejected this submission on the ground that the engineer, in providing the soils report to the co-defendant architect, was not acting pursuant to any contractual obligation that he owed the architect. This appears to be a fairly surprising conclusion in view of the commercial nature of the relationship. Nevertheless it points out that "independence" is being defined in relation to the contractual term in the contract between the defendant and his immediate contracting client, and is in line with the reasoning in *Rivtow Marine*. In *obiter*, the court also suggested that the principle enunciated in the *Sealand* case regarding an independent tort should be limited to claims against employees because it is only in such situations that the liability of an employee raises the potential for the vicarious liability of the employer.[51] The tangential issue of an employer's vicarious liability under the doctrine of *respondeat superior* is not under debate here.[52] Rather, it is sufficient merely to point out that the British Columbia Court of Appeal was inclining away from the application of the independent tort test in *Nunes Diamonds*, a conclusion which seems difficult to reconcile with the support given to the doctrine by the Supreme Court in the *Rivtow Marine* decision.[53]

### D. *Dutton v. Bognor Regis Urban District Council*

As is perhaps demonstrated by the foregoing cases, the full extent of the *Rivtow Marine* decision has not yet been determined. The issue remains whether the case is limited to economic loss claims for the cost of repairs to chattels, or whether it might extend to all types of claims for economic loss such as the type that arose in the *Sealand* decision. One case that has in part considered a similar issue and provided a slightly broader basis on which to analyse the problem is that of *Dutton v. Bognor Regis Urban District Council*,[54] particularly the reasons of Stamp L.J. whose conclusions closely resemble those reached by Ritchie J. in *Rivtow Marine*. In the *Dutton* case, Stamp L.J. suggested that a purchaser could not recover against the manufacturer for economic loss

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[51] *Id.* at 303, 101 D.L.R. (3d) at 230.

[52] Lord Denning M.R. would suggest not: *see Scruttons Ltd.*, *supra* note 27, at 492, [1962] 1 All E.R. at 22. Spence J. appears to take the opposite view: *see Cominco Ltd.*, *supra* note 47, at 444, 15 D.L.R. (3d) at 84.

[53] The same limitation is placed on *Nunes Diamonds* by Taylor J. in Toronto-Dominion Bank v. Guest, 16 B.C.L.R. 174, at 180-81, 105 D.L.R. (3d) 347, at 353 (S.C. 1979).

[54] *Supra* note 5.

that flows from the manufacture of merely defective goods because the contractual relationship under which the manufacturer operates *affects the character of the duty* the defendant owes the plaintiff. This conclusion, although not explicitly stated in the reasons, is reflected in the rationale underpinning Stamp L.J.'s conclusions. In view of the similarity of his conclusions to those of Ritchie J. in *Rivtow Marine*, the analysis adopted by Stamp L.J. in the *Dutton* case takes on a special relevance for Canadian law and merits close attention here.

In *Dutton*, the plaintiff had suffered damage to his house caused by improper construction of the foundations. The plaintiff originally claimed against the builder and the local council that employed the building inspector to inspect the foundations during their construction. There was no contractual link between the plaintiff and the builder as the plaintiff had purchased the house from the original owner. The foundations were improperly constructed due to the combined negligence of the builder, who failed to construct the house to the municipal standards, and the inspector, who failed to ensure adherence by the builder to those standards. When the matter came before the Court of Appeal, the plaintiff had settled with the builder and was pursuing his claim against the local council alone. Despite the builder's absence before the Court of Appeal, his theoretical liability was still very much in issue. The council argued that the builder owed no duty to the plaintiff and that its liability should be no greater than that of the builder whose negligence primarily caused the loss.

The court found unanimously for the plaintiff against the council. In arriving at his decision, however, Stamp L.J. adopted a unique approach to the problem and as a result differed from his brethren on most points, excepting that of the ultimate liability of the council. It was his Lordship's opinion, contrary to that of Lord Denning and Sachs L.J., that the builder probably owed no duty of care to the plaintiff for the nature of the loss.[55] Also contrary to the views of his brethren was his conclusion that it was illogical to measure the inspector's duty by the same standards as those of the builder. Consequently, even if the builder was not liable in tort, the inspector nevertheless owed a duty of care to the plaintiff for the type of loss that occurred. These results followed an analysis of the defendant's liability based, not on the classification of the loss as economic or physical, but on the assessment of the character of the duty of care that each defendant owed the plaintiff. Thus, viewing the economic loss issue as an adjunct to the duty question, Stamp L.J. distinguished the *Donoghue v. Stevenson* situation from that before him in the following manner:

> But the distinction between the case of the manufacturer of a dangerous thing which causes damage and that of a thing which turns out to be defective and

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[55] *Id.* at 414-15, [1972] 1 All E.R. at 489-90. In the absence of the builder he expressed no final opinion on the subject.

> valueless lies I think *not in the nature of the injury but in the character of the duty*. I have a duty not carelessly to put out a dangerous thing which may cause damage to one who may purchase it, but the duty does not extend to putting out carelessly a defective or useless or valueless thing.[56]

In the case of the builder, the significant factor affecting the character of the duty of care he owed was the contractual nature of his liability. Like Ritchie J. in the *Rivtow Marine* decision, Stamp L.J. noted that the builder's negligence was akin to the type of liability which follows a breach of a contractual warranty that a thing manufactured is reasonably fit for its purpose. For this type of liability, Stamp L.J. reasoned that the manufacturer's duty sounded only in contract.

> I may be liable to one who purchases in the market a bottle of ginger beer which I have carelessly manufactured and which is dangerous and causes injury to person or property; but it is not the law that I am liable to him for the loss he suffers because what is found inside the bottle and for which he has paid money is not ginger beer but water. I do not warrant, except to an immediate purchaser, and then by the contract and not in tort, that the thing I manufacture is reasonably fit for its purpose.[57]

Most importantly, Stamp L.J. distinguished the builder's liability from that of the council on the following basis:

> At this point I repeat and emphasize the difference between the position of a local authority clothed with the authority of an act of Parliament to perform the function of making sure that the foundations to the house are secure for the benefit of the subsequent owners of the house *and a builder who is concerned to make a profit*. So approaching the matter there is in my judgment nothing illogical or anomalous in fixing the former with a duty to which the latter is not subject.[58]

Thus, Stamp L.J. distinguished between the duty that arises on the carrying out of a statutory duty and the duty that arises in the profit and loss context of contractual relations.

Stamp L.J. followed a two step methodology, similar to that in *Rivtow Marine*, to determine whether the character of the duty extended liability to the loss. He first looked to ascertain whether the activity was one that created a danger. It is implicit from his reasoning that the nature of the loss was evidence of the risk of danger. Where the damage is physical, the contractual origin of the loss is irrelevant because physical damage is sufficient to establish a duty of care in tort under *Donoghue v. Stevenson* principles. But where there is no danger, usually evidenced by loss which is purely economic, the character of the duty, Stamp L.J. suggested, is affected by the contractual origin of that duty. On the one hand, if the defendant is not working from a contract and therefore is not concerned to make a profit, then it is likely that the character of the duty is sufficient to allow recovery for economic loss. This was his conclusion

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[56] *Id.* at 415, [1972] 1 All E.R. at 490 (emphasis added).
[57] *Id.* at 414, [1972] 1 All E.R. at 489.
[58] *Id.* at 415, [1972] 1 All E.R. at 490 (emphasis added).

regarding the inspector's duty in *Dutton*, and also that of the Supreme Court regarding the duty to warn owed by the manufacturer in the *Rivtow Marine* decision. This duty, it should be recalled, was found by the majority not to be contractual in origin. It is also in harmony with the general tendency in tort law to extend the scope of recovery for economic loss. The conclusions differ, however, if there is a contractual foundation to the duty. Stamp L.J. accepted that the contract was evidence that the defendant was working from an economic relationship where parties deal with each other in terms of economic profit and loss. This fact would appear to reduce or eliminate the defendant's duty to others for any loss that falls within the scope of the economic relationship that is defined by the limits of the contract. It is a rationale that appears premised on a *laissez-faire* attitude to economic loss. It rejects interference with contractual relations where the matter concerns profits and losses, but not where the loss risks physical injury to members of society.

In this analysis, which it is submitted is similar to that in *Rivtow Marine*, there are two points to bear in mind. First, the issue of recovery for economic loss on the sale of a defective product becomes a question concerning the division between tort and contract. Economic loss on a breach of a contract is not recoverable because tort duties are excluded from operation where contractual obligations are more appropriate. In this sense, as in *Rivtow Marine*, there is a harkening back to such cases as *Winterbottom v. Wright*.[59] There, the contractual duty in the privity relationship was viewed as precluding a duty of care in tort for loss that was economic in kind and contractual in origin. This viewpoint is to be contrasted with that of Lord Denning, in the same case, where he rejected the contract as an impediment to the establishment of the duty of care.[60] Lord Denning's analysis was apparently accepted by the House of Lords in the *Anns* decision.[61] Stamp L.J.'s conclusions, however, approach those of Ritchie J. in *Rivtow Marine*, and suggest that it is contractual duties in the privity relationship that prevent the recovery of economic loss in the non-privity field. If the immediate purchaser was entitled to ignore his contract and bring his action in tort for breach of a contractual term that caused economic loss only, one could hardly see, on the analysis of Stamp L.J. or Ritchie J., any reason to prevent a subsequent purchaser from being also able to recover in tort.

By way of example, this logical connection between the privity and non-privity fields was accepted by Megarry J. in *Ross v. Caunters*.[62] This was a case concerning a solicitor's duty to third party beneficiaries for a negligently drafted will that deprived them of their bequests. The defendant argued that it would be illogical to allow the claim by a third party if the solicitor owed no duty of care in tort to the deceased client for

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[59] *Supra* note 16.
[60] *Supra* note 5, at 392-93, [1972] 1 All E.R. at 471-72.
[61] *Supra* note 18, at 759, [1977] 2 All E.R. at 504.
[62] [1979] 3 All E.R. 580, [1979] 3 W.L.R. 605 (Ch.).

whom he prepared the will. Megarry J. agreed with the logic, but turned the argument to the plaintiff's advantage when he adopted the conclusions of Oliver J. in *Midland Bank Trust Co. v. Hett, Stubbs & Kemp*[63] in support of the proposition that a solicitor may be sued in tort or contract by his client.

In regard to determining the scope of the *Rivtow Marine* decision, there is a second point of significance in the analysis adopted by Stamp L.J. His Lordship's approach to the question of the recovery for contractual economic loss through the analysis of the character of the duty has the potential for application beyond the realm of products liability. There seems no reason why the same rationale should not apply to preclude plaintiffs from recovery in situations where the contract is to supply services or advice. A defendant in these circumstances is in an analogous position to that of the defendant in *Dutton*. He too could argue that he is concerned to make a profit and, therefore, concerning claims for economic loss that are related to the performance of the contract, only accountable for his contractual liability. In fact, this result probably comes closest to that in *Rivtow Marine* where the Court, by applying the *Nunes Diamonds* test, suggested that economic loss that is contractual in origin comprises all economic losses that are related to the performance of the contract including contracts for service or advice.

An additional point that merits comment in the analysis adopted by Stamp L.J. is that it de-emphasizes the concern for the characterization of the loss as either economic or physical. Rather, the nature of the loss is relevant to the characterization of the breach of the duty as one that creates a danger, as opposed to being a breach that results merely in a defect in quality. This approach avoids having to resolve the difficult question of whether damage is "physical", when, say, defects manifest themselves physically in goods, or when damage occurs in a product made up of separately identifiable but integrated components.[64] An example of this problem occurred in the *Dutton* case where Lord Denning and Sachs L.J. described damage to the house itself as material physical damage.[65] Both judges went on to justify an award for the loss on other grounds. Lord Denning referred to preventative loss, and Sachs L.J. questioned the relevance of classification of the loss in any event. Sachs L.J. eventually brought the matter back to policy, but, presumably recognizing the force of Stamp L.J.'s reasoning as regards economic loss claims against manufacturers, was prepared to distinguish between builders and manufacturers on the basis that "appropriate weight can, if necessary, be given to the fact that this case concerns a house and not a chattel".[66] Lord Wilberforce in *Anns* characterized similar loss as

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[63] [1979] Ch. 384, [1978] 3 All E.R. 571 (1977).

[64] For a discussion of the difficulties arising when defective products damage themselves, *see* C. MILLER & P. LOVELL, PRODUCT LIABILITY 328-44 (1977).

[65] *Supra* note 5, at 396, 404, [1972] 1 All E.R. at 474, 481.

[66] *Id.* at 404, [1972] 1 All E.R. at 481.

material physical damage, but also adverted to the danger that the damage posed to the health of persons, and the fact that the builder's failure to comply with the by-laws was tantamount to breach of a statutory duty.[67] These characterizations of loss are to be compared with that in *Rivtow Marine* where substantially similar damage[68] to the crane itself was unanimously viewed[69] as economic in kind. Stamp L.J. ultimately avoided having to classify the damage, emphasizing that it was not the nature of the injury, but the character of the duty which was relevant. This view, concentrating as it does on the character of the duty as opposed to the physical attributes of the damage, would seem to be a useful test. The question posed is more manageable, in that one must determine the risks created by the breach, rather than attempting to discern the technical distinction between material physical damage and financial loss. In this test, therefore, the nature of the damage is viewed as evidence of the character of the duty.

The characterization of the duty also seems to lie at the heart of the American jurisprudence. The American view requires evidence of impact or collision before success may be achieved in claims for the cost of repairs to the product itself brought about by their inherent defects. This conclusion appears to flow from the following excerpts from *Trans World Airlines v. Curtiss-Wright Corp.*, a decision which commented on the fact that in New York law a plaintiff could recover for damage to the article itself if an accident had occurred.

> The Court then stated, [*Quackenbush v. Ford Motor Co.*,] 167 App Div., at p. 436, 153 N.Y.S. 131, at p. 133, the rule which, I deem, sound: "... the manufacturer's duty depends, not upon the results of the accident, but upon the fact that his failure to properly construct the car resulted in the accident." *Quackenbush* thus holds that where an accident has occurred, the manufacturer may be sued directly in negligence despite the absence of privity even though the damage resulting is limited to the article itself.
>
> [T]he court [in *Quackenbush*] held, when plaintiff sustained damages as a result of an accident caused by Ford's sending out a defective car, she was entitled to recover such damages directly from Ford in her capacity as a member of the public "because of the failure of the manufacturer to perform a duty which he owed" to her in common with the public generally.[70]

This reasoning suggests that the "accident" is evidence of the dangerous character of a breach of the duty. Therefore, the loss is recoverable despite the fact that it is tantamount to a claim for the cost of repairs such as occurred in *Rivtow Marine*.

On the other hand, one would also think that the analysis of the problem from the perspective of the character of the duty would support

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[67] *Supra* note 18, at 759, [1977] 2 All E.R. at 504-05.

[68] The crane had "suffered cracking in the legs of the pintle masts". *Rivtow Marine*, *supra* note 4, at 1193, 40 D.L.R. (3d) at 532.

[69] *Id.* at 1210, 1216, 40 D.L.R. (3d) at 544, 548.

[70] 148 N.Y.S. 2d 284, at 289-90 (Sup. Ct. 1955) (Eder J.).

the conclusions of the minority judgment in *Rivtow Marine*. Laskin J. (as he then was), in dissent, would have permitted recovery for economic loss where the negligent act threatened physical injury.

> It seems to me that the rationale of manufacturers' liability for negligence should equally support such recovery in the case where, as here, there is a threat of physical harm and the plaintiff is in the class of those who are foreseeably so threatened. . . .[71]

There seems little doubt that the defendant manufacturer in *Rivtow Marine* was in breach of a duty which created an obvious danger, inasmuch as a similar crane had collapsed killing a workman. Perhaps recovery for economic loss incurred to prevent physical injury is regarded as a special circumstance standing on its own[72] because the limits of the claims are so ill-defined. This would particularly be so where the cause of action extends to include threatened physical damage to goods.[73] In any event, the fact is clear from the majority decision in *Rivtow Marine* that preventative contractual economic loss claims are not recoverable, regardless of the danger created by the negligence.[74]

### E. *Expectation Versus Consequential Loss*

It has recently been suggested, in contrast with the analysis offered by Stamp L.J. in *Dutton* to support the builder's non-liability, that contractual economic loss claims can be explained, not in terms of the character of the duty, but on the basis of the nature of the loss.[75] An explanation of *Rivtow Marine* in this manner limits its effect to product liability situations. The suggested rationale does not distinguish between economic and physical loss; instead the proposal distinguishes between expectation loss and consequential loss. Claims for cost of repairs, or other types of "loss of value" claims, may be explained by the fact that complaints of this nature would sound in contract, which generally has to do with disappointed expectations arising, *inter alia*, from defects of quality, and not in tort, which has to do with loss consequential upon

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[71] *Supra* note 4, at 1218, 40 D.L.R. (3d) at 549.

[72] Eder J. was not prepared to allow a claim for preventative loss. "Until there is an accident, there can be no loss arising from breach of this duty. . . ." *Trans World Airlines*, *supra* note 70, at 290.

[73] The House of Lords in *Anns* suggested that claims for preventative repair loss arise when the state of the building is such that there is a present or imminent danger to the health or safety of persons occupying it. *Supra* note 18, at 759, [1977] 2 All E.R. at 505, applied in Batty v. Metropolitan Property Realizations Ltd., [1978] 1 Q.B. 554, at 571, [1978] 2 All E.R. 445, at 457 (C.A. 1977). Laskin J. (as he then was) in *Rivtow Marine* would have included claims of threatened physical damage to property within those that give rise to a cause of action in tort for cost of repairs: *supra* note 4, at 1219, 1221-22, 40 D.L.R. (3d) at 550, 552.

[74] *See* McGrath v. MacLean, 22 O.R. (2d) 784, at 802, 95 D.L.R. (3d) 144, at 162 (C.A. 1979).

[75] Cane, *supra* note 2.

defects of quality.[76] The theory is premised on defining the core area of contractual claims as compensation for financial losses for unrealized expectations.[77] Claims for compensation for damages suffered, that is consequential loss, would be secondary to the subject area of contract.[78] Thus, when the plaintiff's only complaint is that the article is worth less than that he paid for, his only entitlement to recovery would be *via* the contract because his only loss is a loss of expectation as to the quality of the article. The author suggests that expectations arise out of and are defined by bargains, so there is no reason why a non-party to the bargain should be responsible for disappointment of expectations raised by it.[79]

Two remarks may be made with respect to the foregoing analysis. In the first place, it is to be noted that the inability to recover contractual economic loss is still explained in terms of the functional division between tort and contract. Therefore, the claim seen as one for loss of value in these product liability cases continues to be founded on the tort-contract dichotomy. Thus if the courts are prepared to overlay contractual duties with those in tort, there remains the issue of the recovery for economic loss, a claim contingent upon the recognition of separate operational areas of tort and contract. The second point to note is that an analysis based upon the differentiation between expectation and consequential loss generally limits the contractual economic loss issue to product liability cases. It is only in claims for the cost of repairs to a chattel that a claim akin to one for the loss of value occurs. For example, the breach of a contractual term to render services or provide advice will always sound in terms of consequential loss in the non-privity context although in the privity context the defendant may also be open to a claim for the loss of value from the poor quality of the performance. To the extent that the loss could be shown to be consequential, this analysis would tend to support recovery in tort, as the matter is outside the nub of the contractual claim for an expectation loss. Therefore this rationale, if applied to explain the *Rivtow Marine* decision, would tend to limit its effect to claims for the cost of repairs in a product liability situation. This compares with the results already outlined where *Rivtow Marine* is explained in terms of the effect of the contract on the character of the duty, which thesis suggests an application beyond the product liability cases.

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[76] *Id.* at 123.

[77] *Id.* at 124.

[78] *Id.* at 126.

[79] It is to be noted that Cane's analysis was directed to recovery of financial loss in the absence of an agreement between the plaintiff and the defendant. *Id* at 118.

## IV. PRIVITY CASES

The following section focuses on the question of establishing concurrent duties in tort for negligent breaches of contract where the parties are in privity, and particularly where claims for economic loss are being advanced. As has already been intimated, in Canadian law there are at least two divergent schools of thought on the tort-contract issue. The first, exemplified by the *Nunes Diamonds*[80] decision, views contractual duties as precluding any concurrent duty of care in tort. To succeed, the plaintiff must demonstrate that the cause of action is independent of the contract in the sense that it is unconnected with the performance of any contractual obligation express or implied. The character of the loss appears to have no significant effect on the defendant's non-liability in tort as the duty of care is not owed regardless of the nature of the damage sustained by the plaintiff. Opposed to this class of cases is that which views the cause of action in tort as arising independently of any contractual obligation.[81] Consequently, the duty of care may be owed concurrently with the contractual obligation even though the breach constitutes a breach of a contractual term. However, in this latter category of cases, there remains the superadded issue pertaining to the nature of the loss, especially in the Canadian context where the *Rivtow Marine* decision requires consideration.

There is probably a further alternative to the tort-contract debate, which represents a compromise between the above two schools. This position would recognize concurrent claims in tort where the loss is physical in nature, but deny claims where financial loss alone is sustained. Characterization of the issue in this fashion is probably closest to the school which views the tort of negligence as independent of contract, inasmuch as it generally accepts the concept of concurrent duties of care in tort and contract. The difference between the two is that in the compromise position liability is denied for all claims for recovery for economic loss and not simply for claims for economic loss that arise in the product liability situation as occurred in *Rivtow Marine*. The distinction, therefore, comes down to the application of the *Rivtow Marine* decision to the recovery for financial loss in the privity cases.

### A. *The Application of Rivtow Marine to the Privity Cases*

In considering the latter two characterizations of the problem, one might be inclined to suggest that the tort-contract issue has disappeared as an impediment to recovery. The only remaining question which affects

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[80] *Supra* note 22.

[81] Dominion Chain Co. v. Eastern Constr. Co., 12 O.R. (2d) 201, 68 D.L.R. (3d) 385 (C.A. 1976), *aff'd*, *sub nom*. Giffels Assocs. Ltd. v. Eastern Constr. Co., [1978] 2 S.C.R. 1346, 84 D.L.R. (3d) 344; *Canadian Western*, *supra* note 28.

liability is that of recovery for economic loss. At first blush, this is probably a fair characterization of the issue. However, it is to be remembered that it is the thesis of this article, which carries over from the analysis in the non-privity area, that the matter of recovery for contractual economic loss in Canadian law relates largely to the separation between the spheres of tort and contract. It follows, therefore, that the economic loss question that arises in these instances should itself be understood as essentially a question of whether there should be concurrent duties in tort and contract. The application of this thesis may be best demonstrated by reference to two of the more prominent Canadian privity decisions which have had cause to entertain the question of recovery for economic loss. These are the majority decisions of the Ontario and Alberta Courts of Appeal in the *Dominion Chain Co. v. Eastern Construction Ltd.*[82] and the *Canadian Western*[83] cases respectively. Both decisions, by their analysis, would fall into what one would describe as the second school, where tort is viewed as independent of contract.

In *Dominion Chain* the action was against a builder and architect for financial loss sustained from an improperly constructed roof. The possible application of the contributory rules of negligence to obviate an exemption clause raised the question of whether the defendants could be sued in tort for what amounted to breaches of their contracts with the plaintiff. In considering the claim against the architect, the majority of the Court of Appeal followed Lord Denning's lead in *Esso Petroleum Co. v. Mardon*[84] and updated the category of "common calling",[85] so as to include architects. The majority, however, was not prepared to extend the common callings to include claims against the builder,[86] and instead applied *Donoghue v. Stevenson* principles to establish concurrent duties in tort and contract. In this fashion the question of recovery for economic loss was analyzed only from the perspective of the builder, as classification as a common calling allowed recovery for economic loss. In the *Canadian Western* decision the plaintiff's action was against a surveyor for negligently staking out the path of a pipeline. The issue was whether the Alberta contributory negligence provisions could apply to limit the plaintiff's award, thus raising the question of the possible alternative claim in tort by the plaintiff. The majority of the Court of Appeal concluded that the surveyor owed the plaintiff an independent duty of care in tort, relying as previously noted[87] on the general negligence principles stated in *Donoghue v. Stevenson* and the *Anns* decisions.

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[82] *Id.*
[83] *Supra* note 28.
[84] [1976] Q.B. 801, [1976] 2 All E.R. 5 (C.A.).
[85] *See* note 93 *infra*.
[86] *Supra* note 81, at 210, 68 D.L.R. (3d) at 394.
[87] *Supra* note 29.

It is the application of the *Rivtow Marine* decision to the *Canadian Western* and *Dominion Chain* cases which is the point of primary interest here, as in both appeals the courts were required to circumvent the Supreme Court decision in order to support concurrent liability in tort and contract. In *Dominion Chain* the loss was primarily the cost of repairs to a roof the defendant had contracted to build, while in *Canadian Western* the loss was that incurred to move the pipeline that had been incorrectly positioned due to the contractual negligence of the surveyor. In both cases the Courts of Appeal distinguished the *Rivtow Marine* decision, ultimately limiting its effect to that of a claim for the cost of repairs to the defective chattel itself. However, it does not appear from the reasons of either of the majority benches in those appeals that sufficient consideration was given to the basis upon which the Supreme Court refused liability in *Rivtow Marine*. It is submitted that the *Rivtow Marine* case must be regarded as a decision where recovery for economic loss was denied because it was decided that the tortious remedy was inappropriate for a loss which was essentially contractual in origin. The pith of the reasoning of Ritchie J. in refusing the claim for cost of repairs was that the liability giving rise to the loss was contractual in origin. The claim there advanced was of the type that had to be confined to an action in contract. It follows that in applying the *Rivtow Marine* decision to other economic loss situations, the threshold issue should be described as whether the type of liability is contractual in nature so as to be inappropriate to a claim in tort. Admittedly, this is not a simple task, for essentially such an analysis requires a framework for distinguishing between the realms of tort and contract.

It has already been suggested that the division between tort and contract as described in the *Rivtow Marine* case might be sustainable on the basis that the law of contract is concerned with expectation losses, such as claims for the diminution of value, whereas the law of torts has regard primarily to consequential loss. Seen in this light, the *Rivtow Marine* decision would have limited application in terms of economic loss beyond product liability cases. Generally, in cases involving the supply of services or advice, the loss is consequential only. Thus, for example, Prowse J.A. could not be criticized for his reasoning in the *Canadian Western* decision. In that case the costs incurred from having to move the pipeline would be consequential in nature and not tantamount to a claim for loss of value from failing to perform the contract as expected.

However, there remain difficulties in the application of the expectation loss in this analysis. In *Rivtow Marine* the consequential loss claim for normal loss of profits that the plaintiff sustained while the crane was being repaired was refused, along with the loss of value claim for the cost of repairs. Moreover, the law of contracts in its damage scheme includes recovery for consequential losses. Insofar as the consequential loss is tied to a loss of expectations, it may be problematic to separate the two types of losses. The difficulty does not arise in the non-privity area, because a third person who sustains physical injury or relies on negligent

advice to his detriment has no expectation loss claim, as his injury is entirely consequential to the breach. However, one would expect in most privity cases that a claim could be advanced for an expectation loss, for the loss of value when the services are not up to expectations. This claim would probably be the lesser of the two, and no doubt would be defeated in tort for fundamentally the same reason that the cost of repairs claim was disallowed in *Rivtow Marine*. But the connection of the consequential loss claim (for moving the pipeline) with the expectation loss claim (for return of contract value) remains. It is not readily apparent how one may distinguish this claim from that for loss of profits (which was refused in *Rivtow Marine*), other than by bringing the matter back to the question of whether the consequential loss is connected to the product, which is the very thing contracted for. Note that even here, the *Canadian Western* case poses problems. It may be difficult to distinguish between defects caused by the negligent design or layout of a pipeline, and those caused by the negligent manufacture of the pipeline, where the issue is that of determining what amounts to damage to the product contracted for.

The *Dominion Chain* case is also of interest in discussing the scope of recovery in tort, when viewed as an element of consequential loss. As against the builder, the majority of the Court of Appeal distinguished *Rivtow Marine* on a number of grounds.

> However, unless I fail to understand both cases, I think that *Rivtow* and *Trans World Airlines* are to be distinguished from both *Dominion* and *Dabous* on the grounds: (a) In both the latter cases there was an 'accident' within the meaning of *Trans World Airlines*; (b) in both such cases there was property damage, other than to the 'article' itself; (c) in neither case was financial loss claimed; (d) in *Dominion* the plaintiff had to repair the defect in order to mitigate damage to other property with probable risk of consequential financial loss. . . .[88]

One encounters some difficulties with these reasons advanced to distinguish the *Rivtow Marine* and *Trans World Airlines* decisions. In the first place, it is questionable whether grounds (c) and (d), advanced by the majority, are valid to distinguish the Supreme Court decision, as the claim in *Rivtow Marine* was unanimously classified as one for financial loss.[89] Moreover, the majority in *Rivtow Marine* did not accept the plaintiff's argument based on mitigation or prevention of loss, despite being attractively presented by Laskin J. (as he then was) in the minority judgment.[90] In addition, the reference to "accident" in ground (a) merits reflection. The thrust of the reasoning in the American jurisprudence on point would tend to focus on the risk to public safety that is created by a dangerous defect in an article that subsequently causes its own

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[88] *Supra* note 81, at 214, 68 D.L.R. (3d) at 398.

[89] *Supra* note 4, at 1210, 1216, 40 D.L.R. (3d) at 544, 548.

[90] Described as "of strong persuasive force" by Lord Wilberforce in *Anns*, *supra* note 18, at 760, [1977] 2 All E.R. at 505.

destruction. As pointed out, the "accident" cases[91] are more in line with the characterization of the problem from the duty aspect. Therefore it would seem inappropriate to include water damage to chains caused by a leaking roof within the scope of the "accident" cases, as described by the American decisions.

The point of concern here primarily regards ground (b): whether the *Rivtow Marine* decision may be distinguished on the basis that there was consequential property damage other than to the roof itself. This consequential head of damage refers to the plaintiff's claim for loss due to rust damage on the manufactured chain caused by the leaking roof. The trial judge quantified the loss required for the "tumbling" of the chain in the amount of $3,434, which compares with the total claim for roof repairs of $107,121.[92] The figures themselves suggest that the consequential loss claim as a basis to support recovery for the cost of repairs might be seen as a case where the tail is wagging the dog. But, even putting aside the relative magnitudes of the losses, the question remains whether physical damage to other property is sufficient to encompass a claim for the cost of repairs to the article or building, where the article or building caused the damage to the other property. In terms of analysis by reference to expectation loss versus consequential loss, one might query this. There is a difference between a claim for physical damage which encompasses recovery for consequential economic loss (wage loss in a personal injury claim), and a claim for consequential physical damage that extends back to provide recovery for an expectation loss for the cost of repair to another chattel. One would think that the cost of repairs remains something akin to a claim for loss of value of contractual expectations. Since the cost of repairs is contractual in origin, it must stand alone for consideration, taking it outside the scope of tortious recovery. This is, of course, unless the "accident" concept is applicable to the duty of care, so as to allow recovery for all types of loss regardless of their nature.

Another approach that may help explain the conclusions arrived at in *Rivtow Marine* can be found in the reasoning of Stamp L.J. in *Dutton*. He had concluded that one ought to determine whether the matter is tortious by analyzing the negligent act which constitutes the breach of a contractual obligation. If the contractual act is one that creates a risk of physical damage, and where there is actual manifestation of physical damage, it is said to be a matter falling within the realm of tort. However, if the negligent act is tantamount to failing to provide goods or services of the contractual quality required, then the matter is best left to the realm of contract. This is based on the premise that the profit and loss relationship described by the contractual relationship ought to prevail, as

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[91] *Supra* note 70.

[92] Dominion Chain Co. v. Eastern Constr. Co., 3 O.R. (2d) 481, at 515, 46 D.L.R. (3d) 28, at 62 (H.C. 1974).

the loss is perceived as part of that predefined relationship. If this model is used, then the characterization of the loss in *Canadian Western* and *Dominion Chain* would appear qualitative in nature only. Both claims would be refused because they arose out of what were essentially qualitative breaches of contractual obligations. In this fashion, the result approximates that suggested in the compromise position, where the application of *Rivtow Marine* would extend to deny all claims of contractual economic loss. Furthermore, this result is in harmony with the *Nunes Diamonds* decision, where tortious recovery for economic loss caused by contractual misrepresentations was refused.

### B. *Physical Loss Claims in Tort or Contract*

The significant factor in the two models described above is not only that each would draw the border between tort and contract along different lines, but also that the issue of recovery for economic loss in the non-privity area reverts to that of the tort-contract interface. Thus, the resolution of what might be described as the contractual facet of economic loss seems premised on essentially the same factors that are generally said to determine the issue currently under debate in the privity area, that is whether to allow alternative claims in tort and contract. Moreover, the proposition that the economic loss issue in the non-privity area is a reflection of the tort-contract debate imports a correlative conclusion. That is, the tort overlay question in the privity domain should be viewed principally as one limited to claims for economic loss. Logically this inference must follow, in that a two-pronged analysis that first contemplates the tort-contract issue without regard to the nature of the loss makes little sense if once over the tort-contract hurdle one is required to reconsider the same issue in the guise of the nature of the loss. If one is prepared to accept the application of the *Rivtow Marine* principle to the privity fact situation, and recognize that the economic loss is not recoverable because it is contractual in origin, then one must also accept that the economic loss issue represents the veritable tort-contract issue and that physical loss claims fall outside the ambit of consideration.

It should be added that logic alone does not lead to the conclusion that the tort-contract dichotomy does not apply to physical loss claims. This rationale is also supported by *dicta* in Canadian and English jurisprudence. Reference has already been made to the duality of definition that exists for the independent tort in the non-privity cases which demonstrated that physical loss claims, although flowing from breach of contractual obligations, are nevertheless independent of contract. Assuming that the meaning of an independent tort is constant for both the non-privity and privity fields, the *dicta* of Pigeon J. in the *Alliance* decision and of Lord Macmillan in *Donoghue v. Stevenson* would support the conclusion reached by Prowse J.A. in *Canadian Western* and Jessup J.A. in *Dominion Chain* that physical loss claims, although flowing from a breach of the very thing contracted to be done, are nevertheless advanceable in either tort or contract.

In addition, there are further authorities that suggest that physical loss claims could always be advanced in either tort or contract. The "common calling"[93] cases are an example. These cases were rooted in the forms of action and conceived at a time when "the ideas of 'tort' or 'contract', as we now understand them, would have conveyed little of their present day meaning to the early lawyers, who thought in terms of actions rather than in terms of substantive rights".[94] Nevertheless, they have retained their precedent value and have consistently been recognized as authority for the proposition that in certain instances a party may be liable in tort for the very thing contracted to be done. Throughout the late nineteenth century and right up to the 1970's, the common calling cases were generally regarded as anachronisms.[95] As late as 1964, Lord Diplock was prepared to restrict these cases to their historical context by limiting their effect to areas where the law had recognized what he described as something in the "nature of a status".

> Now, I could accept that there may be cases where a similar duty is owed under a contract and independently of contract. I think that on examination all those will turn out to be cases where the law in the old days recognized either something in the nature of a status like a public calling (such as common carrier, common innkeeper or a bailor and bailee) or the status of master and servant.[96]

However, this was all to change. Lord Denning in the pivotal decision of *Esso Petroleum Co. v. Mardon*[97] described the common calling cases as "decisions of high authority"[98] in support of his proposition that "in the case of a professional man, the duty to use reasonable care arises not only in contract, but is also imposed by the law apart from contract and is therefore actionable in tort."[99] *Esso Petroleum* has in turn served as the primary impetus in further recent English decisions, which have set aside long established precedents that had confined a solicitor's liability to

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[93] Where a man, by his incompetence in the exercise of a 'common calling', injures another, he is liable in damages. Such a person is a smith, a farrier, a surgeon, an innkeeper, a common carrier. The older lawyers found classification of this obligation of competence a tough affair. Being an instance at [*sic*] the oldest form of *assumpsit*, it arose quite independently of contract, although it is clear that in most instances of it there would be a co-existing contract.

P. WINFIELD, *supra* note 14, at 658.

[94] *Id.* at 655.

[95] "Although I do not agree with what Bramwell L.J. said in Bryant v. Herbert, 3 C.P.D. 389, 392 (1878), that in approaching such a question all the old learning is to be regarded as 'useless, and worse than useless,' I agree that it has to be kept in its proper place." *Jarvis*, *supra* note 19, at 406 (Slesser L.J.); Steljes v. Ingram, 19 T.L.R. 534, at 535 (K.B. 1903); *Bagot*, *supra* note 20, at 204, [1964] 3 All E.R. at 580.

[96] *Bagot*, *id.* at 204-05, [1964] 3 All E.R. at 580.

[97] *Supra* note 84.

[98] *Id.* at 15, [1976] 2 All E.R. at 819.

[99] *Id.*

breach of contract.[100] The decision has also been used to extend alternative claims in tort beyond contracts for services of persons having, or professing to have, special knowledge or skill, to include all commercial contracts, the breach of which give rise to a claim in negligence.[101] This is to be contrasted with the Canadian position which as regards the liability of professionals is unsettled.[102] To date, the extension of tort in overlaying contractual relationships has primarily been through the application of *Donoghue v. Stevenson* principles.[103]

However, the point to bear in mind in the common calling cases is that prior to the watershed decision of *Hedley Byrne*,[104] success in achieving the status of a common calling appeared to depend largely upon whether exercise of the calling would incur a risk of loss that was physical in nature. For instance, in those cases where the plaintiff suffered physical damage, the common callings appeared to remain steadfast, or perhaps, were even broadened in scope. This occurred in cases where dentists[105] and barbers[106] were subject to suit in tort for their contractual negligence that had caused physical harm to the plaintiff. On the other hand, for those categories of callings where the risk appeared to result primarily in financial loss, the status of common calling that would have provided the alternative cause of action in tort was lost. As a result, stockbrokers,[107] for example, were denied the status of the common calling despite the earlier precedent of the House of Lords in the case of *Brown v. Boorman*[108] where a claim in tort had been successfully advanced for financial loss against an oil broker. Similarly, architects, surveyors[109] and solicitors[110] were denied the status of exercising a public calling. It is true that in none of these cases was the nature of the loss

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[100] *Midland Bank*, *supra* note 63 and *Ross*, *supra* note 62 overrule Groom v. Crocker, [1939] 1 K.B. 194, [1938] 2 All E.R. 394 (C.A.).

[101] *Batty*, *supra* note 73; *Midland Bank*, *supra* note 63.

[102] Messineo v. Beale, 20 O.R. (2d) 49, 86 D.L.R. (3d) 713 (C.A. 1978); Page v Dick, 12 C.C.L.T. 43 (Ont. H.C. 1980); Power v. Halley, 18 Nfld. & P.E.I.R. 531, 88 D.L.R. (3d) 381 (Nfld. S.C. 1978).

[103] *Canadian Western*, *supra* note 28. In *Dominion Chain*, *supra* note 81, at 210, 68 D.L.R. (3d) at 394, Jessup J.A. stated: "The Commonwealth authorities, at least, would not justify extending even the broad language in *Brown v. Boorman*, 11 Cl. & Fin. 1, 8 E.R. 1003 (H.L. 1844), beyond contracts of employment for any kind of services, skilled or otherwise, and so as to include contracts to provide the materials for and to erect a building."

[104] *Supra* note 35.

[105] Edwards v. Mallan, [1908] 1 K.B. 1002, 77 L.J.K.B. 608 (C.A.)

[106] Hales v. Kerr, [1908] 2 K.B. 601, 77 L.J.K.B. 870.

[107] *Jarvis*, *supra* note 19.

[108] 11 Cl. & Fin. 1, 8 E.R. 1003 (H.L. 1844). The narrow issue was, however, whether "*after verdict*, a judgment could be arrested on the ground that the cause of action had been wrongly stated in the declaration". *Midland Bank*, *supra* note 63, at 432, [1978] 3 All E.R. at 609 (Oliver J.).

[109] *Steljes*, *supra* note 95; Phillips v. Ward, [1956] 1 All E.R. 874, [1956] 1 W.L.R. 471 (C.A.); *Bagot*, *supra* note 20.

[110] *Groom*, *supra* note 100.

discussed. Yet one would have thought it to be an underlying consideration, at least in a case such as *Jarvis v. Moy, Davies, Smith, Vandervell & Co.*[111] where the plaintiff would have apparently had no cause of action in tort for the nature of the loss claimed, unless the defendant was somehow endowed with the thankless status of exercising a public calling.

No doubt the *Hedley Byrne* decision has brought about reconsideration of the common calling cases, not merely because it recognized a duty of care on skilled persons to avoid misrepresentations, but because the decision removed the disability of claiming in tort for economic loss. This thereby reopened the common calling cases where previously there had been a disinclination to allow recovery for economic loss. However, in saying this, one must add that economic loss has not been a major factor in the recent reconsideration of the common calling cases. The nearest that any decision has come to recognizing the nature of the loss as an explanation for the inconsistent categorizations of the public callings is Oliver J.'s reasons in *Midland Bank Trust Co. v. Hett, Stubbs & Kemp*.[112] There, the learned judge raised the nature of the damage to distinguish the case of a medical man from other professionals, but rejected the rationale by applying the reasoning of Salmon L.J. in *Ministry of Housing & Local Government v. Sharp*.[113] The detail which was apparently overlooked in this reasoning is that the *Sharp* case reflects post-*Hedley Byrne* thinking. Thus, it cannot be proferred as a basis for rejection of the nature of loss to explain the inconsistencies in classification of the callings made at a time when economic loss was thought not recoverable.

There are other decisions which illustrate situations where alternative claims in tort have been successfully advanced for physical loss sustained by the plaintiff. One such decision is that of the King's Bench in *Jackson v. Mayfair Window Cleaning Co.*[114] which came after *Donoghue v. Stevenson* and before *Hedley Byrne*. The ostensible issue was to determine the proper scale of costs in a County Court action, which in turn raised the question of whether the plaintiff's action was founded on contract or tort. A chandelier belonging to the plaintiff had been damaged by the negligence of the defendant, who had been contracted to clean it. Despite the fact that the acts complained of might well have been pleaded as a breach of contract, Barry J. held that the plaintiff's action arose out of an obligation on the part of the defendant to take reasonable care and so was founded on tort. He applied the test

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[111] *Supra* note 19. Mention was made of the nature of the loss as an explanation to the common callings by the former authors of Halsbury: "[W]here the prospect of physical injury is absent, the duty to exercise skill is only contractual." 28 HALSBURY, LAWS (3rd) at 20.

[112] *Supra* note 63, at 420, [1978] 3 All E.R. at 598-99.

[113] *Supra* note 37.

[114] *Supra* note 25.

formulated by A.L. Smith L.J. in *Turner v. Stallibrass*[115] to the effect that if the plaintiff could make out a cause of action without relying on a contract, then the action should be regarded as one in tort. Barry J. also viewed the plaintiff's claim in comparison to the hypothetical situation where the work was being carried out gratuitously, or by a third party with whom the plaintiff had no contract. He concluded that a duty of care would attach in these non-privity situations independently of contract, and was therefore satisfied that the defendant should similarly be liable to the plaintiff in the case before him.[116]

The comments of Barry J. on the common callings are also of interest. The learned judge did not attempt to apply these cases to support his conclusions, but rather explained them as examples of the law imposing a "positive" duty in the exercise of some professions or trades.

> Persons exercising 'public callings' and others who enter into certain special relationships may, apart from contract, have certain positive duties imposed on them, which the law does not impose in the case of other professions or trades.[117]

He reasoned, however, that all persons exercising professions or trades owed a "negative" duty to avoid negligent acts that cause damage to another person's property. He would have distinguished the stockbroker who owed no positive duty to sell shares on any particular date, or at all, from the professional who negligently burned some valuable document belonging to the plaintiff.

> Very different considerations would have arisen in the latter case [*Jarvis v. Moy, Davies, Smith, Vandervell & Co.*] if, for example, the stockbroker had negligently burned some valuable document belonging to the plaintiff.[118]

Thus, Barry J. would have allowed alternative recovery in tort or contract for physical damage, but apparently viewed the law, in 1952, as recognizing no concurrent duty in tort on these professionals to avoid inflicting economic loss on others.

A similar decision is that of the English Court of Appeal in *White v. John Warrick & Co.*[119] The defendant had leased a defective tricycle which caused the plaintiff lessor to be thrown and to sustain physical injuries as a consequence. The contract of hire contained an exemption clause which barred recovery in contract. The plaintiff's argument was that his cause of action arose in tort, and therefore the exclusionary clause ought not to apply. The defendant's counsel admitted that if negligence was a completely independent tort, the exemption clause would not avail. But he contended that the negligence alleged was tantamount to a breach of contract, and not an independent tort.

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[115] *Supra* note 25.
[116] *Id.* at 218, [1952] 1 T.L.R. at 178.
[117] *Id.*
[118] *Id.*
[119] [1953] 2 All E.R. 1021, [1953] 1 W.L.R. 1285 (C.A.)

Singleton L.J. and Denning L.J. (as he then was) held that the claim for negligence was founded on tort and not contract. Singleton L.J. supported his conclusions by reference to Lord Macmillan's reasons in *Donoghue v. Stevenson*. He concluded that they were authority to support the plaintiff's contention that an action for damages for breach of contract and an action for tort may arise from the same set of facts.[120] The difficulty with Singleton L.J.'s judgment is that one cannot determine whether he concluded that the case fell under the rubric of a common calling, similar to the decision of *Hyman v. Nye*,[121] which although generally similar on the facts was not mentioned in his reasons, or whether he appears to be stating the broader proposition that the independent tort test described by Lord Macmillan in *Donoghue v. Stevenson* should apply in any case where the same set of facts involving physical damages gives rise to an action in tort or contract. However, there is nothing equivocal in Lord Denning's reasoning, which is clearly to the effect that the defendant's negligence was a completely independent tort. His test is similar to that suggested by Barry J. in *Jackson v. Mayfair Window Cleaning Co.*[122] His Lordship considered what would have resulted if, instead of the plaintiff, it was the plaintiff's servant who had been injured while riding the tricycle. By referring to the non-privity situation, Lord Denning was satisfied that the duty was independent of the contract. Again, this was a case of physical damage occurring on a breach of contract where the contractual origin of the claim was rejected as a ground to defeat the cause of action in tort.

There is also Canadian jurisprudence which would tend to support concurrent duties of care in tort and contract where the loss is physical in kind. Reference has already been made to the reasoning of Pigeon J. in the *Alliance*[123] decision, which suggests that a manufacturer's duty of care as concerns his acts that cause physical damage is independent of contract. Jessup J.A. appears to express the same view in the *Dominion Chain* decision:

> In any event, I think that a contractor or builder who is negligent in the performance of a contract to build is liable in tort, under the principle of *M'alister (or Donoghue) v. Stevenson*, [1932] A.C. 562, to any person suffering resultant injury to person or property (without deciding whether he is also liable for financial loss other than consequential to such injury). . . .[124]

Similar *dicta* may be found in the words of Mr. Justice Rand in the 1952 case of *Canadian Indemnity Co. v. Andrews & George Co.*[125] There, the plaintiff glue manufacturer had sold defective glue to a plywood

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[120] *Id.* at 1024, [1953] 1 W.L.R. at 1291.
[121] 6 Q.B.D. 685, [1881-85] All E.R. Rep. 183 (1881).
[122] *Supra* note 25.
[123] *Supra* note 43.
[124] *Supra* note 81, at 211, 68 D.L.R. (3d) at 395.
[125] [1953] S.C.R. 19, [1952] 4 D.L.R. 690 (1952).

manufacturer which the Court found had caused damage to the latter's property. The plaintiff glue company reimbursed the plywood manufacturer for its loss, and claimed back against the defendant under a business liability policy that it maintained with the defendant. The defendant resisted the claim on the basis, *inter alia*, that the glue manufacturer's liability was not "imposed by law", that is, founded in tort, but only fixed by contract. The Court ultimately found for the defendant on other grounds. However, Mr. Justice Rand, in *obiter*, considered whether there was an alternative claim in tort and concluded that there was no reason why *Donoghue v. Stevenson* principles ought not to apply in both the non-privity and privity contexts.

> Although there is a warranty, is there also a collateral co-existing right in tort based on negligence? Whether the rule of *Donoghue v. Stevenson* runs in favour of the immediate purchaser from the manufacturer has not apparently been expressly decided. But I can see no reason why the general duty of the manufacturer should not extend to his purchaser, the first in the direct line of those within the scope of the potential mischief. Where warranty is excluded, what is there in the policy of the law to deny him the same relief from the effects, say, of an explosion as would be accorded a purchaser from him on the same terms? An exclusion of warranty does not necessarily involve a release of the general duty of care in manufacture; and I should say that the duty does extend to the immediate purchaser.
>
> Does the sale, then, with warranty impliedly absorb all other liability that would, in its absence, arise out of the transaction? Where a contract expressly or by implication of fact provides for a performance with care, as in the case of carriers, the general duty is clearly not displaced and the person injured or damaged in property may sue either in contract or tort.[126]

The comments of Rand J., which seem directed primarily to the situation of physical damage, are thus strong *obiter* to support the contention that in Canadian law a plaintiff who has suffered physical damage should be capable of bringing suit in either tort or contract.

## V. Conclusion

In closing, it is appropriate to point out that the foregoing reasoning of Rand J. goes beyond one of the propositions sought to be established here, namely that concurrent duties in tort and contract should be permitted where the loss is physical in kind. If, as Mr. Justice Rand has suggested, one is prepared to accept that the contract does not "absorb all other liability", this would also infer that a general duty of care, say to avoid negligent misrepresentations that cause economic loss, would similarly not be "displaced" by the contract. Such a conclusion seems at odds with that of Pigeon J. in *Nunes Diamonds*. In highlighting this fact, in conjunction with the attempt at formulating a dichotomy between tort

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[126] *Id.* at 25-26, [1952] 4 D.L.R. at 695-96.

and contract that concords with the nature of the loss, it is hopefully understood that it was not intended to suggest that contractual economic loss should not be recoverable in tort, either in part or at all.[127] Whether the law of torts "ought" to encompass claims of the type that arise on a contract for economic loss is an issue that must be contemplated on another plane. It must therefore remain for future consideration, whether, after *Hedley Byrne*, there is any sound basis upon which to distinguish between economic and physical loss that is contractual in origin.

The point of the matter is that the Supreme Court in the *Rivtow Marine* decision has accepted such a distinction. In reliance upon this decision, which moreover clearly adopted the reasoning of Pigeon J. in *Nunes Diamonds*, it has been submitted that in Canadian law there is a definite link between the issues of tort overlay in the privity field, and recovery for economic loss in the non-privity domain. Indeed, the thesis here has been that these issues in the Canadian context should be regarded as the same. The implications of this proposition have been shown to be twofold: first, that the economic loss issue that occurs in the contractual context should be viewed as one revolving around the division between contractual and tortious obligations; and second, that the tort-contract debate should not be framed too broadly, as the core of the issue only involves claims in tort for financial loss that are related to the performance of the contract. Overall, it has been suggested that the structure of liability in the privity and non-privity fields should be regarded as the same where, in the final analysis, the threshold issue relates back to the recovery for economic loss with the understanding that it is the contractual origin of the liability that presents the primary impediment to its recovery in tort.

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[127] The law of tort seems quite capable of giving adequate regard to the contractual basis of a claim either through its effect on the standard of care (*see Cominco*, *supra* note 47, at 418, 15 D.L.R. (3d) at 63; *Voli*, *supra* note 48; *McGrath*, *supra* note 74, at 801, 95 D.L.R. (3d) at 160-61) or by modification of tort principles where necessary to meet the ends of justice: *see* Parsons Ltd. v. Uttley Ingham & Co., [1978] 1 Q.B. 791, at 805-06, [1978] 1 All E.R. 525, at 535 (C.A. 1977).