

ECONOMIC NEGLIGENCE: THE RECOVERY OF PURE ECONOMIC LOSS. By Bruce Feldthusen. Fourth Edition. Scarborough: Carswell, 2000. Pp. 315 (\$99.00).

Bruce Feldthusen, now Dean of the Common Law Section of the University of Ottawa Faculty of Law, has published a fourth edition of his masterful and influential book, *Economic Negligence*. Based on his doctoral thesis at the University of Michigan, this book, published first in 1984, and revised in 1989, 1994 and in 2000, has helped to explain and reshape one of the most difficult areas of tort law, which has produced a flood of cases and a torrent of academic writing.

Until the early 1960s, there was no problem in this area; economic loss, that is pure financial loss, was not recoverable in negligence. All that changed rapidly with the decision of *Hedley Byrne & Co. v. Heller & Partners*¹ in 1963, where the “bold spirits”² emerged triumphant over the “timorous souls”³ who wanted to preserve the old law. Henceforth, it was possible to recover for *some* pure economic loss in negligence, but the exact scope of that recovery remained shrouded in mystery. As we enter the new millennium, we are still searching for rational and practical parameters for that field of tort liability. As a result of Dean Feldthusen’s superb scholarship and his continuing involvement in the field with his writing and lecturing, we are moving closer to a sensible resolution of these problems.

Dean Feldthusen’s book is a superb analysis of one of the most intractable problems in the law of torts. His style is understandable and devoid of jargon. He analyses the issues in depth, describing how they are treated in all Commonwealth and U.S. jurisdictions, something that, except for John Fleming, is rarely done by legal writers. His criticism is both theoretical and practical. He deals with history and with the future. Each of the main sections of the book contains a convenient summary that ties together the sometimes-complex discussion. This book is, in short, a *tour de force*, all that a leading law book should be. The new edition, incorporating the developments since 1994, is most welcome.

One threshold matter Feldthusen explores is the difference between physical damage and pure economic loss. He contends that the rules governing recovery of economic loss should not be derived merely by logical extension from the rules covering physical loss. I originally disagreed with this distinction, as did the great Lord Robin Cooke, who described it as “an impossible distinction”.⁴ But it must now be recognized that most courts and scholars have concluded, with Feldthusen, that these types of economic losses should be viewed differently than physical ones.

Another source of the difficulty, according to Feldthusen, is that courts wrongly tended to think that there was only one rule - an exclusionary rule for *all* economic losses, which was promulgated by the great Patrick Atiyah in 1967 in his seminal article, “Negligence and Economic Loss”.⁵ In fact, Dean Feldthusen explains, the exclusionary rule actually applied to one category of economic loss only, relational economic loss, and was not necessarily connected to the other types of economic loss

¹ [1964] A.C. 465, [1963] 2 All E.R. 575 (H.L.).

² *Candler v. Crane, Christmas & Co.*, [1951] 2 K.B. 164 at 178, [1951] 1 All E.R. 426 at 432 (C.A.).

³ *Ibid.*

⁴ R. Cooke, “An Impossible Distinction” (1991) 107 L.Q.R. 46.

⁵ P. Atiyah, “Negligence and Economic Loss” (1967) 83 L.Q.R. 248.

cases, such as services, shoddy products and public authority claims. When *Hedley Byrne* was decided, the Law Lords paid little attention to the exclusionary rule cases and, following that decision, later courts decided that *Hedley Byrne* did not overturn the earlier exclusionary rule.⁶

As an antidote to the questionable mingling of ideas that are not necessarily consistent, Dean Feldthusen advocates a fresh approach, one that has been strongly embraced by the Supreme Court of Canada. He urges courts to treat these economic loss cases in five different categories, rather than just one: negligent misrepresentation, negligent performance of a service, defective products, relational economic losses, and public authorities' failure to confer an economic benefit. There is no doubt in my mind that this categorization of the different types of economic loss cases has improved the quality of analysis in the Canadian decisions adopting it. It is an approach not unlike an approach which I have advocated in the past, for the treatment of the various types of remoteness cases. Hence, just as rescuer cases, intervening medical malpractice cases and psychiatric damage cases should be analysed individually,⁷ so too should the various classes of economic loss cases. One must be careful, however, not to create separate pockets of cases that are divorced from the general principles of negligence law. In other words, there should be separate categories, but these categories should be treated, as much as possible, consistently with general negligence principles.

Pursuant to the need he sees for reconstructing our analysis, Dean Feldthusen divides his book into five chapters, each dealing with one of these five proposed categories of economic loss. In the chapter on "Negligent Misrepresentation", he does a thorough analysis of the history and current status of the *Hedley Byrne* principle, which is still the leading case on the point. He examines the three questions: (1) is there a duty? (2) to whom and for what is that duty owed? (3) what are the specific obligations owed? He outlines the three theories used by courts and scholars - special relationship, foreseeable reasonable reliance and voluntary assumption of responsibility. While he expresses some preference for the assumption of responsibility theory, and while I personally admire the foreseeable reasonable reliance approach, the Canadian courts have solidly adopted the special relationship approach to duty in this context.⁸ This approach has been refined to make the duty "transaction specific" by *Hercules Management Ltd. v. Ernst & Young*,⁹ which essentially corresponds to *Caparo v. Dickman*¹⁰ and *Esanda Finance v. Peat Marwick Hungerfords*.¹¹ In other words, the duty in these cases is now owed only to known plaintiffs or classes of plaintiffs and only for the particular transaction for which the representation was made. Dean Feldthusen favours this "end and aim rule" which he explains "restricts the defendant's liability to losses suffered by a foreseeable plaintiff in a transaction in which the defendant intended or knew the recipient intended the advice to be employed."¹² Incidentally, he,

⁶ *Weller & Co. v. Foot & Mouth Disease Research Inst.*, [1966] Q.B. 569, [1965] 3 All E.R. 560.

⁷ A.M. Linden, *Canadian Tort Law*, 6th ed. (Toronto: Butterworths, 1997) at 325.

⁸ *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87, 99 D.L.R. (4th) 626.

⁹ [1997] 2 S.C.R. 165, 146 D.L.R. (4th) 626.

¹⁰ [1990] 2 A.C. 605, [1990] 1 All E.R. 568 (H.L.).

¹¹ [1997] 142 A.L.R. 750, 188 C.L.R. 241 (H.C. Aus.).

¹² B. Feldthusen, *Economic Negligence: The Recovery of Pure Economic Loss*, 4th ed. (Toronto: Carswell, 2000) at 112.

like Lewis Klar,¹³ and unlike my book,¹⁴ opposes the idea of contributory negligence being used in these cases, for, he contends, "to hold the defendant even partly responsible for the unreasonable reliance of others" is "inappropriate and inefficient".¹⁵

The next chapter deals with "Negligent Performance of a Service" which considers issues such as the liability of lawyers and insurance agents who fail to do their job properly and cause economic loss. Often these cases can be analysed as negligent misrepresentation cases, but that sometimes distorts the facts. A separate category is, thus, justified for disappointed beneficiary cases like *Ross v. Caunters*,¹⁶ *White v. Jones*,¹⁷ and *Whittingham v. Crease & Co.*,¹⁸ Also covered in this group are cases like *B.D.C. Ltd. v. Hofstrand Farms Ltd.*,¹⁹ where a late delivery of a package by a courier caused economic loss to the plaintiff, who sued successfully.

The third category is discussed in a chapter called "Owners' Claims for Damages Relating to Defective Products or Building Structures". In these cases, the claim is against a third person for the cost of repairing or replacing a defective product or structure where there is no contractual relationship between the parties. It is a controversial topic touching on the relationship between tort law and sales law. The recent significant case for Canadians on this point is *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.*,²⁰ where the Supreme Court of Canada allowed recovery for the cost of repairing certain defects in structures that posed a risk to persons or property. As for products and structures that pose no risk of harm, the issue has been left open in Canada, some expressing support for *Junior Books Ltd.*,²¹ and others contrary views. Commonwealth and American courts are in total disarray on these complex issues, which need further consideration before being ultimately resolved.

The matter of "Relational Economic Loss" is covered in a chapter by that name. On this issue, Dean Feldthusen's view has been adopted by the Supreme Court of Canada,²² after a brief period of confusion,²³ holding that there is in fact an exclusionary rule in force here, subject to three exceptions. In *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*,²⁴ the Supreme Court explained its view of the exclusionary rule, subject to certain limited exceptions, when McLachlin J. (now C.J.) stated:

(1) relational economic loss is recoverable only in special circumstances where the appropriate conditions are met; (2) these circumstances can be defined by reference to categories, which will make the law generally predictable; (3) the categories are not closed. La Forest J. identified the

¹³ L. Klar, "Recent Developments in Canadian Law: Tort Law" (1991) 23 Ottawa L. Rev. 177 at 200.

¹⁴ *Supra* note 7 at 449.

¹⁵ *Supra* note 12 at 115.

¹⁶ [1980] Ch. 297, [1979] 3 All E.R. 580.

¹⁷ [1995] 2 A.C. 207, [1995] All E.R. 691 (H.L.).

¹⁸ [1978] 5 W.W.R. 45, 88 D.L.R. (3d) 353 (B.C.S.C.).

¹⁹ [1986] 1 S.C.R. 228, 26 D.L.R. (4th) 1.

²⁰ [1995] 1 S.C.R. 85, 121 D.L.R. (4th) 193 [hereinafter *Winnipeg Condominium* cited to S.C.R.].

²¹ *Junior Books Ltd. v. Veitchi Co.*, [1983] 1 A.C. 520, [1982] 3 All E.R. 201 (H.L.).

²² *D'Amato v. Badger*, [1996] 2 S.C.R. 1210, 153 D.L.R. (4th) 385.

²³ *C.N.R. v. North Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, 91 D.L.R. (4th) 385.

²⁴ [1997] 3 S.C.R. 1210, 153 D.L.R. (4th) 385.

categories of recovery of relational economic loss defined to date as: (1) cases where the claimant has a possessory or proprietary interest in the damaged property; (2) general average cases; and (3) cases where the relationship between the claimant and property owner constitutes a joint venture.²⁵

These various categories of cases and exceptions are explained by Feldthusen, who recognizes the possibility of new exceptions being allowed in the future.

The fifth category of case is discussed in a controversial chapter entitled "The Liability of Statutory Public Authorities". One might comment that, except for the material on economic loss, this chapter may not really belong in this book, as it deals with a completely separate issue, that is, when does negligence law apply to government authorities and when should government authorities be immunized from tort liability or treated differently than other defendants. This engenders an entirely different debate, placing in conflict the Diceyan view that government (the Crown) should be treated in law like any "private person" - an idea enshrined in Canada's *Crown Liability Act*²⁶ - and a contrary view that broadly protects government officials from interference by negligence suits. Although some of the government cases do involve economic losses, the main issues in this field are usually different from those considered in the other parts of this excellent book. Feldthusen recognizes this when he writes that "it would be absurd to deny a claim against a government merely because it is for economic loss."²⁷ He also accepts that government must be liable for ordinary tort claims such as assault, battery and false imprisonment. So too, he thinks that bringing negligent information should lead to liability.²⁸ It is where claimants are seeking a benefit from government, like in the inspection cases, that the "immunity principle" should be invoked, he argues, because the matter is not "justiciable".²⁹

Dean Feldthusen advocates a very logical and sensible position for these cases - that there should be an immunity where the court would be substituting its discretion for that of the government officials.³⁰ According to Feldthusen, liability should be imposed only where a discretionary decision of government is not involved. As rational as this treatment may be, in my view, it is not consistent with the Canadian case law and legislation but is based on American jurisprudence and legislation, which is quite different than ours. The U.S. legislation bars recovery against the federal government for any exercise of "a discretionary function or duty...whether or not the discretion involved be abused".³¹ Our statute, on the other hand, does not employ the word "discretion" at all; it stipulates that "the Crown is liable in tort for damages for which, if it were a private person ... it would be liable".³² Our courts, despite the inclusive language in our statutes, have nevertheless created a partial common law immunity, but understandably it is a much narrower one than the American one. The Supreme Court

²⁵ *Ibid.* at 1241-42.

²⁶ R.S.C. 1985, c. C-50, s. 3.

²⁷ Feldthusen, *supra* note 12 at 264.

²⁸ *Ibid.* at 283-84.

²⁹ *Ibid.* at 266.

³⁰ *Ibid.* at 277.

³¹ *Federal Tort Claims Act*, 28 U.S.C. § 2680 (1994). See also *Estate of Callas v. U.S.*, 682 F.2d 613 (7th Cir. 1982).

³² *Supra* note 26.

of Canada in *Just v. B.C.*³³ has declared that tort recovery is barred in negligence only for policy decisions, but allows it for operational ones. Dean Feldthusen disagrees with this decision.³⁴ But, despite the difficulty of drawing the line, this approach is as good a treatment of this issue as any common law court has yet developed.³⁵

In Canada, the current law is that it is only where important policy decisions involving "social, political and economic factors"³⁶ and "budgetary allotments"³⁷ that the immunity from negligence liability is invoked. Where ordinary implementation is involved, liability is imposed for negligence, even if some discretion may be involved in the decision. The Supreme Court has recognized that the government "must be free to govern"³⁸ without being held liable in tort, but otherwise it can be liable for its negligence. This is less protection than Feldthusen would like for governments, for it would immunize only those decisions that could be viewed as part of "governing". This less protective approach evinced in the Canadian jurisprudence is consistent with the Canadian view that frequently holds government officials accountable for constitutional breaches as well as for conduct that denies our citizens fairness. Canadians often engage in litigation with their government officials; we expect them to behave professionally and to be held liable for their negligence, just like other professionals, when they act unreasonably, unlike the situation in England where broad protection from negligence law is accorded to officials³⁹. Except perhaps for a possible defence when there are insufficient resources, government officials should generally be required to live up to a reasonable standard of care in the same way as other professionals, unless the court finds that their ability to govern would be impaired by such a holding.

In conclusion, this is an excellent book, one that has been as influential in changing the law for the better as Prosser's great article, "The Assault on the Citadel,"⁴⁰ which influenced major reform of the U.S. products liability law. Although I have not always been personally enthusiastic about all the changes in the handling of economic loss cases advocated by Dean Feldthusen, they have been accepted and I pay tribute to him for his great contribution in bringing them about. I hope, however, that his views on governmental liability are not as influential in the years ahead as were his views on economic negligence generally.

The Hon. Mr. Justice Allen M. Linden *

* Of the Federal Court of Appeal

³³ [1989] 2 S.C.R. 1228, 64 D.L.R. (4th) 689 [hereinafter *Just* cited to S.C.R.].

³⁴ *Supra* note 12 at 290. He also criticizes *Kamloops v. Nielsen*, [1984] 2 S.C.R. 2, 10 D.L.R. (4th) 641.

³⁵ J. Sopinka, "The Liability of Public Authorities: Drawing the Line" (1993) 1 Tort L.Rev. 123; A.M. Linden, "Tort Liability of Governments for Negligence" (1995) 53 The Advocate 535.

³⁶ *Just*, *supra* note 33 at 1240.

³⁷ *Ibid.* at 1245.

³⁸ *Ibid.* at 1239.

³⁹ Criticized by B.S. Markesinis, *The Tortious Liability of Statutory Bodies* (Oxford: Hart Publishing, 1999).

⁴⁰ W.L. Prosser, "The Assault on the Citadel" (1960) 69 Yale L.J. 1099.