THE *JERVIS CROWN* CASE: A JURISPRUDENTIAL ANALYSIS

*Hon. Mr Justice Mark R. MacGuigan, P.C.**

At first blush it would seem that the Supreme Court last year settled the law of Canada with respect to pure economic loss. By a 4-3 decision in the Jervis Crown *case, which arose in the field of maritime law, the Court held that the owners of a barge which negligently struck and damaged a railway bridge were liable in negligence, not only to the owners of the bridge, but also to long-term railway lessees for their economic loss in having to reroute their trains. Moreover, all seven participating judges united in refusing to follow the lead of the House of Lords in* Murphy *v.* Brentwood District Council *the previous year where the House had limited recovery for economic loss in such situations to cases in which the plaintiff had suffered physical damage.*

Nevertheless, if one looks to the jurisprudential theories incorporated in the judicial reasoning, one finds a wide variation. One of the majority judges favours a narrow, radical pragmatist approach. The other members of the majority adopt the legal realist approach of moulding precedent to the perceived exigencies of the times and to the natural-rights view of a theory of negligence seen in terms of personal fault. The minority judges adhere to a form of sociological jurisprudence which determines results on the basis of the most efficient allocation of social resources.

In consequence, the settling effort of the Jervis Crown *decision on the law of torts is more apparent than real, because the case fails to yield a* ratio decidendi. *As indicated by their different jurisprudential*

Il semble à première vue que l'an dernier la Cour suprême du Canada ait déterminé le droit applicable à l'indemnisation de la perte purement économique au Canada. Dans l'arrêt Jervis Crown, *qui portait sur le droit maritime, la majorité des juges qui siégeaient (4 contre 3) a statué que les propriétaires d'un chaland qui avait heurté et endommagé un pont ferroviaire étaient responsables de négligence, non seulement envers les propriétaires du pont, mais aussi envers des compagnies ferroviaires qui louaient la voie ferrée à long terme et qui ont subi une perte économique à la suite du changement d'itinéraire des trains. En outre, les sept juges qui ont entendu la cause ont tous refusé de suivre le précédent de la Chambre des lords dans l'arrêt* Murphy *c.* Brentwood District Council, *où l'année précédente la Chambre avait limité l'indemnisation de la perte économique aux cas où le demandeur ou la demanderesse avait subi un préjudice physique.*

Toutefois, si l'on examine les théories jurisprudentielles sur lesquelles s'appuie le raisonnement des juges, on constate des divergences importantes. Un des juges de la majorité suit une approche pragmatiste, restrictive et radicale. Les autres juges de la majorité, quant à eux, adoptent une approche réaliste du droit qui consiste à adapter les précédents aux exigences de l'époque, telles que perçues, et à une perspective de la théorie de la négligence qui est fondée sur le droit naturel et qui aborde la négligence sous l'angle de la faute personnelle. Les juges

* Of the Federal Court of Appeal

approaches, three of the four members of the majority decide the case on the principle of proximity, the fourth on the "known plaintiff" rationale. The three judges in the minority, while not denying liability in every case of pure economic loss, disallow it where the outcome could have been provided for by the contract between the lessees and the owners of the railway bridge. Naturally, the majority three and the minority three cannot accept the others' reasoning, but the fourth majority judge rejects both other approaches, thus leaving the Court, not only with no majority opinion, but with a majority against every view. It is easy to predict further litigation.

dissidents préconisent une forme de jurisprudence sociologique qui détermine les résultats en fonction de la répartition des ressources sociales qui est la plus adéquate.

Par conséquent, l'effort que la Cour a fait dans cet arrêt pour déterminer le droit applicable en matière de responsabilité délictuelle est plus apparent que réel, parce qu'elle n'a pas réussi à dégager une ratio decidendi. *Comme l'indique les différentes approches jurisprudentielles qui ont été suivies, trois des quatre membres de la majorité décident de l'affaire en s'appuyant sur la règle du lien étroit, et le quatrième, sur celle du « demandeur connu ». Bien qu'ils n'écartent pas la responsabilité dans tous les cas de perte purement économique, les trois juges dissidents refusent de la reconnaître en l'espèce, parce que le contrat entre les propriétaires et les locataires du pont ferroviaire aurait pu prévoir cette éventualité. Naturellement, les trois juges de la majorité et les trois juges de la minorité ont des opinions opposées, et le quatrième juge de la majorité rejette l'approche de ces deux groupes. Ainsi, la Cour ne réunit pas une majorité en faveur d'une opinion, mais une majorité contre l'opinion des autres. Il est facile de prédire qu'il y aura d'autres litiges.*

It is a rare decision, even of a highest court, that can not only express the whole of a country's law in a particular area, but also recapitulate the whole of traditional jurisprudence.[1] That is the unique status of the decision by the Supreme Court of Canada in *Norsk Pacific Steamship Co.* v. *Canadian National Railway Co.*,[2] decided on 30 April, 1992 by a panel of seven of the nine judges of the Court.

The facts of the case in skeleton form are as follows. A barge being towed down the Fraser River near Vancouver in British Columbia, owned and operated by the Norsk companies, in heavy fog ran into a railway bridge, causing it to close for several weeks. Although the bridge was used by four railways,[3] with more than 85% of the use by the Canadian National Railway Company (CN), they all used it under contract with the owner, Public Works Canada (PWC), which owned not only the bridge, but also the tracks on and adjacent to it. All of the railways paid a toll for each railway car that crossed the bridge, the toll being fixed in such a way as to cover the entire cost of operation of the bridge to Public Works Canada but not so as to make a profit.

CN, the principal railway user, had used the bridge continuously since 1915. In fact, it was an integral part of the railway's main line, constituting the connecting link between the city of Vancouver terminus of the railway and the main line. On the average CN sent 32 trains with 1530 cars a day across the bridge.

There was an extra clause in the CN's licence agreement not found in the other licences, by which the railway agreed that in case of emergency it would provide such services as: (1) emergency repairs, changes, alterations and maintenance; (2) consulting, inspection and planning services; and (3) maintenance and repairs to the signal system. CN was to be reimbursed for any such services, but it also provided free of charge engineering consulting services, periodic inspection of the bridge and rails, and materials for repairs. The timing and duration of closures for routine maintenance were to be negotiated between CN and PWC.

None of the licences, however, provided for indemnification of the railways in case of interruption of the bridge service for any reason, and in the event of the partial or complete destruction of the bridge, PWC was under no obligation to repair or replace the bridge. The licences could also be terminated by PWC on three years' notice, as they specifically denied any leasehold estate or interest in land to the railways.

Following the accident, CN had to detour over railway tracks and a railway bridge considerably upriver and owned by another railway. CN sued only for its actual costs incurred by reason of the bridge closure, and not for loss of freight business. Liability for the collision itself was admitted by Norsk, so the only issue in dispute was the pure question of law as to Norsk's liability for CN's financial losses resulting from rerouting and delay.

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[1] I am, of course, using the word "jurisprudence" in its common law academic sense, to which the field of legal philosophy most closely corresponds in civil-law systems. The correspondence is exact only if the study of the legal process is included in the philosophy of law.

[2] [1992] 1 S.C.R. 1021, 137 N.R. 241 [hereinafter *Jervis Crown* cited to S.C.R.].

[3] The smallest railway user did not participate in the litigation at all. There was an agreement before trial between the other two railways and Norsk that their lawsuits would be determined by the result of this action.

The seven judges of the Court divided into three camps on this issue. McLachlin J., speaking for three judges, upheld the decision of the trial judge[4] and the Federal Court of Appeal[5] in recognizing liability. La Forest J., also speaking for three judges, would have denied liability. Stevenson J. agreed with McLachlin J. in dismissing the appeal but on a basis unacceptable to all of the other six judges.[6]

The kind of financial loss suffered by CN is usually referred to as a "pure economic loss," which has been defined as "a diminution of worth incurred without any physical injury to any asset of the plaintiff."[7] It differs from "consequential economic loss" which in Atiyah's phrase is "parasitic on some physical damage done to the plaintiff himself"[8] because it may be claimed by the same party that suffered physical damage to its own property. The law in every common-law country has shown considerable reluctance to allow liability in negligence for purely economic loss, and in Commonwealth countries this reluctance has expressed itself in a rule generally excluding liability, though not without a number of exceptions. The rationale for this exclusionary rule has been frequently expressed by Commonwealth judges in language borrowed from Cardozo C.J. (as he then was) in *Ultramares Corporation* v. *Touche*,[9] where he described recovery for pure economic loss as "a liability in an indeterminate amount for an indeterminate time to an indeterminate class."[10]

The exclusionary rule has often been stated so as to link recovery by a plaintiff with physical damage to that plaintiff's property. A formulation of the legal issue to be decided in the *Jervis Crown* case is thus put in this way by McLachlin J.: "is the right to recover in tort confined to cases where the plaintiff can show that his or her property or person was injured?"[11]

La Forest J., however, regards CN's loss as one more accurately classified as a sub-species of economic loss, which he terms "contractual relational economic loss"[12] and analogizes to the rubric of "negligent interference with contractual relations" in United States law, which he describes as "a less barbarous but perhaps

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[4] *Canadian National Railway Co.* v. *Norsk Pacific Steamship Co.* (1989), 49 C.C.L.T. 1, 26 F.T.R. 82.

[5] *Canadian National Railway Co.* v. *Norsk Pacific Steamship Co.*, [1990] 3 F.C. 114, 65 D.L.R. (4th) 321 (C.A.). In the interests of full disclosure, I should reveal that I authored the majority judgment in the Court of Appeal.

[6] L'Heureux-Dubé and Cory JJ. agreed with McLachlin J.; Sopinka and Iacobucci JJ. with La Forest J.

[7] *Ontario (A.G.)* v. *Fatehi*, [1984] 2 S.C.R. 536 at 542, 15 D.L.R. (4th) 132 at 137.

[8] P.S. Atiyah, *Negligence and Economic Loss* (1967) 83 L.Q. Rev. 248 at 265.

[9] 174 N.E. 441 (1931).

[10] *Ibid.* at 444.

[11] *Jervis Crown*, *supra* note 2 at 1134-35.

[12] The term "relational economic loss" appears to come from Professor B. Feldthusen, Economic Negligence: The Recovery of Pure Economic Loss, 2d ed. (Toronto: Carswell, 1989) at 199, where, "[t]he plaintiff suffers economic loss because of some relationship which exists between the plaintiff and the injured third party. It will be convenient to refer to these [as] claims for relational economic loss." La Forest J. relied explicitly on Feldthusen's *Economic Loss in the Supreme Court of Canada: Yesterday and Tomorrow* (1990-91) 17 Can. Bus. L.J. 356.

less accurate name".[13] He therefore poses the issue more narrowly as follows: "whether a person (A) who contracts for the use of property belonging to another (B) can sue a person who damages that property for losses resulting from A's inability to use the property during the period of repair."[14] He adds, with respect to his colleague's statement of the issue:

> To phrase the key issue in this case as a simple one of "is pure economic loss recoverable in tort?" is misleading. I do not doubt that pure economic loss is recoverable in some cases. It does not follow, however, that all economic loss cases are susceptible to the same analysis, or that cases of one type are necessarily relevant to cases of another.[15]

Accordingly, La Forest J. puts great emphasis on the categorical rule excluding contractual relational loss he believes he sees in traditional common law, beginning with *Cattle* v. *Stockton Waterworks Co.*,[16] where a contractor hired by a landowner to make a tunnel on his land was held not entitled to recover against a wrongdoer to the land whose wrong made the contract less profitable.

Although it would be too much to reduce the difference between McLachlin and La Forest JJ. entirely to the relative merits of approaches in tort or in contract, there is certainly to be found in La Forest J.'s position, as in recent dicta in the House of Lords,[17] a strong preference for upholding the exclusionary rule in cases where a claim in tort can be seen as an end-run around limitations on contractual liability. His own phrasing of it is as follows:

> Thus I do not say that the right to recovery in all cases of contractual relational economic loss depends exclusively on the terms of the contract. Rather, I note that such is the tenor of the exclusionary rule and that departures from that rule should be justified on defensible policy grounds.[18]

Another way of conceptualizing the difference in perspective is in terms of the landmark decision of *Donoghue* v. *Stevenson*,[19] the snail-in-the-ginger-beer case, before which, in the absence of a contract, there had been thought to be no duty of care in tort on the part of a manufacturer of defective goods. The House of Lords phrased the duty of care owing by a manufacturer in terms of a good neighbour principle. Lord Atkin said:

> The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply.

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[13] *Jervis Crown*, *supra* note 2 at 1074.

[14] *Ibid.* at 1037.

[15] *Ibid.* at 1048.

[16] (1875) L.R. 10 Q.B. 453.

[17] *See, e.g.*, Lord Brandon in *Junior Books Ltd.* v. *Veitchi Co. (1982)*, [1983] 1 A.C. 520, [1982] 3 ALL E.R. 201 (H.L.); and in *Leigh & Sillavan Ltd.* v. *Aliakmon Shipping Co.*, [1986] A.C. 785, [1986] 2 ALL E.R. 145 (H.L.); and Lord Bridge in *D. & F. Estates Ltd.* v. *Church Commissioners for England* (1988), [1989] 1 A.C. 177, [1988] 2 ALL E.R. 992 (H.L.).

[18] *Jervis Crown*, *supra* note 2 at 1134.

[19] [1932] A.C. 562, [1932] ALL E.R. Rep. 1 (H.L.) [hereinafter *Donoghue* cited to A.C.].

> You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be — persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.[20]

In effect, McLachlin J. is merely applying the *Donoghue* principle to the case at bar, through the intermediary offices of *Anns* v. *Merton London Borough Council*,[21] and other cases.[22]

In *Anns*, the House of Lords held that a local authority might be liable in negligence to lessees of houses built, as a result of poor inspection, on inadequate foundations contrary to building regulations. The well-known dictum of Lord Wilberforce in *Anns*, in the words of McLachlin J., "suggested that recovery should not depend on the category of case, but should lie wherever two general conditions were found: (1) foreseeability and sufficient proximity between the negligent act and the loss; and (2) the absence of considerations which call for a limitation on liability."[23]

The first of these conditions, of course, expresses the good neighbour principle of *Donoghue*. The second is a pragmatic limitation which McLachlin J. finds to be inappropriate in the present case, thereby allowing full scope to the *Donoghue* principle. La Forest J., on the other hand, offers several pragmatic reasons supporting the exclusionary rule.[24]

I

Every literary creation relies for much of its impact on the confrontation provided by an anti-hero. In most contemporary legal scenarios English legal positivism is cast in the role of villain. The jurisprudential drama in *Jervis Crown* is no exception: the legal positivism expressed by the House of Lords in *Murphy* v. *Brentwood District Council*,[25] is the antagonist — surprisingly, perhaps, of the whole Court.[26]

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[20] *Ibid.* at 580.

[21] (1977), [1978] A.C. 728, [1977] 2 All E.R. 492 (H.L.) [hereinafter *Anns* cited to A.C.].

[22] Another English case in which *Donoghue* was applied was *Hedley Byrne & Co.* v. *Heller & Partners Ltd.* (1963), [1964] A.C. 465, [1963] 2 All E.R. 575 (H.L.), where the defendant had made a negligent misstatement to a bank about the creditworthiness of a company, and the bank passed the information on to the plaintiff, who relied on it to its detriment. The House of Lords, by way of exception, recognized the right to compensation for purely economic loss resulting from a negligent misstatement.

[23] *Jervis Crown*, *supra* note 2 at 1141.

[24] *Ibid.* at 1130-31.

[25] (1990), [1991] 1 A.C. 398, [1990] 2 All E.R. 908 (H.L.) [hereinafter *Murphy* cited to A.C.].

[26] For my views as to the positivist tradition, *see* M.R. MacGuigan, *Law, Morals, and Positivism* (1961-62) 14 U.T.L.J. 1. *Murphy* was foreshadowed, in its rejection of *Anns*, by *Caparo Industries plc* v. *Dickman*, [1990] 2 A.C. 605, [1990] 1 All E.R. 568 (H.L.) decided by the House of Lords some six months prior to *Murphy*. E. A. Cherniak & K. F. Stevens, *Two Steps*

One of the principal characteristics of positivism is to take law as a given, particularly in the course of the judicial process: judges must take law as they find it, as prescribed by either legislatures or common-law precedents. The most creativity they are allowed is to re-establish the correct path of the law when it has unaccountably strayed from the prescribed straight and narrow.

That is what the House of Lords saw itself as doing in *Murphy*, a case like *Anns* of a defective house foundation, where the trial judge had found that the local authority was negligent in approving the building plans. Lord Wilberforce was said to have gone astray in *Anns* by following Lord Denning, M.R., in the English Court of Appeal in *Dutton* v. *Bognor Regis Urban District Council*,[27] a decision of which Lord Bridge of Harwich said in *Murphy*: "That decision was certainly without precedent and was, I think, widely regarded as judicial legislation."[28] In the words of Lord Keith of Kinkel:

> The jump which is here [in Dutton] made from liability under the *Donoghue* v. *Stevenson* principle for damage to person or property caused by a latent defect in a carelessly manufactured article to liability for the cost of rectifying a defect in such an article which is *ex hypothesi* no longer latent is difficult to accept.[29]

Lord Jauncey of Tullichettle emphasized that *Anns* "was not based on any recognised principle" and that "it conflicts with established principles in a number of respects".[30]

Right order having been restored by overruling *Dutton* and its derivative, *Anns*, the exclusionary rule against pure economic loss was maintained in the interests of limiting such liability to contractually accepted liability. Lord Bridge of Harwich put the law this way:

> [I]f a manufacturer produces and sells a chattel which is merely defective in quality....the manufacturer's liability at common law arises only under and by reference to the terms of any contract to which he is a party in relation to the chattel; the common law does not impose on him any liability in tort to persons to whom he owes no duty in contract but who, having acquired the chattel, suffer economic loss because the chattel is defective in quality....
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> I believe that these principles are equally applicable to buildings. If a builder erects a structure containing a latent defect which renders it dangerous to persons or property, he will be liable in tort for injury to persons or damage to property resulting from that

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Forward or One Step Back? Anns *at the Crossroads in Canada* (1992) 20 CAN. BUS. L.J. 164 at 177 criticize *Murphy* for "treating public authorities on the same plane as private competitive actors" and add that "[t]he advantage of the *Anns* approach is that it allows courts to take into consideration a wider range of social expectations than is permitted by the ideological stance of the recent English cases.": *ibid.* at 179.

[27] (1971), [1972] 1 Q.B. 373, [1972] 1 ALL E.R. 462 (C.A.).

[28] *Murphy*, *supra* note 25 at 473.

[29] *Ibid.* at 465.

[30] *Ibid.* at 498.

> dangerous defect. But if the defect becomes apparent before any injury or damage has been caused, the loss sustained by the building owner is purely economic.[31]

The social consequences of this reversion to the perceived tradition were dealt with by Lord Oliver of Aylmerton in typically positivist fashion:

> There may be very sound social and political reasons for imposing upon local authorities the burden of acting, in effect, as insurers that buildings erected in their areas have been properly constructed in accordance with the relevant building regulations. Statute may so provide. It has not done so and I do not, for my part, think that it is right for the courts not simply to expand existing principles but to create at large new principles in order to fulfil a social need in an area of consumer protection which has already been perceived by the legislature but for which, presumably advisedly, it has not thought it necessary to provide.[32]

Such sentiments may be found in hundreds of positivist decisions.

The unanimity with which *Murphy* is rejected by all seven Supreme Court of Canada judges is striking, particularly in the light of the Canadian tradition of extreme respect for English precedents, even since the abolition of appeals to the Judicial Committee of the Privy Council (the House of Lords in another guise) in 1949. The Supreme Court continued to rely on its own previous decision in *Kamloops (City of)* v. *Nielsen*,[33] rather than reversing itself according to the English model.

The issue in *Kamloops* was whether a municipality was liable in negligence, for failing to prevent the construction of a house with defective foundations, to a purchaser who took the house without notice of the state of the foundations and of the inadequacy of the municipal surveillance. A majority of the panel held for liability. Speaking for the majority, Wilson J. said: "I do not believe that to permit recovery in this case is to expose public authorities to the indeterminate liability referred to in *Ultramares*."[34] Material to this holding was the fact that the lawsuit was against a public authority and that there were therefore no perceived contractual overtones.

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[31] *Ibid.* at 475.

[32] *Ibid.* at 491-92.

[33] [1984] 2 S.C.R. 2, 10 D.L.R. (4th) 641 [hereinafter *Kamloops* cited to S.C.R.]. La Forest J. also relied on the majority in *Rivtow Marine Ltd.* v. *Washington Iron Works*, [1974] S.C.R. 1189, 40 D.L.R. (3d) 530 [hereinafter *Rivtow*], where the plaintiff had chartered a crane for its logging business which the defendant knew had a hidden defect. The majority allowed recovery on the basis of a duty to warn but maintained the general exclusionary rule. Laskin C.J.C. dissented on the basis that "the rationale of manufacturers' liability for negligence should equally support suchrecovery 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": *ibid.* at 1218. The Laskin view appears to have appealed to Lord Wilberforce in *Anns*, *supra* note 21 at 760; to Wilson J.in *Kamloops*, *ibid.* at 32-33; and to McLachlin J. in *Jervis Crown*, *supra* note 2 at 1161.

[34] *Kamloops*, *ibid.* at 35.

Applying *Kamloops*, McLachlin J. stated:

> The House of Lords recently resiled from *Anns* and returned to the old proposition that economic loss could be recovered in negligence only where the plaintiff had suffered physical damage or in the reliance situation of *Hedley Byrne: Murphy* v. *Brentwood District Council*, [1991] 1 A.C. 398. The reasons cited in *Murphy*, at p. 472, for the return to the narrow rule focus on the absence of any "coherent and logically based doctrine" or device for avoiding the spectre of unlimited liability, an absence, in the view of Lord Keith, calculated "to put the law of negligence into a state of confusion defying rational analysis". The only way to avoid this result, in the view of their Lordships, was to return the law to its former narrow, if arbitrary state....
>
> I conclude that, from a doctrinal point of view, this Court should continue on the course charted in *Kamloops* rather than reverting to the narrow exclusionary rule as the House of Lords did in *Murphy*.[35]

Stevenson J. writes simply that "While the general exclusionary rule has been emphatically re-affirmed in England in *Murphy*....I see no justification for our so doing."[36]

La Forest J. takes the same position as his colleagues:

> It is sufficient to say that I fully support this Court's rejection of the broad bar on recovery of pure economic loss in *Rivtow* and *Kamloops*. I would stress again the need to take into account the specific characteristics of each case. I agree with McLachlin J. that *Murphy*....does not represent the law in Canada.[37]

However, La Forest J. sees *Kamloops* and *Murphy* as representing non-relational economic loss, where the plaintiff claims for pure economic loss unrelated to any personal injury or property loss suffered by either the plaintiff or any third party. He therefore immediately adds:

> The present case, however, is of a third type. It involves a claim for contractual relational loss by the plaintiff as a result of damage caused to someone else's property.[38]

This matter must be explored further, but for the moment the point to be emphasized is the complete rejection by the Canadian Supreme Court of English legal positivism. The reasons behind the rejection differ with each of the three judgment-writers. It is those reasons which must now be explored.

II

Stevenson J. agrees with his colleagues that "recovery of relational losses is....exceptional."[39] Where, then, to draw the line? Stevenson J. takes the view that

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[35] *Jervis Crown*, *supra* note 2 at 1141 & 1155.
[36] *Ibid.* at 1167.
[37] *Ibid.* at 1054.
[38] *Ibid.*
[39] *Ibid.* at 1177.

"the known plaintiff approach does provide an appropriate basis for excluding the relational loss exclusionary rule."[40] He writes:

> The line must be drawn by considering the policy concerns which underlie the need to limit the recovery of relational losses. The policy rationale which precludes recovery for most relational losses does not exist if there is no danger of indeterminate liability. There is no danger of indeterminate liability, and thus no policy reason to deny recoverability, when the defendant actually knows or ought to know of a specific individual or individuals, as opposed to a general or unascertained class of the public, who is or are likely to suffer a foreseeable kind of loss as a result of negligence by that defendant. For sake of convenience, this can be called the "known plaintiff" exception to the usual position that relational losses cannot be recovered for the policy reason that indeterminate liability could result.
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> With a known plaintiff, the scope of liability cannot become indeterminate. Liability is kept within a limited and determinate scope.[41]

It appears that by a "known plaintiff" Stevenson J. means primarily a specific individual rather than a general class, because he says that "[t]here is no danger of indeterminate liability when the defendant actually knows or ought to know of an identifiable plaintiff, as opposed to a general or unascertained class of the public...."[42]

Such a "known plaintiff" concept is verified on the facts as found by the trial judge in this case. The damaged bridge was commonly referred to in the area, no doubt because of that railway's predominant use of it, as the "CN bridge". The master of the Jervis Crown believed until sometime after the collision that the bridge was owned by CN.

Stevenson J. therefore concludes:

> To use Lord Atkins' [sic] question: ought this particular plaintiff have been in the contemplation of those defendants? Ought this class of plaintiff, a known bridge user, a person with a contractual right to use the bridge be in contemplation? The answer is affirmative....
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> In my view, the plaintiff was and ought to have been within the contemplation of the crew operating the tug. Economic loss to the plaintiff was foreseeable, in no way indeterminate or uncertain. Its nature and extent were almost predictable. The specific plaintiff was actually foreseen by the defendants. I see no policy rationale for excluding liability on the facts of this case.[43]

I can describe this approach in jurisprudential terms only as a kind of radical pragmatism, marked, it seems to me, by a complete individualizing of the case, in the sense that it establishes the narrowest possible rule consistent with deciding the case. It does not deny that other rules may be possible, but it finds them unnecessary for the decision here. In the Justice's own words, "[i]t is therefore unnecessary, for

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[40] *Ibid.* at 1182.
[41] *Ibid.* at 1179.
[42] *Ibid.* at 1182.
[43] *Ibid.* at 1183 & 1184.

the purposes of this case, to determine whether or not interference with contractual duties can give rise to a duty of care in tort."[44] This is the common law at its most limiting, evoking the poet's description of it as a "wilderness of single instances".

It is an approach rejected by the other six judges. McLachlin J. adopts the dissenters' criticism:

> I, like La Forest J., would not accept, by itself, the "known plaintiff" test or the "ascertained class" test, which, to borrow La Forest J.'s phrase, places a premium on notoriety.[45]

La Forest J. deals with the matter in more detail. Apart from authoritive pronouncements against such an approach, he also rejects it in principle. There is no malicious intent on the part of the defendant. There is no intention to affect the plaintiff at all. What has taken place is an accident. Knowledge of the individual plaintiff "operates arbitrarily both in terms of singling out defendants and in terms of singling out plaintiffs."[46] More particularly, he points out:

> Allowing CN's claim to be distinct from the other contractual victims by virtue of its particular foreseeability as an individual victim would in my view give rise to an unjust rule owing to its sheer arbitrariness. It serves neither to distinguish particularly meritorious victims, nor to single out particularly careless tortfeasors. Its sole function is to reduce the class of claimants to a small group, a function that could be equally well performed by any other factual distinction. Further, the test would have the effect of singling out the wrong parties for relief. It would offer a premium to notoriety, a premium for which I can find no legal or social justification, particularly since such persons are most likely to advert to the matter and to contract out or insure against the harm.[47]

In the light of the strong and unanimous criticism from the other members of the Court, I think it is unlikely that the "known plaintiff" principle will have any continuing influence on the development of the law.

III

The judgment of McLachlin J. is probably the most eloquent statement to this point in Canadian law of the American legal realist approach, which exalts the creative role of judges and the creative mission of the common law. McLachlin J. relies in good part on the insights of Holmes himself. Following her analysis of the common law in the United Kingdom, Australia, the United States, and Canada, she concludes:

> The foregoing comparative review suggests that in some cases damages for economic loss should be available where the plaintiff has neither suffered physical damage nor

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[44] *Ibid.* at 1183-84.
[45] *Ibid.* at 1163.
[46] *Ibid.* at 1111.
[47] *Ibid.* at 1111-12.

relied in the sense of *Hedley Byrne*. Civil law jurisdictions, far from precluding such recovery, require it where it is direct and certain. The common law jurisdictions started from a narrow rule excluding most pure economic loss, but found themselves in a situation where judges on a case-by-case basis persisted in awarding damages for economic loss outside the categories. Even in the United States, where fear of the floodgates of unlimited liability has held the strongest sway, courts have been forced to make exceptions in the interests of justice. The fact is that situations arise, other than those falling within the old exclusionary rule, where it is manifestly fair and just that recovery of economic loss be permitted. Faced with these situations, courts will strain to allow recovery, provided they are satisfied that the case will not open the door to a plethora of undeserving claims. They will refuse to accept injustice merely for the sake of the doctrinal tidiness which is the motivating spirit of *Murphy*. This is in the best tradition of the law of negligence, the history of which exhibits a sturdy refusal to be confined by arbitrary forms and rules where justice indicates otherwise. It is the tradition to which this Court has adhered in suggesting in *Kamloops* that the search should not be for a universal rule but for the elaboration of categories where recovery of economic loss is justifiable on a case-by-case basis....

Judges seem able to pick out deserving cases when they see them. The difficulty lies in formulating a rule which explains why judges allow recovery of economic loss in some cases and not in others.

Such difficulties are not new to the common law. It was the great insight of Justice Oliver Wendell Holmes that the common law resides most fundamentally not in a set of *a priori* principles but in the decisions of the courts. The task of doctrine is to identify the factors which unite the different applications with a view to formulating emergent principles, recognizing that absolute logical formulations may not in all cases be possible or practical.

The decisions of the House of Lords in *Murphy* and of this Court in *Kamloops* illustrate two different approaches to the problem of defining the legal parameters of common law rules....

It is my view that the incremental approach of *Kamloops* is to be preferred to the insistence on logical precision of *Murphy*. It is more consistent with the incremental character of the common law. It permits relief to be granted in new situations where it is merited. Finally, it is sensitive to danger of unlimited liability.

But where, one may ask, are future courts to find guidance? The answer is that as the courts recognize new categories of cases where economic recovery is available, rules will emerge. This is what happened in the case of *Hedley Byrne*. Up to that time, it was accepted that there could be no recovery for negligent misstatement causing economic loss. The court held that there could be, and formulated conditions (reliance) which would limit claims and avoid the spectre of open floodgates. This decision was transmuted to a rule of general application which has functioned without difficulty and to the betterment of justice ever since....

If this approach is followed, as it has been to date in Canada, new categories of cases will from time to time arise. It will not be certain whether economic loss can be recovered in these categories until the courts have pronounced on them. During this period, the law in a small area of negligence may be uncertain. Such uncertainty however is inherent in the common law generally. It is the price the common law pays for flexibility, for the

> ability to adapt to a changing world. If past experience serves, it is a price we should willingly pay, provided the limits of uncertainty are kept within reasonable bounds.[48]

It was Holmes who wrote more than a century ago that "[t]he life of the law has not been logic: it has been experience."[49] The foregoing passage is redolent of the same spirit.

McLachlin J. draws from two Australian cases in her elaboration of the controlling concept of proximity as "an umbrella, covering a number of disparate circumstances in which the relationship between the parties is so close that it is just and reasonable to permit recovery in tort".[50] She writes:

> The matter may be put thus: before the law will impose liability there must be a connection between the defendant's conduct and plaintiff's loss which makes it just for the defendant to indemnify the plaintiff. In contract, the contractual relationship provides this link. In trust, it is the fiduciary obligation which establishes the necessary connection. In tort, the equivalent notion is proximity. Proximity may consist of various forms of closeness — physical, circumstantial, causal or assumed — which serve to identify the categories of cases in which liability lies....
>
> Proximity, like the requirement of directness [in the civil law], posits a close link between the negligent act and the resultant loss. Distant losses which arise from collateral relationships do not qualify for recovery.[51]

Having concluded that from a doctrinal point of view the Court should employ a controlling concept of proximity to determine liability in pure economic loss, subject to Lord Wilberforce's second principle (or pragmatic veto), McLachlin J. considers the degree of proximity to be found on the facts here. One factor which she entertains, following the minority opinion in *Rivtow*, but nevertheless leaves undecided, is the likelihood of physical injury to CN's property, since CN's trains were so frequently on the bridge as to be likely to be damaged by an accident.[52]

The key factors on which she fastens, however, are that CN's properties on both sides of the river were in close proximity with the bridge, that neither of those properties could be enjoyed without the link of the bridge, which was an integral part of its railway system, that CN supplied materials, inspection and consulting services for the bridge, that it was its preponderant user, and that it was recognized in the periodic negotiations surrounding the closing of the bridge. Such a characterization of the CN - PWC relationship creates a relationship analogous to a "joint" or

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[48] *Ibid.* at 1146-50.

[49] O.W. Holmes, THE COMMON LAW (Boston: Little, Brown & Company, 1923) at 1.

[50] *Jervis Crown, supra* note 2 at 1152. *See Caltex Oil (Australia) Pty. Ltd.* v. *The Dredge "Willemstad"* (1976), 11 A.L.R. 227, 136 C.L.R. 529 (H.C.) and *Sutherland Shire Council* v. *Heyman* (1985), 60 A.L.R. 1, 157 C.L.R. 424 (H.C.), per Deane J.

[51] *Jervis Crown, supra* note 2 at 1152 & 1154.

[52] *Ibid.* at 1161.

"common venture" under which recovery for purely economic loss has previously been recognized in maritime law cases in both the U.K.[53] and the U.S.[54] She states:

> The reasoning, as I apprehend it, is that where the plaintiff's operations are so closely allied to the operations of the party suffering physical damage and to its property (which — as damaged — causes the plaintiff's loss) that it can be considered a joint venturer with the owner of the property, the plaintiff can recover its economic loss even though the plaintiff has suffered no physical damage to its own property. To deny recovery in such circumstances would be to deny it to a person who for practical purposes is in the same position as if he or she owned the property physically damaged.[55]

All that remains is the question whether such recovery should be denied for practical reasons. She writes:

> The second question is whether extension of recovery to this type of loss is desirable from a practical point of view. Recovery serves the purpose of permitting a plaintiff whose position for practical purposes, vis-à-vis the tortfeasor, is indistinguishable from that of the owner of the damaged property, to recover what the actual owner could have recovered. This is fair and avoids an anomalous result. Nor does the recovery of economic loss in this case open the floodgates to unlimited liability. The category is a limited one. It has been applied in England and the United States without apparent difficulty. It does not embrace casual users of the property or those secondarily and incidentally affected by the damage done to the property. Potential tortfeasors can gauge in advance the scope of their liability. Businesses are not precluded from self-insurance or from contracting for indemnity, nor are they 'penalized' for not so doing. Finally, frivolous claims are not encouraged.[56]

She categorizes her disagreement with La Forest J. as over "the test for determining joint venture."[57] The right to recovery cannot depend exclusively on the terms of the formal contract between the plaintiff and the property owner, as La Forest J. would have it. She continues:

> The terms of the contract are an important consideration in determining whether economic loss is recoverable. But the contract may tell only part of the story between the parties. If the evidence establishes that having regard to the entire relationship between the owner of the damaged property and the plaintiff, the plaintiff must be regarded as standing in the relation of joint or common venturer (or a concept akin thereto) with the property owner with the result that in justice his rights against third parties should be the same as the owner's, then I would not interfere. Here as elsewhere in the law of tort, the question is where the balance between certainty and flexibility should be struck. It is my conviction, based on the development of the law relating to recovery of economic loss thus far, that the balance must be struck this side of rigid

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[53] *Morrison Steamship Co.* v. *Greystoke Castle* (1946), [1947] A.C. 265, [1946] 2 ALL E.R. 696 (H.L.).

[54] *Amoco Transport Co.* v. *S/S Mason Lykes*, 768 F.2D 659 (5th Cir. 1985).

[55] *Jervis Crown*, *supra* note 2 at 1162.

[56] *Ibid.* at 1162-63.

[57] *Ibid.* at 1163.

> categorization which denies the possibility of recovery in new cases which may not meet the categorical test.[58]

Such a test will permit predictability "in substantial measure, while leaving the door open to future developments in the law".[59] Predictability, in fact, is "a more complex matter than looking at a particular contract".[60] Business decisions as to insurance are most likely to be made on a global risk assessment, taking into account that, even with favourable law, recovery may be impeded by the insolvency or lack of insurance of tortfeasors. She concludes:

> In the end, I conclude that a test for recovery of economic loss outside situations akin to *Hedley Byrne* — whether 'contractual relational' economic loss or otherwise — should be flexible enough to meet the complexities of commercial reality and to permit the recognition of new situations in which liability ought, in justice, to lie as such situations arise.[61]

This concluding reference to "justice" draws attention to another jurisprudential approach which I believe is latent in McLachlin J.'s judgment, viz., that of natural-law or natural-rights theory, or at least a broadly justice-oriented viewpoint analogous to those theories, which are usually considered to be defined by the application of generally valid value judgments to particular legal situations. The same perspective appears in McLachlin J.'s initial statement of the problem:

> While the criterion of physical damage successfully avoided the spectre of unlimited damages, it suffered from the defect that it arbitrarily, and in some cases, arguably unjustly, deprived deserving plaintiffs of recovery. Why, it was asked, should the right to recover economic loss be dependant on whether physical damage, however minuscule, had been inflicted on the plaintiff's property? Why should a plaintiff who waits for a defective machine to break and cause physical injury or damage be able to recover, while one who prudently repairs the machine before the physical damage or injury occurs be left without remedy? Is there really a generic distinction between the loss resulting from repair of physical damage and loss resulting from loss of use in a commercial situation where the only real loss is one of profit? While it may be argued that physical injury is inherently more deserving than economic loss, particularly where the economic loss is not associated with physical damage ... that does not explain why the law should not permit recovery for economic loss where justice so requires nor how damage to property and economic losses can be distinguished in many situations. Someone who invests in a bridge in order to use it cannot be distinguished from someone who leases a bridge in order to use it. If the bridge is lost they have both lost something of value: the use of the bridge.[62]

Her view that tort law is essentially based on the concept of personal fault is most clearly seen where she crosses swords with the proponents of loss distribution. For instance, she states:

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[58] *Ibid.* at 1164.
[59] *Ibid.* at 1165.
[60] *Ibid.* at 1166.
[61] *Ibid.*
[62] *Ibid.* at 1137-38.

> The arguments advanced under this head proceed from the premise that a certain type of loss should not be seen in terms of fault but seen rather as the more or less inevitable by-product of desirable but inherently dangerous (or 'risky') activity. Viewing the activity thus, it is argued that it may well be just to distribute its costs among all who benefit from that activity, and conversely unfair to impose it upon individuals who (assuming human error to be the inevitable by-product of human activity) are viewed as the "faultless" instruments causing the loss. This basis for administering losses has been variously described as "collectivisation of losses" or "loss distribution"....It arguably amounts to a rejection or diminution of the concept of personal fault on which our law of tort (and the civil law of delict) is based.[63]

The justification for the loss-spreading approach is that spreading the risk among many parties is better for the economic well-being of society than saddling the tortfeaser alone with it. McLachlin J. follows W. Bishop in estimating that "usually the only insurance available will be self insurance."[64] Moreover, in their joint views, "the loss spreading rationale cannot justify the numerous cases where *there is only one victim.*"[65]

The approach of La Forest J. based on contractual allocation of risk is for her unsatisfactory, especially since it overlooks the historical centrality of personal fault to the concept of negligence. She argues:

> The "contractual allocation of risk" argument rests on a number of important, but questionable assumptions. First, the argument assumes that all persons or business entities organize their affairs in accordance with the laws of economic efficiency, assigning liability to the "least-cost risk avoider". Second, it assumes that all parties to a transaction share an equality of bargaining power which will result in the effective allocation of risk. It is not considered that certain parties who control the situation (e.g., the owners of an indispensable bridge) may refuse to indemnify against the negligence of those over whom they have no control, or may demand such an exorbitant premium for this indemnification that it would be more cost-effective for the innocent victim to insure itself. Thirdly, it overlooks the historical centrality of personal fault to our concept of negligence or "delict" and the role this may have in curbing negligent conduct and thus limiting the harm done to innocent parties, not all of whom are large enterprises capable of maximizing their economic situation.[66]

The reasons for judgment of McLachlin J. appear to me to be an expression of both American legal realism and natural law theory. If I am right, that involves her in no contradiction, because, while the original legal realists were intensely hostile to natural law, and might even be said to have become realists to counter the excesses of a natural-rights-driven laissez-faire legal theory, there has been something of a rapprochement between the two approaches in recent years.[67]

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[63] *Ibid.* at 1156.

[64] *Economic Loss in Tort* (1982) OXFORD J. LEGAL STUDIES 1 at 2 [hereinafter *Economic Loss*], quoted by McLachlin J. in *Jervis Crown*, *supra* note 2 at 1157.

[65] *Economic Loss*, *ibid.*, quoted by McLachlin J. in *Jervis Crown*, *ibid.* at 1158.

[66] *Jervis Crown*, *ibid.* at 1159.

[67] *See* M.R. MacGuigan, *The Problem of Law and Morals in Contemporary Jurisprudence* (1962) 8 CATH. LAW. 293.

IV

La Forest J. takes direct issue with his colleague on her view as to "the historical centrality of personal fault to our concept of negligence."[68] In his opinion "liability in this particular area should not be established based on the court's perception of the extent of the defendant's moral fault."[69] For one thing, a defendant's liability may well be vicarious and may involve neither conduct nor breach of duty by the defendant directly. For another, deterrence is adequately effected through the property owner, who is in a position to sue because of the damage to his property:

> In my view, cases like the present do not fall to be decided on the grounds of personal fault. Rather they concern the effort to deter accidents and to allocate losses in a reasonable and efficient manner.[70]

This emphasis on the allocation of losses makes La Forest J. a foremost exponent of sociological jurisprudence.

For the sociological school law is merely a means, though a principal means, to the achievement of social values, which are described as social interests. Hence it is always interests, and never rights, which clash in litigious contests. Sociologists do not rank these conflicting interests, but take their values from society itself. In tort, loss distribution on a wide basis is the hallmark of the sociological approach. La Forest J.'s variation is loss distribution on the socially best, rather than on the socially widest, basis. In this he appears to fall squarely within the new approach of the economic analysis of law, which is directed to the most efficient allocation of social resources.[71]

La Forest J. makes the point that loss bearing is not the same as loss avoidance. He admits that the better loss bearer is not necessarily the better risk avoider. His approach is to take the loss as a given. He thus writes:

> Determining which party is best able to *bear* the loss essentially involves asking which party is in a better position to predict the frequency and severity of CN's economic loss when bridges are damaged, and to plan accordingly. Analysis of loss bearing ability emphasizes how the parties deal with accidents that tort law has not succeeded in preventing, rather than with preventing accidents.[72]

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[68] *Jervis Crown*, *supra* note 2 at 1115.

[69] *Ibid.*

[70] *Ibid.* at 1115-16. La Forest J. specifically leaves open for future decision the question as to liability for contractual relational economic loss where the property damage is inconsequential and it might make sense to impose additional liability on deterrence grounds (*ibid.* at 1121). He also reserves what he calls "the residual cases" where the plaintiff does not have any other "commercially reasonable method of protecting itself.": *ibid.* at 1132.

[71] *See, e.g.*, R.A. Posner, THE ECONOMICS OF JUSTICE (Cambridge, Mass.: Harvard University Press, 1981) and W.M. Landes & R. Posner, THE ECONOMIC STRUCTURE OF TORT LAW (Cambridge, Mass.: Harvard University Press, 1987).

[72] *Jervis Crown*, *supra* note 2 at 1117.

Increasingly, in his view, courts have addressed the issue of insurance as one of the principal policy concerns in what I might call loss management.

To his mind there is no question that "a denial of recovery in this case is justified in light of CN's overwhelmingly superior risk bearing capacity on the facts of this case".[73] It was well aware of the risk of bridge failure, since the same bridge had been damaged by ships on a number of previous occasions. It had participated in a study of the matter, and it had even lost an earlier lawsuit in similar circumstances.[74] It could have insisted on reimbursement in its contract with PWC, in which case PWC would have been able to collect that amount from the tortfeaser, but the contract, by its silence, rather allocated the risk to the potential victim, CN, which benefited from a lower price and was best placed to take other measures, such as in its own contractual relations with its clients, suppliers and others.

In any event, because of the ever-present uncertainties in litigation, the only solution for the prudent railway would be to purchase insurance. As a consequence, La Forest J. alleges that "the rules suggested by my colleagues thus will require that *both* parties insure at considerable additional social cost".[75]

La Forest J. thus takes the view that the outcome of cases under the exclusionary rule depends upon the terms of the contract. The contract may create a possessory interest or a joint venture or it may provide for an indemnity from the property owner. Here it does none of those things, and so there should be no liability, either in contract or in tort.

He dismisses CN's strongly-pressed argument for a common venture based upon its contract with PWC, largely because it does not explicitly provide for any joint responsibility for property losses:

> CN's preponderant usage of the bridge and participation in negotiations over bridge closure do not justify a finding of common adventure. I can see no reason to allow recovery based simply on the plaintiff's status as a principal client....
>
> CN also argues that paragraph 10 of its licence agreement... together with its provision of materials for repairs, is sufficient to constitute a "common adventure" between itself and PWC. In my view, that provision is far from sufficient to create an alternative interest. While it does provide that CN will make emergency repairs, it provides both for prior approval and reasonable reimbursement by Canada. The consulting services, inspections, maintenance and repairs are subject to a similar regime. These provisions merely provide for the establishment of further contractual relations between CN and PWC. CN is both a supplier to PWC and a contractor for services from PWC. None of the clauses provides for any joint responsibility for property losses. It would be curious if a bridge user could found a contractual loss claim on the fortuitous circumstance that it also was the company hired to fix the bridge on occasion.[76]

In terms of fundamental analysis, fault is for La Forest J. too arbitrary a standard, since in any event some admittedly affected claimants will have to have their claims

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[73] *Ibid.* at 1127.

[74] *Gypsum Carrier Inc.* v. *The Queen* (1977), [1978] 1 F.C. 147, 78 D.L.R. (3d) 175 (T.D.).

[75] *Jervis Crown, supra* note 2 at 1127.

[76] *Ibid.* at 1097-98.

denied. Moreover, the proximity test has practically no predictive value. Only the exclusionary rule carries any real certainty. He expands on its virtues:

> [T]he reasons supporting the exclusionary rule ... are, of course, essentially pragmatic, as has been recognized in cases of this type from the very beginning. First, denial of recovery places incentives on all parties to act in ways that will minimize overall losses, a legitimate and desirable goal for tort law in this area. Second, denial of recovery allows for only one party carrying insurance rather than both parties. Third, it will result in a great saving of judicial resources for cases in which more pressing concerns are put forward. The difficult job of drawing the line is at least done quickly without a great deal of factual investigation into the various factors that found proximity. The right to recover can be most often determined from the face of the contract. Fourth, it also eliminates difficult problems of sharing an impecunious defendant's limited resources between relational claims and direct claims. Fifth, the traditional rule is certain, and although like any pragmatic solution, borderline cases may cause problems, the exceptions to the rule in cases of joint ventures, general average contributions, and possessory and proprietorial interests are reasonably well defined and circumscribed. This case, in my view, does not even constitute a borderline case in this respect, since CN has no property interest of any kind. The consequence of that certainty is that contracting parties can be certain of where the loss with respect to the unavailability of property will lie in the absence of any contractual arrangement.[77]

Nevertheless, in the final analysis, the exclusionary rule is no more than the least unsatisfactory of the alternatives, particularly given the established exception as to time charterers:

> The exclusionary rule is not in itself attractive. It excludes recovery by people who have undeniably suffered losses as a result of an accident. It also leads to some arbitrary but generally predictable results in cases at the margin. The results with respect to time charters may be "capricious", but time charterers know their rights and obligations from the start and can act accordingly. The rule only becomes defensible when it is realized that full recovery is impossible, that recovery is in fact going to be refused in the vast majority of such claims regardless of the rule we adopt, and when the exclusionary rule is compared to the alternatives. In my view, it should not be disturbed on the facts of this case.[78]

This diminished praise at the end of his judgment for the exclusionary rule narrows the distance between the two points of view. It also has the effect of blunting any implication of legal positivism that might be drawn from his apparent reliance on the typically positivist emphasis on the necessity of certainty in the law. La Forest J. therefore concludes in these terms, leaving open for future decision potentially large exceptions to the exclusionary rule:

> I should add a few words about McLachlin J.'s suggestion that the essential difference between her approach and mine lies in the flexibility allowed by her approach....

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[77] *Ibid.* at 1130-31.

[78] *Ibid.* at 1133.

> I do not see the essential difference between our two approaches as that between certainty and flexibility. In my view, the key difference is between a principled flexibility, which adheres to a general rule in the absence of policy reasons for excluding its application, and arbitrariness. Among the policy factors considered in the course of this opinion that might justify relaxing the rule are the ability of the plaintiff to protect itself and the quantum of property damage caused by the tortfeasor with its attendant impact on the issue of deterrence. I have not found it necessary to consider the precise role of these factors in this case since CN was clearly able to protect itself and the property damage sustained was sufficient to afford deterrence. Whether such factors would in fact provide workable criteria sufficient to provide for recovery despite the strong arguments in favour of the longstanding exclusionary rule, based on certainty and other factors, is an open question. What I have decided is that in the absence of all of these factors, there is no reason to disturb the rule.[79]

In the end, both judges want to avoid arbitrariness in favour of flexibility, principle, and justice. The exclusionary rule even in cases of contractual relational economic loss evidently has no one on the Supreme Court prepared to defend it to the last ditch.

V

Even apart from the impropriety of my passing judgment on the opinions of the highest court in my country, it must be apparent that I would not be able to set forth the present Canadian law on pure economic loss in a clear and concise fashion if I wanted to.

The solitary rationale of Stevenson J. proved unacceptable to all his colleagues. The approach of McLachlin J. was explicitly rejected by the three dissenting judges. The dissenting reasons of La Forest J. were disapproved of by the McLachlin three. Stevenson J. disagreed with neither judge by name, but in fact turned thumbs down on both of their approaches.[80]

As a result, not only is there no judicial reasoning which commands majority support, but each of the three carefully reasoned judgments is repudiated by a majority of the panel.

One might be tempted to read such a situation in nihilistic terms. My own conclusion is that the two principal points of view finish in a dead heat. It can scarcely be doubted that the issue will, before long, come before the Court again.

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[79] *Ibid.* at 1133-34.

[80] He rejects the concept of proximity on which McLachlin J. relies (*ibid.* at 1177-78), and the La Forest J. insurance loss-spreading rationale (*ibid.* at 1173). The unpredictability of the result is compounded by the fact that Stevenson J. has since resigned from the Court for reasons of ill health.