
ECONOMIC NEGLIGENCE

The Recovery of Pure Economic Loss

Sixth Edition

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Preface to the Sixth Edition

A great deal of what follows in this preface appeared verbatim in the preface to the previous edition. This simply reflects the reality of the law governing the recovery of pure economic loss, especially in Canada. The law has remained relatively settled over the past decade.

Despite the many changes in the law governing the recovery of pure economic loss in negligence since the first edition of this book was published in 1984, the major themes remain as relevant in this edition as they were then. Economic injury is significantly different from personal injury and property damage. The law of contract is likely to be just as helpful in resolving economic loss claims as the law of personal injury negligence. There are different categories of economic loss claims, each raising different problems. Misrepresentation actions require different solutions than product quality claims, which in turn require different solutions from relational loss claims, and so on. It is unhelpful for the courts to attempt to articulate one set of principles for all economic loss claims based on abstract principles such as “proximity”. Relatively certain rules, important in the commercial context of economic loss, can be developed in each category of case. The book is organized to deal with each well-recognized category in separate chapters.

This edition, like the third, fourth, and fifth, emphasizes Canadian law. In Canada, most of the major court decisions rendered since the last edition have emerged in the area of statutory public authority negligence. This is a complicated category of claim that includes many important economic loss decisions, but here, at least on the surface, the same principles of recovery govern economic and physical harm. The vexing question about recovery for non-dangerous product and structure defects continues to be litigated more frequently than necessary, and is one that requires some clear guidance from the Supreme Court. Otherwise, since the Supreme Court endorsed the categorization approach to pure economic loss in the mid-1990s, the law has stabilized a great deal. The Canadian courts have been dealing largely with refining that law since then, not with developing new or radical principles and rules.

In the previous editions, it was accurate to say that the law governing the recovery of pure economic loss in negligence had become more complex, and more varied from jurisdiction to jurisdiction, since the first edition of this book was published in 1984. Today, one might say cautiously that the law in Canada, England and New Zealand is becoming increasingly settled, and substantially similar in each of these jurisdictions.

In England, it is now virtually impossible to recover economic loss in negligence except in a classic action for misrepresentation. In this respect,

the English position is similar to the traditional position adopted in most of the jurisdictions in the United States. The Canadian position is probably closest to the English, although somewhat more liberal than England in regards to product and structural defect claims. New Zealand was at one time quite liberal about the recovery of pure economic loss in negligence, but increasingly seems to be taking the English and Canadian path. In Australia, the High Court has taken a very different approach. The High Court has been very receptive to claims for pure economic loss, and has shown a disinclination to follow the Supreme Court's orderly classification of claim approach. This edition attempts to articulate these differences and to examine the competing judicial philosophies that account for them.

Perhaps the most significant development during the past decade has been the proliferation of interest in the subject of pure economic loss in the United States. This is probably due to the American Law Institute's having embarked on a major project, the *Restatement Third of Torts: Economic Torts and Related Wrongs*. Along with the interesting Restatement drafts and comments, numerous important academic articles on point have been published in the United States after a long period of relative neglect. Unfortunately, Professor Mark Gergen, the original project director whose exceptional work is cited frequently in this book, resigned from the project in 2007. The project has been revived and work began in earnest in the fall of 2011, but it is too early to say what impact it will now have.

Potentially the most important recent work in economic negligence has emerged from the legal academy where scholarly articles have proliferated. Of particular significance has been the highly theoretical approach taken to the topic by authors who might be described as rights-based theorists, mostly influenced by the work of Ernest Weinrib. They are to be distinguished from those who support or criticize the relevant rules on efficiency or other policy grounds, an arguably expanding group in Canada with the Supreme Court's rejuvenation of the two-step *Anns* test for duty of care. Generally speaking, the theorists reach the same conclusion as do the policy analysts, or at least support most of the existing rules that deny recovery for certain types of economic loss. But they do so for different reasons. Theoretical discourse has difficulty finding its way into case law, but this is an area where the law would benefit greatly from a more theoretical approach. It may be true, for example, that an otherwise deserving claim must fail because to allow it would pose a risk of indeterminate liability, but this is not a sympathetic justification. What the theorists are doing is exposing many economic loss claims as undeserving in principle, quite apart from the practical policy issues. This approach has the potential to enrich what is today a somewhat sterile and mysterious proximity enquiry.

I am grateful to the University of Ottawa for helping me to engage the research services of Anne-Marie Magneron, who is now a second year law student in the Common Law *en français* program at uOttawa. I would again like to thank the entire publication team at Carswell. I would also like to

repeat the thanks to Justice Allen Linden made in the preface to the third edition, an educator in the finest sense of the word, who has supported and encouraged several generations of Canadian torts students, lawyers, and academics, and infected all of us with his love of the law of torts. Finally, I offer a special salute to the new economic loss theorists whose work promises to enrich and refresh the study of this topic that has preoccupied me for more than 30 years.

Bruce Feldthusen

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