

Economic Loss

Third edition

Robby Bernstein

B Com LLB (Witwatersrand) BCL (Oxon)

Barrister (England and Wales)

Barrister and Solicitor, Canada (Ontario)

Mediator and Arbitrator

rbernstein@bernsteinlaw.ca

www.bernsteinlaw.ca

Contents

<i>Foreword</i>	xiii
<i>Preface</i>	xv
<i>Table of Cases</i>	xix
<i>Table of Statutes</i>	lxix
<i>Table of Statutory Instruments</i>	lxxv

Volume 1 – General Principles

Chapter 1 Introduction	1
1.1 Context and scope	13
1.2 Definition of pure economic loss	15
1.2.1 General	15
1.2.2 Different types of pure economic loss	15
1.3 The categorisation approach	19
1.3.1 General	19
1.3.2 The actual categories	20
1.3.3 Recognition by judges	22
1.4 Rationale for different treatment	28
1.4.1 Introduction	28
1.4.2 Historical accident	28
1.4.3 Specific remarks	31
1.5 Contrary views	48
1.5.1 Introduction	48
1.5.2 <i>Dicta</i> in cases	48
Chapter 2 The Elements of Liability	53
2.1 Introduction	87
2.1.1 General	87
2.1.2 Causation, Remoteness and Scope	99
2.1.3 The essential ingredients	294
2.1.4 The composite approach	295
2.1.5 The scope of the duty	300
2.2 Foreseeability	410
2.2.1 Context	410
2.2.2 <i>Dicta</i> in cases	431
2.2.3 Physical damage cases	432

2.3	Proximity	435
2.3.1	Context	435
2.3.2	<i>Dicta</i> in cases	452
2.3.3	Reliance	464
2.3.4	<i>Dicta</i> in cases	471
2.4	Justice and reasonableness	481
2.4.1	Introduction	481
2.4.2	<i>Dicta</i> in cases	484
2.4.3	Indeterminate liability	494
2.4.4	<i>Dicta</i> in cases	497
Chapter 3	Alternative Approaches	503
3.1	Introduction	518
3.2	General formulations	522
3.2.1	Lord Atkin in <i>Donoghue</i>	522
3.2.2	The two-stage <i>Anns</i> test	530
3.2.3	The threefold <i>Caparo</i> test	536
3.2.4	The incremental approach	550
3.2.5	Assumption of responsibility	565
3.3	The current position	611
3.4	Overseas jurisdictions	656
3.4.1	Australia	656
3.4.2	Canada	670
3.4.3	New Zealand	679
Chapter 4	Consequential Economic Loss and Accidental Direct Pure Economic Loss	691
4.1	Context	692
4.1.1	General	692
4.1.2	Some important distinctions	693
4.2	The historical context	694
4.2.1	No appreciation of difference	694
4.2.2	Recognition of Different categories	695
4.2.3	Remoteness of damage	696
4.3	Consequential loss	697
4.3.1	Confusion with remoteness	697
4.3.2	Identifying 'truly' consequential loss	698
4.3.3	Statement of the rule	721
4.3.4	The dividing line	722
4.4	Pure economic loss	723
4.4.1	Context	723
4.4.2	Dearth of authority	723
4.4.3	Probably no duty of care	724
4.5	Policy considerations	726
4.5.1	Context	726
4.5.2	Consequential losses	726
4.5.3	Physical damage	728

4.5.4	Truly consequential loss	732
4.5.5	Pure economic loss	733
4.6	Dissentient voices	774
4.6.1	Introduction	774
4.6.2	Very few decisions	774
4.6.3	Very limited acceptance	777
4.7	Alternative theories	782
4.7.1	No separation of categories	782
4.7.2	Transference of arguments	782
4.8	Bailee in possession	782
4.8.1	Introduction	782
4.8.2	The rule in <i>The Winkfield</i>	783
4.8.3	The suggested approach	784
4.8.4	Settlement of claims	786
4.8.5	The Torts (Interference with Goods) Act 1977	787
Chapter 5	Relational Pure Economic Loss	789
5.1	Definition	793
5.1.1	General	793
5.1.2	Terminology	794
5.2	The exclusionary rule	795
5.2.1	Introduction	795
5.2.2	Proprietary interest	798
5.2.3	Possessory interest	820
5.2.4	The 'right to possession'	828
5.2.5	Not displaced by the 'threefold test'	831
5.3	Applications of the exclusionary rule	833
5.3.1	Personal injury	833
5.3.2	Property damage	845
5.3.3	Damage to a financial interest	847
5.4	The established exceptions	852
5.4.1	General average	852
5.4.2	Share fishermen	853
5.4.3	Commercial fishermen	853
5.4.4	Other pollution victims	856
5.4.5	Integrated unit	866
5.4.6	Common adventure	866
5.5	Rationale of the relational pure economic loss exclusionary rule	870
5.5.1	Introduction	870
5.5.2	Three policy considerations	932
5.5.3	Justice	933
5.5.4	Practicality	934
5.5.5	Deterrence	938
5.6	Alternative theories	939
5.6.1	Introduction	939

5.6.2	Transferred loss	941
5.6.3	Common adventure	954
5.6.4	Known plaintiff	960
5.6.5	Proximity	963
5.6.6	Physical propinquity	965
5.6.7	Loss-bearing ability	967
5.6.8	Reconciliation of approaches	968
5.7	Conclusion	977
5.8	Relevant cases	978
5.8.1	Cases which affirm the exclusionary rule	978
5.8.2	Cases which challenge the exclusionary rule	989
	<i>Index</i>	1003

Volume 2 – Specific Applications

Chapter 6	Product Liability—Physical Injury and Property Damage	1019
6.1	Context	1024
6.2	Importance of <i>Donoghue v Stevenson</i>	1024
6.2.1	The actual decision	1024
6.2.2	The general exclusionary rule	1026
6.2.3	Two important exceptions	1026
6.2.4	The early cases: the ‘floodgates’ fear	1032
6.2.5	The pedigree of <i>Donoghue v Stevenson</i>	1038
6.3	Intermediate inspection	1043
6.3.1	Lord Esher’s example	1043
6.3.2	Application in <i>Donoghue v Stevenson</i>	1044
6.3.3	Fundamental importance	1045
6.3.4	Applications of the principle	1049
6.3.5	‘Opportunity’ not always sufficient	1064
6.3.6	Relationship with <i>Murphy</i>	1073
6.4	Wider application of ‘the neighbour principle’	1078
6.4.1	Narrow <i>ratio</i>	1078
6.4.2	Wider application of the principle	1079
6.4.3	Limited ambit	1079
6.4.4	Some early cases	1079
6.5	The Consumer Protection Act 1987	1080
6.5.1	Liability for defective products	1080
6.5.2	Food	1081
6.5.3	Definitions	1081
6.5.4	Defences	1081
6.5.5	Land and buildings excluded	1082
6.5.6	Consequential loss excluded	1083
6.5.7	Economic loss excluded	1083
6.6	Defective buildings	1084
6.6.1	Early obstacles	1084

6.6.2	The first signs of change	1086
6.6.3	Section 4 of the Defective Premises Act 1972	1087
6.6.4	Section 1 of the Defective Premises Act 1972	1088
6.6.5	Conclusions	1089
6.6.6	Comment	1090
Chapter 7	Product Liability – Pure Economic Loss	1091
7.1	Context	1106
7.1.1	General	1106
7.1.2	Example	1107
7.1.3	The problem stated	1107
7.1.4	Determining the type of loss	1108
7.1.5	Case summaries	1124
7.2	'An impossible distinction'	1124
7.2.1	Submission in <i>Dutton</i>	1124
7.2.2	Distinction rejected	1124
7.2.3	Chattels	1125
7.2.4	'An unhappily odd state of the law'	1125
7.3	The current law	1125
7.3.1	Rejection of <i>Dutton</i>	1125
7.3.2	Three propositions	1126
7.3.3	Example	1127
7.3.4	Lord Bridge's exposition	1127
7.3.5	Consequential loss	1129
7.3.6	'A special relationship of proximity'	1130
7.3.7	Manufacturers' warranties	1178
7.3.8	The Consumer Protection Act 1987	1180
7.3.9	Limitation ramifications	1182
7.4	Emerging areas of the law	1197
7.4.1	'Close to the edge'	1197
7.4.2	A duty to warn	1199
7.4.3	The complex structures theory	1214
7.4.4	Damage to other property	1222
7.4.5	The Defective Premises Act 1972	1234
7.4.6	Concurrent contractual duty	1245
7.5	Critical comment on the current law	1359
7.5.1	Introduction	1359
7.5.2	Proximity based on reliance	1359
7.5.3	Knowledge of the defect	1365
7.5.4	Contrary to <i>Donoghue v. Stevenson</i>	1370
7.5.5	Legislative intent	1372
7.5.6	Judicial legislation	1378
7.5.7	Transmissible/transferable warranties of quality	1378
7.5.8	The <i>Linden Gardens</i> solution	1391

7.6	Other jurisdictions	1400
7.6.1	The United States	1400
7.6.2	New Zealand	1414
7.6.3	Canada	1424
7.6.4	Australia	1494
7.7	Relevant cases	1554
Chapter 8	Nonfeasance	1569
8.1	Introduction	1578
8.1.1	Context	1578
8.1.2	Different considerations for omissions	1579
8.2	Statutory authorities	1583
8.2.1	Special features	1583
8.2.2	General principles	1585
8.2.3	Breach of statutory duty <i>simpliciter</i>	1599
8.2.4	Common law duty of care	1602
8.2.5	<i>Dicta</i> in cases	1606
8.2.6	The <i>East Suffolk</i> debate	1614
8.2.7	The policy – operational dichotomy	1625
8.2.8	General Reliance	1629
8.2.9	The Statutory Framework	1640
8.2.10	Illustrations from Cases	1642
8.2.11	The Public Health Act	1830
8.2.12	The Building Act	1831
8.3	Other Relationships	1832
8.3.1	Introduction	1832
8.3.2	Overview	1833
8.3.3	The Individual Groupings	1834
8.3.4	Comment	1918
8.4	Overseas cases	1920
8.4.1	Australia	1920
8.4.2	New Zealand	1965
8.4.3	Canada	2004
8.4.4	United States	2094
Chapter 9	Negligent Misstatements and Services	2097
9.1	Introduction	2102
9.1.1	Context	2102
9.1.2	Governing principle: Reasonable foreseeability of reasonable reliance	2102
9.2	Historical obstacles	2111
9.2.1	Introduction	2111
9.2.2	The contractual block	2111
9.2.3	Not affected by <i>Donoghue</i>	2114
9.3	Other conceptual difficulties	2118
9.3.1	Characteristics of words	2118
9.3.2	Comment	2120

9.3.3	Indeterminate liability: <i>Ultramares v Touche</i>	2121
9.4	The importance of <i>Hedley Byrne</i>	2127
9.4.1	Introduction	2127
9.4.2	The actual decision	2130
9.4.3	Individual formulations	2130
9.4.4	Pure economic loss	2133
9.4.5	Comment	2134
9.5	Assumption of responsibility	2135
9.6	Other formulations	2135
9.6.1	General	2135
9.6.2	<i>Dicta</i> in judgments	2135
9.7	Illustrations from cases	2138
9.7.1	Introduction	2138
9.7.2	'Financial sphere' cases	2138
9.7.3	Surveyors	2256
9.7.4	Other certifiers	2277
9.7.5	Solicitors	2299
9.7.6	Insurance brokers, insurance companies and underwriting agents	2344
9.7.7	Referees	2356
9.7.8	Miscellaneous	2370
9.8	The Misrepresentation Act	2417
9.8.1	Introduction	2417
9.8.2	Section 2(1)	2417
9.8.3	Limited scope	2417
9.9	Overseas cases	2418
9.9.1	Introduction	2418
9.9.2	Australia	2418
9.9.3	Canada	2429
9.9.4	New Zealand	2450
9.9.5	United States	2456
Chapter 10	The Contractual Connection	2461
10.1	Context	2470
10.2	Categories of cases	2471
10.2.1	Contract between plaintiff and third party	2471
10.2.2	Contract between defendant and third party	2608
10.2.3	Contract between plaintiff and defendant	2613
10.3	Exemption clauses	2613
10.3.1	Introduction	2613
10.3.2	Waiver of rights by plaintiff against third party in third party/intermediate contract	2614
10.3.3	Waiver of rights by plaintiff against defendant in third party contract	2622

xii Contents

10.3.4	Exemption clause in contract between defendant and third party	2640
10.3.5	The Unfair Contract Terms Act	2654
10.4	Concurrent liability	2664
10.4.1	Introduction	2664
10.4.2	The new law – concurrent liability, subject to certain qualifications	2667
10.4.3	Relevant pre- <i>Henderson</i> cases	2699
10.4.4	Overseas cases	2713
	<i>Index</i>	2719