The Limits to Recovery: Economic Loss Claims from the Defendant’s Perspective

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A. Introduction

The common law has traditionally been reticent to recognize claims for pure economic loss arising from negligence claims. Before the House of Lords’ landmark decision in Hedley Byrne & Co. v. Heller & Partners Ltd.¹, recovery for economic loss in negligence was virtually unknown. Since Hedley Byrne, and the subsequent decision in Anns v. Merton London Borough Council,² the principles have been incorporated into Canadian law by the Supreme Court, and claims for recovery for pure economic loss have grown dramatically. The courts, however, have continued to control the outer limits of recoverability for economic loss through the application of the principles of proximity and policy. For defence-side practitioners, the court’s ongoing reluctance to open the floodgates for economic loss claims is good news.

This paper provides a primer on the evolution and state of Canadian law in relation to claims for pure economic loss in negligence, and provides a practical guide to defence-side practitioners in addressing such claims.

B. Pure Economic Loss: Nature and History

a) The Nature of Economic Loss

The common law historically denied claims for pure economic loss arising from negligence. The reason for this lies in the nature of the loss suffered. Pure economic loss is distinguishable from consequential economic loss, and different policy considerations apply with respect to each of these two forms of financial loss.³

Consequential economic loss is financial loss causally connected to physical damage to the plaintiff’s own person or property. For instance, a victim in a car collision may suffer consequential economic loss in the form of medical expenses or loss of earnings causally connected to the injuries suffered in the collision. Typically, consequential loss is governed by the same principles of recovery applicable to the physical damage itself (i.e. was the loss a reasonably foreseeable result of the defendant’s breach of his or her duty of care). On the other hand, pure economic loss is a financial loss that is not causally connected to damage to the plaintiff’s person or property. For instance, a person relying on a negligently prepared financial statement or prospectus may suffer a loss by investing in a poorly performing company. Recovery for this type of loss is governed by application of a judicially created three-stage test which I will refer to as the Anns/Cooper analysis.

The reason for the dichotomy in the treatment of claims for pure economic loss versus consequential economic loss arises from the underlying objective for transference of loss. The accepted paradigm is that actions resulting in physical damage to persons or property invariably create a social loss - something of value has been destroyed or damaged. However, claims for pure economic loss generally revolve around nothing more than a transfer of wealth. While courts feel compelled to deter conduct which causes a societal loss, they are more reluctant to interfere in conduct which merely results in a transfer of wealth in a commercial context.

b) Treatment of Pure Economic Loss in the U.K.

The starting point for an analysis of entitlement to damages for economic loss cases is, like all tort claims, the decision of the House of Lords in Donoghue v. Stevenson. While not at all about economic loss, the case importantly set out the principled approach to the law of negligence which forms the foundation of all modern negligence law. The question of negligence liability should be approached by asking if the defendant ought reasonably to have had the interests of the plaintiff in mind when she (the defendant) undertook the risky action which led to his (the plaintiff’s) injury; a subsequent inquiry asks if the injuries that the plaintiff sustained were foreseeable to a reasonable person in the defendant’s place. This principle has come to be known as the “neighbour principle.”

Historically, there has been a general exclusionary rule against recovery of pure economic loss except where the plaintiff has suffered physical damage. The general exclusionary rule came to an end in the House of Lords’ decision in Hedley Byrne in which Lords Hodson and Devlin specifically rejected the broad exclusionary rule against recovery of pure economic loss.

In Anns v. Merton London Borough Council, the House of Lords adopted a principled approach to address recovery for pure economic loss. In Anns, the House ruled that the inquiry based on the neighbour principle, as set out in Donoghue v. Stevenson, is actually the first step of a two-step process for determining negligence liability. Once that inquiry was satisfied, a court should inquire as to whether or not any “policy” reasons exist to deny liability:

[T]he question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to

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4 Ibid. at p. 450.
5 Ibid.
7 It should be noted that the neighbour principle is not a “test” per se, but rather a principle upon which casuistic common-law reasoning in negligence cases is based. In other words, the evaluation of the facts of a given case is undertaken by way of analogy to other cases with similar facts, where ‘similar’ means that similar considerations ought to be made by the parties taking account of the legitimate interests of others.
9 Supra note 4.
10 Supra note 5.
cause damage to the latter – in which case a *prima facie* duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise.\[^{11}\]

c) **Developments in Pure Economic Loss in Canada**

The House of Lords’ approach to negligence liability in *Anns* was adopted into Canadian law in *Nielsen v. Kamloops (City)*\[^{12}\]. In adopting the House of Lords’ decision, the Supreme Court articulated the test as follows:

1. Is there a sufficiently close relationship between the parties (the [defendant] and the person who has suffered the damage) so that, in the reasonable contemplation of the [defendant], carelessness on its part might cause damage to that person? If so,

2. Are there any considerations which ought to negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise?

It is upon this basis that the law of negligence liability for pure economic loss has developed in Canada. While this two-step approach was subsequently abandoned in the United Kingdom,\[^{13}\] the Canadian Supreme Court has repeatedly refused to reconsider its use of this test, and it continues to be applied by the courts in all cases in which novel claims for economic loss arise.

*Emergence of the Five Categories*

After *Anns* and *Kamloops*, and also in light of the landmark House of Lords decision in *Hedley Byrne v. Heller*, claims to recover economic loss took flight. This proliferation of cases led Professor Bruce Feldthun to propose a categorization of these cases in the 1980s, presumably with a view to simplifying the application of the two-part analysis, by setting out the types of cases where economic loss would be recoverable without undergoing an extensive analysis. That categorization was adopted by LaForest J. in his dissent in *CN v. Norsk*\[^{14}\] (1992) and, subsequently, by the rest of the Court.\[^{15}\] It is now the preferred method for the preliminary analysis of economic loss cases. The categories are as follows:

1. **The Independent Liability of Statutory Public Authorities**

\[^{11}\] Supra note 5 at p. 3.
2. Negligent Misrepresentation
3. Negligent Performance of a Service
4. Negligent Supply of Shoddy Goods or Structures
5. Relational Economic Loss\(^\text{16}\)

**Beyond the Five Categories**

In its decision in *Martel Building v. Canada*, the Supreme Court approached the question of economic loss claims that do not fit into any of the five established categories.\(^\text{17}\) The Court in that case held that the five categories exist “merely to provide greater structure to a diverse range of factual situations by grouping together cases that raise similar policy concerns. These categories are merely analytical tools.”\(^\text{18}\) The Court continued:

> Canadian jurisprudence has consistently applied the flexible two-stage analysis of *Anns* ... in determining whether to extend a duty of care in a given case. The *Anns* approach has been applied in this manner to each of the first four categories of economic loss. ...

> The *Anns* approach is equally applicable when, as in this appeal, the claim alleges a duty of care in an area not previously categorized. The respondent's submission has to be considered within that framework.\(^\text{19}\)

In other words, claims for the recovery of economic loss which do not fit into the five categories are properly evaluated according to the two-stage test, applied to the facts of the case. This is the process that continues to be applied by our courts.

**C. Current State of the Law of Economic Loss**

a) When is Pure Economic Loss Recoverable?

The Supreme Court’s articulation of the *Anns* test is found in *Cooper v. Hobart* and *Design Services Ltd. v. Canada*.\(^\text{20}\) In that decision, the Court reaffirmed the role of the already recognized categories of relationships,\(^\text{21}\) but inserted a consideration of policy at the first stage of the test relating to proximity.

\(^{16}\) *Supra* notes 17 and 18.
\(^{19}\) *Ibid.* at para. 46.
\(^{20}\) [2001] 3 S.C.R. 537
\(^{21}\) [2008] 1 S.C.R. 737

\[^{21}\] The Court in *Childs v. Desormeaux*, [2006] 1 S.C.R. 643 clarified that the “reference to categories simply captures the basic notion of precedent: where a case is like another case where a duty has been recognized, one may usually infer that sufficient proximity is present and that if the risk of injury was foreseeable, a *prima facie* duty of care will arise.
It is now accepted that cases which fit into any of the established five categories have satisfied the first stage of the test, and a *prima facie* duty is found:

What then are the categories in which proximity has been recognized? First, of course, is the situation where the defendant's act foreseeably causes physical harm to the plaintiff or the plaintiff's property. This has been extended to nervous shock. Yet other categories are liability for negligent misstatement and misfeasance in public office. A duty to warn of the risk of danger has been recognized. Again, a municipality has been held to owe a duty to prospective purchasers of real estate to inspect housing developments without negligence. Similarly, governmental authorities who have undertaken a policy of road maintenance have been held to owe a duty of care to execute the maintenance in a non-negligent manner. Relational economic loss (related to a contract's performance) may give rise to a tort duty of care in certain situations, as where the claimant has a possessory or proprietary interest in the property, the general average cases, and cases where the relationship between the claimant and the property owner constitutes a joint venture. When a case falls within one of these situations or an analogous one and reasonable foreseeability is established, a *prima facie* duty of care may be posited.²²

In the companion case to *Cooper, Edwards v. Law Society of Upper Canada* articulated the two-part test in these words:

At the first stage of the *Anns* test, the question is whether the circumstances disclose reasonably foreseeable harm and proximity sufficient to establish a *prima facie* duty of care. The focus at this stage is on factors arising from the relationship between the plaintiff and the defendant, including broad considerations of policy. The starting point for this analysis is to determine whether there are analogous categories of cases in which proximity has previously been recognized. If no such cases exist, the question then becomes whether a new duty of care should be recognized in the circumstances. Mere foreseeability is not enough to establish a *prima facie* duty of care. The plaintiff must also show proximity - that the defendant was in a close and direct relationship to him or her such that it is just to impose a duty of care in the circumstances. Factors giving rise to proximity must be grounded in the governing statute when there is one, as in the present case.

If the plaintiff is successful at the first stage of *Anns* such that a *prima facie* duty of care has been established (despite the fact that the proposed duty does not fall within an already recognized category of recovery), the second stage of the *Anns* test must be addressed. That question is whether there exist residual policy considerations which justify denying liability. Residual policy considerations include, among other things, the effect of

recognizing that duty of care on other legal obligations, its impact on the legal system and, in a less precise but important consideration, the effect of imposing liability on society in general.\(^\text{23}\)

Thus, the current Canadian law of economic loss in negligence can be succinctly described in the following way:

1. In a case whose facts fit into a pattern or category established by the case law as being one where recovery is allowed – the five categories set out by the Supreme Court in *Cooper* – a *prima facie* duty of care exists.

2. In a case which fits into none of those categories, a plaintiff must show both proximity and no reason internal to her relationship with the defendant to override that proximity. If the plaintiff can meet both of those burdens, a *prima facie* duty of care exists.

3. However a *prima facie* duty is found to exist, the Court must still examine considerations of public policy to ensure that no policy reason exists to limit or negative the *prima facie* duty of care.

b) **Recognized General Categories**

Given the importance of recognized general categories of relationships in the proximity analysis, it may be useful to canvass the five categories in which duty of care has been recognized in claims for pure economic loss.

*i) Independent Liability of Statutory Public Authorities*

The emblematic case in this category is found in the Supreme Court’s decision in *Kamloops*.\(^\text{24}\) The case involved a statutory public authority – the City of Kamloops – which, under its own by-laws had the discretion to inspect the construction of new buildings. In the case, the City found that a new home construction had faulty foundations and issued a stop-work order against the builder. The builder refused to comply with order, and the City failed to enforce it. A subsequent purchaser of the faulty home brought a successful action against the City. In finding that the City owed the subsequent purchaser a duty of care, the Court noted that the City had chosen to regulate the construction of buildings by way of by-law and imposed on the City’s building inspector a duty to enforce the provisions of the by-law. While policy decisions are immune from a private law duty of care, operational decisions, as the case was here, may be the subject of a duty of care.\(^\text{25}\)

In *Cooper*, the Court had a chance to clarify the law as applied to statutory public authorities. The Court held that to establish a relationship of proximity between a plaintiff and defendant public authority, the court must consider the authority’s statutory


\(^{24}\) *Supra* note 15.

framework to determine whether it imposes a duty of care on the authority to the plaintiff, and not merely a duty owed to the public at large.\textsuperscript{26} At the policy stage, it is necessary to consider, as found in \textit{Kamloops} whether the decision taken was policy (which would immunize the authority) or operational.\textsuperscript{27}

\textit{ii) Negligent Misrepresentation}

Negligent misrepresentation arises when one party relies on the negligently made statements of another, and the reliance results in loss.

The approach to determining proximity in a claim for negligent misrepresentation is the standard of foreseeable reasonable reliance. The Court in \textit{Hercules} identified five general indicia of reasonable reliance:

\begin{itemize}
\item[(i)] the defendant had a direct or indirect financial interest in the transaction in respect of which the representation was made;
\item[(ii)] the defendant was a professional or someone who possessed special skill, judgment or knowledge;
\item[(iii)] the advice or information was provided in the course of the defendant’s business;
\item[(iv)] the information or advice was given deliberately, and not on a social occasion; and
\item[(v)] the information or advice was given in response to a specific enquiry or request.\textsuperscript{28}
\end{itemize}

Limiting policy considerations that often appear in negligent misrepresentation cases include: concerns for indeterminate liability to an indeterminate class, and the presence of a contractual relationship.\textsuperscript{29}

\textit{iii) Negligent Performance of a Service}

These sorts of cases often arise where the negligent act of the defendant deprives a beneficiary of a contracted benefit. In \textit{Whittingham v. Crease & Co.}, the intended beneficiary of a will was allowed to recover against the solicitor who carelessly allowed the will to be executed invalidly.\textsuperscript{30}

\begin{footnotes}
\item[26] \textit{Cooper, supra} note 23 at paras. 43-5.
\item[27] \textit{Ibid.} at para. 52.
\item[29] Linden and Feldthusen, \textit{supra} note 6 at pp. 461-6.
\end{footnotes}
iv) Negligent Supply of Shoddy Goods or Structures

This sort of case is exemplified by the Supreme Court’s decision in Winnipeg Condo.\textsuperscript{31} In that case, the Court held that a general contractor responsible for the construction of a building could be held liable for negligence to a subsequent purchaser of the building for the cost of repairing dangerous negligent defects.

v) Relational Economic Loss

These cases arise when the defendant negligently causes personal injury or property damage to a third party. The plaintiff suffers pure economic loss by virtue of some relationship, usually contractual, it enjoys with the injured third party or the damaged property. The oft-cited example is Norsk.\textsuperscript{32} In that case, the defendant Norsk had negligently damaged a bridge owned by a third party. The plaintiff, CN, used the bridge pursuant to a contractual agreement with the owner. CN sued Norsk to recover the losses occasioned (in terms of the cost of diverting trains) during the time it took to repair the bridge. CN’s claim was granted by the Court.\textsuperscript{33}

c) Proximity and Policy in the Courts

Courts continue to be reluctant to presume a \textit{prima facie} duty of care unless the facts before them are particularly analogous to those of a case in which duty of care was found to exist. For instance, in many cases where the independent liability of a statutory authority was pled, the court nonetheless undertook the full two-step \textit{Anns/Cooper} test on the basis that the facts pled were not specifically analogous to a previous recognized relationship between government agents and citizens.\textsuperscript{34} It is therefore useful to canvass recent decisions in which the courts have fleshed out the limiting principles of proximity and policy.

\textit{Proximity}

In determining whether there is a sufficiently proximate relationship to impose a duty of care, the court will look at the closeness of the relationship between the parties other than foreseeability, including questions of policy in the broad sense. This includes the expectations, representations, and reliance existing between the parties. It is explained in \textit{Cooper} as follows:

\begin{itemize}
\item \textsuperscript{31} \textit{Supra} note 18.
\item \textsuperscript{32} \textit{Supra} note 17.
\item In Norsk, there was a dispute as to whether an “exclusionary rule” existed which barred recovery for economic loss of any type, for relational loss only, or not at all. That debate was resolved in \textit{D’Amato v. Badger} (1999), and the law is now that in a relational loss case, recovery is barred, unless the claimant has a possessory or proprietary interest in the property damaged, or the property owner and plaintiff are part of some type of joint venture. Typically such an interest arises out of a contract between the plaintiff and property owner.
\item \textsuperscript{34} See for e.g. \textit{Attis v. Canada (Minister of Health)} (2007), 46 C.P.C. (6\textsuperscript{th}) 129 [“Attis”] and \textit{Drady v. Canada (Minister of Health)}, 159 A..C.W.S. (3d) 177 [“Drady”].
\end{itemize}
Essentially, these are factors that allow us to evaluate the closeness of the relationship between the plaintiff and the defendant and to determine whether it is just and fair having regard to that relationship to impose a duty of care in law upon the defendant.\textsuperscript{35}

\textit{Policy}

In determining whether there are residual policy considerations that would limit or negative a duty of care, a court will consider “the effect of recognizing that duty of care on other legal obligations, its impact on the legal system and, in a less precise but important consideration, the effect of imposing liability on society in general”.\textsuperscript{36} In \textit{Drady}, the Court of Appeal reminded that these policy decisions include the categorization of government policy or operational decision-making in claims asserted against the Crown.\textsuperscript{37}

d) \textbf{Recent Cases}

\textit{Attis v. Canada}

\textit{Attis} provides a particularly helpful and comprehensive review of the law of pleading claims for pure economic loss and the requisite elements of the test to establish a duty of care in which a new cause of action is being posited.

In \textit{Attis}, the Ontario Court of Appeal found that Health Canada did not owe a private law duty of care to victims of negligently manufactured breast implants.

First, the court found that there was not a sufficiently proximate relationship between the agency and the victims, on the basis that: (i) the agency provided no direct service to the victims, (ii) the agency had no contact with them, (iii) the agency did not keep and was not mandated to keep any records of individuals who received implants, (iv) there was no mechanism to notify such individuals about product defects or recalls, and (v) the agency’s only method of notification was by public notice (not by individual notice).\textsuperscript{38} Further, the Court noted that any duty to ensure safety of the product was on the medical device industry, and by extension, the victims’ medical advisors, hospitals, manufacturers and distributors of the device.\textsuperscript{39}

\begin{itemize}
  \item \textsuperscript{35} \textit{Cooper, supra} note 23, at para. 34.
  \item \textsuperscript{36} \textit{Edwards, supra} note 27, para. 20.
  \item \textsuperscript{37} \textit{Drady v. Canada (Minister of Health)\textsuperscript{2008} CarswellOnt 5662, 300 D.L.R. (4\textth) 443, 68 C.P.C. (6\textth) 306 (CA), at para. 34.}
  \item \textsuperscript{38} \textit{Attis, supra} note 37 at para. 69.
  \item \textsuperscript{39} \textit{Attis} can be distinguished from \textit{Sauer v. Canada (Attorney General)}, 2007 ONCA 454, 225 O.A.C. 143, in which the Court of Appeal, on a Rule 21 motion, refused to strike a claim brought by cattle farmers affected by the mad cow crisis against the federal government. The Court held that it was not plain and obvious that the claim would fail based on the pleadings, which asserted that the Canadian government made public representations to commercial cattle farmers that the content of cattle feed was regulated.
\end{itemize}
Second, the Court held that a duty of care should not be found for policy reasons, namely because: (i) it would trigger indeterminate liability by making the government an insurer of medical devices, and (ii) it could create a chilling effect on public health decision-making, where Health Canada would be inclined to limit the number of devices available to the public.40

Wellington v. Ontario

Wellington41 involved an action brought by family members of a youth killed in a police shooting against the Special Investigations Unit (SIU), an Ontario agency charged with investigating deaths caused by members of the police forces in the province. The family of the deceased alleged that the SIU had conducted a negligent investigation, which caused their grief to be compounded and their ability to recover in another action diminished. The Court held that no duty of care could attach to the SIU.

The relationship between the agency and the victim’s family was not sufficiently proximate, because: (i) the SIU owes its duty to the public at large and not to individual victims or their families, (ii) the duties are overwhelming public in nature, and (iii) the agency’s enabling statute imposes no explicit duties to victims or their families.42

Although not explicitly considered policy by the Court, it held that a private law duty of care to the family would interfere with the SIU fulfilling its primary duty to the public at large.43

Heaslip Estate v. Mansfield Ski Club

The estate of a deceased brought an action against the government of Ontario for failing to dispatch an air ambulance to transport the victim from a remote community to a hospital.44

The Ontario Court of Appeal held that the government, for the purposes of a Rule 21 motion, owed the victim a duty of care. The Court found that a sufficiently proximate relationship between the parties could be made out on the basis that: (i) the province was made aware that the victim had suffered a life-threatening injury and (ii) the province had adopted a policy for air ambulances that gave priority to those suffering from life-threatening injuries.45

The Court found no policy reasons to limit or negative the duty because of the highly specific nature of the claim, which would not open the door to indeterminate liability.46

Knight v. Imperial Tobacco Canada Ltd.47,

40 Ibid. at paras. 73-75.
41 2011 ONCA 274, 105 O.R. (3d) 81 [“Wellington”].
42 Ibid. at paras. 40-3.
43 Ibid. at paras. 45 and 48.
46 Ibid. at para. 33.
In *Knight v. Imperial Tobacco Canada Ltd.*, the Supreme Court considered two actions involving allegations of negligent representation against the federal government, one by smokers of ‘light’ and ‘mild’ cigarettes and the second by the manufacturers of those cigarettes (by way of third-party notices).

The Court found that the federal government did not owe a duty of care to consumers, on the basis that (i) its relationship with consumers was limited to statements to the general public that low-tar cigarettes were less hazardous, and (ii) there were no specific interactions between Canada and the class members.

The Court, however, found that there was a proximate relationship between Canada and the tobacco companies. It found: (i) that Health Canada assumed duties separate and apart from its statute, including research, design and promotion of tobacco products, (ii) that Agriculture Canada carried out a program of cooperation with and support for tobacco growers and cigarette manufacturers, including advising cigarette manufacturers of the desirable content of nicotine in tobacco to be used in products, and (iii) that Agriculture Canada provided advice and directions to manufacturers relating to tobacco strains developed by the agency for use in the manufacturers’ tobacco products. The Court, however, declined to recognize a duty of care as between Canada and the tobacco companies for policy reasons, because Canada’s conduct constituted a policy decision, involving social and economic considerations, developed out of concerns for the health of Canadians. It also found that it would open to the door to indeterminate liability, particularly given that Canada had no control over the number of people who smoke light cigarettes.

**D. Responding to a Claim for Economic Loss**

From the preceding overview of the status of the law of recovery for pure economic loss, the defence bar can take some comfort. This is not an area of the law that is expanding by leaps and bounds. The courts remain reluctant to find claims that open up new categories of potential recovery, or to venture intrepidly into uncharted waters.

When faced with a claim for economic loss, it always makes sense to start from first principles. Does the claim fit squarely into one of the five established categories? If it is not exactly on all fours, then there is a strong argument to be made that the court should undertake a full *Anns/Cooper* analysis. That leaves the defendant with three different opportunities to develop arguments in favour of rejecting the claim as disclosing no reasonable cause of action. First, is there reasonable foreseeability of harm arising from the defendants’ conduct, particularly in a case where the conduct was not directed at the plaintiff, specifically. Second, is there sufficient proximity? Proximity is a malleable concept, and requires a detailed fact-specific analysis. There is ample opportunity for a defendant to argue that there is, in all the circumstances of the case, an insufficiently

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47 2011 SCC 42.
48 2011 SCC 42.
49 Ibid. at para. 49.
proximate relationship for a prima facie duty of care to arise. Finally, there is the second stage policy analysis. This, too is an area open to creative interpretation. What policy objectives can or should be in play? In the case of competing policy concerns, which ones should have precedence? In developing and arguing the reasons why a particular economic loss claim should not be allowed out of the gate, the defendant should take full advantage of articulating the reasons against permitting the claim under each head of the analysis.

Economic loss generally arises in a commercial context, and in that context, typically there are contracts between the parties that define their relationships. In many instances the contracts will include terms that exclude liability for negligent conduct. So to in corporate by-laws or articles of incorporation. An important part of the factual analysis relevant to the question of proximity and the existence of a duty of care will be what the parties have agreed between themselves. In many instances the relationship and the limits of exposure will be well defined already. Even if there is no exclusion of liability expressly incorporated into the documents, the scope of the relationship, including the reasonable expectations can be gleaned from the commercial terms of the parties’ dealings with each other. These can provide a fertile ground for arguments limiting the proximity argument and the presumption of a duty of care.

The principle area of concern for the courts and for defendants arises in the final “policy” analysis. Particularly, the spectre of indeterminate liability for indeterminate losses to an indeterminate number of claimants. In each area of the law, limits on liability are imposed, and here the courts are particularly wary of expansion. Absent reasonable limits, there is a genuine policy concern that commerce, the judicial system and society, in general could be impaired. Strong arguments can be advanced that untried claims for economic loss should be permitted in only the most clear of cases, where there is a direct and obvious causal link and damage to the plaintiff was the patent and inevitable result of a want of care on the defendant’s part. In all other cases, the plaintiff should accept that there are some economic costs to life in a developed society and that they should bear the loss as a cost of participation.

Even if the claim is allowed to proceed to trial, the plaintiff is still faced with a tremendous burden to establish that the losses she or he is claiming are causally connected to the alleged breach of duty of care. Causation can be tricky to establish in today’s complicated economic environment, where there may be many factor at play affecting financial circumstances. The onus rests squarely on the shoulders of the plaintiff to clearly link their loss to the allegedly negligent behaviour. The challenge for the defendant is to point to the other potential reasons for the loss, or to show that there is, in fact no loss that was caused by the defendant’s actions. Similarly, arguments regarding the plaintiffs duty to mitigate are particularly strong in the context of claims for pure economic loss. In the commercial context, there are ample opportunities for parties to recoup their losses through taking reasonable steps to mitigate loss. Here is fertile ground for the defendant to till.