SEEDS, WEEDS AND UNLAWFUL MEANS: NEGLIGENT INFLICTION OF ECONOMIC LOSS AND INTERFERENCE WITH TRADE AND BUSINESS

FRANCESCO BONOLLO*

The purpose of this article is to examine the decision of the High Court in Perre v Apand Pty Ltd *(1999) 198 CLR 180 and subsequent cases and developments, including* Dovuro Pty Ltd v Wilkins *(2000) 105 FCR 476; (2003) 215 CLR 317,* Johnson Tiles Pty Ltd v Esso Australia Pty Ltd *[2003] VSC 27 and* Woolcock Street Investments Pty Ltd v CDG Pty Ltd *(2004) 216 CLR 515 relating to the negligent infliction of pure economic loss and to compare the principles and policies identified in those cases with those in the 'genus' or 'innominate' tort of interference with trade and business by unlawful means. In this respect, Part I of the article will seek to examine the approach of the High Court to the determination of questions relating to the duty of care in cases of pure economic loss – in particular, the search for a universal approach or methodology and the 'factors' or 'salient features' indicative of the duty in such cases. Part II will examine the unlawful interference tort with particular emphasis on the 'unlawful means' and 'intention' elements of the tort. Assistance will also be drawn from relevant concepts in the tort of interference with contractual relations. In Part III, comparisons between the operation of various concepts in the negligence tort and the intentional torts under consideration will be drawn and distinctions and overlapping concepts highlighted, in particular in relation to the knowledge requirements and the operation of unlawful or otherwise illegitimate conduct. The article will conclude that, on account of conceptual and practical difficulties, these intentional torts should remain separate and distinct from the negligence framework and not be subsumed within the negligence tort.*

* Assistant Lecturer, Department of Business Law and Taxation, Faculty of Business and Economics, Monash University. An earlier version of this article was submitted by the author as a Graduate Research Paper in the LLM program in the Faculty of Law, Monash University. The author is indebted to Professor Marilyn Pittard, Faculty of Law, Monash University for her encouragement, guidance and comments in relation to drafts of this article. The author also gratefully acknowledges the comments and guidance provided by Mr Keith Akers, Research Assistant, Department of Business Law and Taxation, Faculty of Business and Economics, Monash University. The author is also grateful for the comments of the anonymous referee in completing this article. All errors and omissions remain those of the author.

I INTRODUCTION

The High Court of Australia observed in *Northern Territory of Australia v Mengel*[1] that

> the recent trend of legal development, here and in other common law countries, has been to the effect that liability in tort depends on *either* the intentional or the negligent infliction of harm. That is not a statement of law but a description of the general trend ...[2]

Lord Wedderburn, writing almost twenty years ago, commented that:

> The law of intentional torts has been developed almost without regard to liability for negligence and vice versa ... More important, it points to the urgent need to consider the relationship of torts of negligence and torts of intention.[3]

In light of the above, the purpose of this article is to examine the decision of the High Court of Australia in *Perre v Apand Pty Ltd*[4] and subsequent cases and developments, including *Dovuro Pty Ltd v Wilkins*[5] and *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd*,[6] relating to negligent infliction of pure economic loss – economic loss which is not consequential on physical damage or personal injury – and to compare principles and policies identified in that tort with the principles of liability established in the intentional 'genus' or 'innominate' tort of interference with trade and business by unlawful means.

Part I of this article will seek to examine in detail the approach of the High Court in *Perre* to the determination of questions relating to the establishment of a duty of care in cases of pure economic loss. In this respect, the discussion will seek to highlight the approach of the Justices of the Court in *Perre* (and in subsequent cases and developments including *Dovuro* and *Johnson Tiles No 5*) to 'factors' or 'salient features' indicative of the duty of care in such cases. While a discussion of cases concerning pure economic loss caused by defective structures is beyond

1 (1995) 185 CLR 307 ('*Mengel*').
2 Ibid 341-2 (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ) (emphasis added). See also Philip Sales and Daniel Stilitz, 'Intentional Infliction of Harm by Unlawful Means' (1999) 115 *Law Quarterly Review* 411, 437.
3 Lord Wedderburn, 'Rocking the Torts' (1983) 46 *Modern Law Review* 224, 230. The first sentence of this quotation is also cited by Carty who states that '[t]he next stage calls for a consideration of liability for negligently inflicted economic loss in line with the rationale selected for intentionally inflicted economic harm'. See Hazel Carty, 'Intentional Violation of Economic Interests: The Limits of Common Law Liability' (1988) 104 *Law Quarterly Review* 250, 285. Phegan notes that: '"Fault" embraces intention and negligence. However, intentional torts have been more or less static while negligence has grown exponentially not only into areas previously untouched by any tort remedy but also at the expense of other torts especially those which traditionally relied on some form of strict liability.' See Judge Colin Phegan, 'The Tort of Negligence Into the New Millennium' (1999) 73 *Australian Law Journal* 885, 898. Heydon also notes that 'the more extensive liability in negligence becomes, the less the scope for some of the traditional economic torts'. See John Dyson Heydon, *Economic Torts* (2nd ed, 1978) v.
4 (1999) 198 CLR 180 ('*Perre*').
5 (2003) 215 CLR 317 ('*Dovuro*').
6 [2003] VSC 27 ('*Johnson Tiles No 5*').

the scope of this article, assistance will also be drawn from the recent decision of the High Court in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*.[7] In particular, the discussion will include examination of the operation of 'foreseeability', the relevant 'knowledge' requirements and 'vulnerability' in the context of contractual and other business or trade interests. Attention will also focus on the effect of illegal or otherwise tortious conduct in establishing a duty of care.

Part II will review the unlawful interference tort with particular emphasis on the principles relating to the 'intention' and 'unlawful means' elements of the tort. In this respect, assistance will also be drawn from the relevant authorities on the tort of interference with contractual relations. Having first examined *Perre* and subsequent cases and developments in detail, it is not intended that a detailed analysis of the authorities on the development of the unlawful interference tort take place as this has been undertaken by other commentators. Instead, the current status of the tort in Australia will be reviewed and the relevant law relating to the mental element of the tort will be identified for the purposes of drawing distinctions between 'foreseeability' and 'intention'. In this respect, the discussion will highlight distinctions between the states of mind and conduct which constitute 'negligence', 'recklessness' and 'intention'. Important distinctions drawn by authorities and commentators between 'foresight' and 'knowledge of inevitable harm' on the one hand and the requisite intention element in the unlawful interference tort on the other will be highlighted.

Given the identification of the principles in Parts I and II, the final part will consider the overlapping concepts which exist between negligent infliction of economic loss, the unlawful interference tort and the tort of interference with contractual relations. The examination will consider, in particular, overlaps and distinctions between the interests sought to be protected and the relevant knowledge requirements. In addition, the article will consider the overlapping operation of 'unlawful' or otherwise 'illegitimate' conduct in the two torts and examine the relevance or otherwise of 'vulnerability'. Hypothetical examples will be suggested to demonstrate the separate operation of negligence, the unlawful interference tort, and interference with contractual relations in relation to the above concepts. The article will conclude that, on account of conceptual and practical difficulties, these intentional torts should remain separate and distinct from the negligence framework and not be subsumed within the negligence tort. Some observations on the future development of the 'illegitimate' conduct aspects of the negligence tort will also be made. In particular, observations by the High Court on the relationship between breaches of statutory provisions and the future development of the tort of negligence will be noted.

7 (2004) 216 CLR 515 ('*Woolcock Street Investments*').

II PART I – NEGLIGENT INFLICTION OF ECONOMIC LOSS

A *General Rule Against Recovery for Negligent Interference with Contract:* Cattle v Stockton Waterworks Co

English and Australian law generally traces the exclusionary rule to the decision in *Cattle v Stockton Waterworks Co*.[8] In that case, Cattle (the plaintiff) was a builder who was a party to a fixed-price contract to construct a tunnel between two blocks of land. The two blocks were owned by Knight and separated by a road elevated on an embankment. The defendant was a statutory body that had earlier placed a mains pipe under the surface of the embankment. A faulty connection in the pipe allowed water to escape and this flowed into the tunnel. This caused a delay in construction and additional costs of 26 pounds.[9] Justice Blackburn, delivering the judgment of the Court, held that Cattle had no right of action against the defendant.[10]

After referring to the tort of *intentional* interference with contractual relations under *Lumley v Gye*,[11] Blackburn J concluded:

> In the present case there is no pretence for saying that the defendants were malicious or had any intention to injure anyone. They were, at most, guilty of a neglect of duty, which occasioned injury to the property of Knight, *but which did not injure any property of the plaintiff*. The plaintiff's claim is to recover the damage which he has sustained by his contract with Knight becoming less profitable, or, it may be, a losing contract, in consequence of this injury to Knight's property. We think this does not give him any right of action.[12]

In relation to the decision, Atiyah comments that 'here the plaintiff was, in effect, claiming damages for a *negligent* interference with contractual relations, and there was no authority for allowing an action in such circumstances'.[13] Similar authority exists in the United States in *Robins Dry Dock & Repair Co v Flint*[14] where Holmes J stated that:

8 (1875) LR 10 QB 453 ('*Cattle*').

9 Ibid 454-6. For a discussion of this case, see Patrick Selim Atiyah, 'Negligence and Economic Loss' (1967) 83 *Law Quarterly Review* 248.

10 *Cattle* (1875) LR 10 QB 453, 457-8.

11 (1853) 118 ER 749.

12 *Cattle* (1875) LR 10 QB 453, 458 (emphasis added). Justice Blackburn also noted that if Cattle could succeed, then 'the defendant would be liable, not only to an action by the owner of the drowned mine, and by such of his workmen as had their tools or clothes destroyed, but also to an action by every workman and person employed in the mine, who in consequence of its stoppage made less wages than he would otherwise have done. And many similar cases to which this would apply might be suggested': at 457.

13 Atiyah, above n 9, 248 (emphasis added).

14 275 US 303 (1927) ('*Robins*'). This case is cited in Roger B Godwin, 'Negligent Interference with Economic Expectancy: The Case for Recovery' (1964) 16 *Stanford Law Review* 664, 689-92. In *Robins*, the plaintiffs/respondents hired a ship under a contract of charter with its owners. The ship was dry-docked for repairs. The contract provided that the hiring fee was not payable during that time. Due to the negligence of the defendant/appellant repairer, the ship's propeller was damaged and the ship could not be used by the plaintiff. The defendant repairer had no knowledge of the hire contract at the time of its negligence. See *Robins*, 275 US 303, 308-9 (1927).

> no authority need be cited to show that, as a general rule, at least, a tort to the person or property of one man does not make the tortfeasor liable to another *merely because the injured person was under a contract with the other, unknown to the doer of the wrong*.[15]

A detailed evaluation of the rationale underpinning the exclusionary rule and the reasons for its 'passing' is beyond the scope of this article but has been undertaken by other commentators.[16] However, the policy considerations identified by the High Court in *Perre* as relevant to attaching liability for negligently inflicted economic loss will be discussed in Part I(C) below.

B *The 'Seeds' Case* - Perre v Apand Pty Ltd

1 *Summary of Facts*

The facts of *Perre* are now well-known.[17] For the purposes of growing an experimental crop, Apand Pty Ltd (unknowingly) supplied diseased potato seed to a grower in South Australia (the Sparnon farm). The Saturna variety seed had

15 *Robins*, 275 US 303, 309 (1927) (emphasis added), cited in Godwin, above n 14, 689. See also J C S Note, 'Negligent Interference with Contract: Knowledge as a Standard for Recovery' (1977) 63 *University of Virginia Law Review* 813, 819-20.

16 Heydon, for example, examines the reasons for the exclusionary rule and identifies two important aspects: 'Any tort will have fairly narrow physical consequences but may have very wide effects on those with whom the plaintiff had business and family relations; hence the defendant, in the interests of preserving his freedom of action, should be spared huge liabilities which would stifle enterprise. The second point is that too many claims would be made for one tort.' See Heydon, above n 3, 6 (footnote omitted), 2-8. The learned author notes that: 'This "floodgates of litigation" argument, used to oppose most suggested extensions of liability, is generally a discredited one, but in this area it has much force. It may seem harsh to deny the innocent plaintiff a remedy; but the risk of financial loss can be spread': at 7. See also Atiyah, above n 9, 248-56; Joachim Dietrich, 'Liability in Negligence for Pure Economic Loss: The Latest Chapter (*Perre v Apand Pty Ltd*)' (2000) 7 *James Cook University Law Review* 74, 76-8; Christopher Harvey, 'Economic Losses and Negligence The Search for a Just Solution' (1972) 50 *Canadian Bar Review* 580, 582-3; Jane Stapleton, 'Duty of Care and Economic Loss: A Wider Agenda' (1991) 107 *Law Quarterly Review* 249, 253-9. For a discussion of the exclusionary rule in the United States, see James Fleming Jr, 'Limitations on Liability for Economic Loss Caused By Negligence: A Pragmatic Appraisal' (1972) 25 *Vanderbilt Law Review* 43, 48-58; Godwin, above n 14, 679-93. For the 'passing' of the exclusionary rule highlighting the views of the members of the Court in *Perre*, see Helen Anderson, 'Implications for Auditors of the High Court Decision in *Perre v Apand*' (2000) 4 *Macarthur Law Review* 37, 38-9. See also Bruce Feldthusen, 'Liability for Pure Economic Loss: Yes, But Why?' (1999) 28 *University of Western Australia Law Review* 84, 85-6. Anderson also notes that Kirby J in *Perre* (1999) 198 CLR 180, 268, approved the dissenting judgment of Denning LJ in *Candler v Crane Christmas & Co* [1951] 2 KB 164, 179. The author quotes this passage where (in part) Lord Denning observed 'once the duty exists, I cannot think that liability depends on the nature of the damage'. See also Harvey, above n 16, 589. In *Cattanach v Melchior* (2003) 215 CLR 1, there was some disagreement between the Justices of the High Court relating to the nature of the damage suffered by a couple who brought an action against a doctor for damages for the future expenses of bringing up a child who was conceived after a (failed) sterilisation procedure. For example, Gleeson CJ, in the minority in allowing the doctor's appeal, appeared to treat the claim as one for pure economic loss (see, eg, at 18-20) yet Hayne J, also in the minority, considered this ignored the 'physical consequences' of the pregnancy (at 72). In the majority, McHugh and Gummow JJ (at 31) found little assistance from categorising the case as one of pure economic loss and Kirby J (at 57) considered the economic loss was *consequential* on 'physical events (pregnancy and child-birth)' but Callinan J (at 109) considered the description 'reasonable in the circumstances'.

17 The facts are taken from the judgment in *Perre* (1999) 198 CLR 180, 194-5 (Gleeson CJ), 204-8 (McHugh J), 237-9, 256-9 (Gummow J).

been previously grown under a seed certification scheme in Victoria but was withdrawn prior to completion. Bacterial wilt disease developed in the Sparnon crop. The Perres' farm was several kilometres away but the Perres' potatoes did *not* contract the disease. However, the *Plant Diseases Regulations 1989* (WA) prohibited the importation of potatoes from any property within 20 kilometres of an outbreak of bacterial wilt and this was an important market for the Perres. In addition, the *Fruit and Plant Protection Act 1968* (SA) banned Apand from bringing the diseased seed into South Australia.[18]

Apand knew (evidenced by internal memoranda) about the serious effects of the disease, the regulations, and that potatoes were grown for the Western Australian market. The 'Perre interests' were largely divided between the Warruga farm, which grew potatoes, and Vineyards, the owner of a processing plant. The Perres suffered large economic losses to both interests. Warruga's losses included lost income from the loss of exports of potatoes to Western Australia including 'loss of *future* sales'.[19]

2 *Overview of the Judgments*

In the case of the Perre growing interests, each Justice of the High Court delivered a separate judgment finding a duty of care and that the respondent had negligently introduced the seed onto the Sparnon farm. However, while there was unanimity in relation to the growing interests, two of the Justices held no duty was owed to the processing interests of the Perres.[20]

The following overview highlights the principal policy 'factors' or 'considerations' and 'salient features' identified by the Justices for imposing a duty of care.

Chief Justice Gleeson agreed with the reasons of Gummow J that a duty of care was owed to all the Perre interests. In particular, the Chief Justice considered that Apand's internal memoranda that highlighted the potential harm to farms inside the 20 kilometre quarantine zone around the outbreak provided the basis for several important factors which now recur in judgments on pure economic loss – '*actual foresight* of the likelihood of harm, and *knowledge* of an *ascertainable class* of *vulnerable persons*'.[21] Also relevant to avoiding indeterminate liability[22] was the 'physical propinquity' between the Perre and Sparnon farms and Apand's '*control*' of the relevant experiment.[23]

18 Ibid 307 (Hayne J).
19 Ibid 292-3, 296-7 (Hayne J) (emphasis in original); Dietrich, above n 16, 80. The separate 'Perre interests' are described by McHugh J at 204-5 and considered in more detail at below n 127-35.
20 See Rashda Rana, 'Negligence and Pure Economic Loss: The Dance of the Seven Veils' (1999) 68 *Australian Construction Law Newsletter* 50, 50. A useful review of the judgements is contained in Dietrich, above n 16, 81-93.
21 *Perre* (1999) 198 CLR 180, 194-5 (emphasis added).
22 See discussion in Part I(C) below.
23 *Perre* (1999) 198 CLR 180, 195.

Justice Gaudron considered that a duty of care arose 'where a person *knows or ought to know* that his or her acts or omissions may cause the *loss or impairment of legal rights* possessed, enjoyed or exercised by another, whether as an individual or as a member of a class, and that that *latter person is in no position to protect his or her own interests*'.[24] Her Honour considered that Apand *knew* that certain growers and processors of potatoes supplied those potatoes to Western Australia and that those inside the 20 kilometre quarantine zone would *lose that right* and could not protect themselves.[25]

Justice McHugh considered *Caltex Oil (Australia) Pty Ltd v The Dredge 'Willemstad'*[26] to be correctly decided and its reasoning also applied in *Perre*. His Honour noted in particular that harm to the Perres was reasonably foreseeable, that the Perres were both within an *ascertainable class* of people and were *vulnerable* and that liability was not indeterminate. In addition, a duty of care did not 'unreasonably interfere with Apand's commercial freedom' and Apand '*knew of the risk* to potato growers and the consequences'.[27] His Honour considered that the ascertainable class included only those Perre interests which owned land or grew potatoes within the 20 kilometre quarantine zone.[28] Accordingly, his Honour excluded the potato processors from the ascertainable class and no duty was owed to them.[29]

Now a well-known phrase, Gummow J favoured the 'salient features'[30] approach adopted by Stephen J in *Caltex Oil* for imposing a duty of care. These features included that imposing a duty did not prevent Apand engaging in *legitimate* activities, Apand's actual or constructive knowledge that the Perres were within the 20 kilometre quarantine zone and its knowledge of the Western Australian regulations. Further, Apand commenced and *controlled* the experiment on the Sparnon farm and the Perres had no knowledge of the risk and were vulnerable.[31] Accordingly, a duty of care was owed to all of the Perre interests.[32]

Justice Kirby considered the correct approach to be the three stage test of foreseeability, proximity and policy[33] from *Caparo Industries Plc v Dickman*.[34] His Honour considered the harm to the Perres was reasonably foreseeable[35] and that proximity was satisfied by Apand's actual or constructive knowledge of farms near to the Sparnon farm (again, from internal memoranda). His Honour further considered that liability was not indeterminate as '[t]he ambit of the

24 Ibid 202 (emphasis added).
25 Ibid.
26 (1976) 136 CLR 529 ('*Caltex Oil*').
27 *Perre* (1999) 198 CLR 180, 204 (emphasis added).
28 Ibid 234.
29 Ibid.
30 Ibid 254, citing *Caltex Oil* (1976) 136 CLR 529, 576-7.
31 *Perre* (1999) 198 CLR 180, 257-60.
32 Ibid 260.
33 Ibid 275.
34 [1990] 2 AC 605 ('*Caparo*').
35 *Perre* (1999) 198 CLR 180, 286-7, citing *Wyong Shire Council v Shirt* (1980) 146 CLR 40, 45-6 (Mason J).

reasonably foreseeable, indeed known, vulnerability was measured by precise considerations of geographical proximity'.[36]

As discussed below,[37] Hayne J took an approach which considered *intentional* conduct and the policy of protecting *legitimate* business dealings. His Honour asked 'what would have been the position if the respondent had deliberately (rather than negligently) engaged in the conduct'?[38] His Honour considered that *intentionally* importing the seed into South Australia was illegal and so imposing a duty of care did not prevent Apand undertaking legitimate activities.[39] However, his Honour also considered that no duty of care was owed to the Perre's processing facilities as the Western Australian regulation did not *directly* prohibit them from exporting potatoes.[40]

Justice Callinan imposed a duty of care in relation to all the Perre interests on the grounds of Apand's 'effective control' of the experiment, the 'geographical propinquity' of the properties and Apand's actual or constructive knowledge of the risk. In addition, the Perres could not protect themselves and the loss did not result from legitimate business conduct.[41]

C *Policy Factors/Considerations for Recovery of Pure Economic Loss in Negligence*

1 *No Recovery Merely Because Loss is Foreseeable*

It is clear that a defendant does not owe a duty of care to avoid the infliction of pure economic loss merely because that loss is reasonably foreseeable.[42] However, it is also not necessary to have specific 'knowledge of the existence of any of the plaintiffs or [groups of plaintiffs] or of their particular circumstances, and it is unnecessary to establish any actual relationship between the parties prior to the commission of the negligent act'.[43]

36 *Perre* (1999) 198 CLR 180, 288-9.
37 See discussion in Part I(C) below.
38 *Perre* (1999) 198 CLR 180, 306.
39 Ibid 307. As noted in the text at above n 18, the *Fruit and Plant Protection Act 1968* (SA) banned Apand from bringing the diseased seed into South Australia.
40 *Perre* (1999) 198 CLR 180, 308.
41 Ibid 326-8.
42 See, eg, *Perre* (1999) 198 CLR 180, 192 (Gleeson CJ) where his Honour noted that this was accepted by every Justice of the High Court except Murphy J in *Caltex Oil* (1976) 136 CLR 529. See also *Perre* (1999) 198 CLR 180, 198 (Gaudron J), 208 (McHugh J); *Woolcock Street Investments* (2004) 216 CLR 515, 529-30 (Gleeson CJ, Gummow, Hayne and Heydon JJ); *North Kalgurli Mines Ltd v FFE Minerals Australia Pty Ltd* [2001] WASC 119, [47] (Hasluck J); *Batten v CTMS Ltd* [1999] FCA 1576, [36]-[37] (Kiefel J) ('*Batten*'). In *Batten*, the applicants were employed to replace waterside workers who were members of the Maritime Union of Australia ('MUA'). The applicants lost their employment after action by the MUA. The applicants sought to argue, at [35]-[36], that the Minister for Industrial Relations and the Commonwealth should have advised them of the consequences of their participation. Justice Kiefel observed: 'What is pleaded is knowledge on the part of the Minister and the Commonwealth of the group members' exposure to economic loss. It remains the case that mere knowledge of the risk of such harm is not sufficient to give rise to a duty of care. Moreover, the risks appreciated by a person, and to which a duty to act might relate, are those created by that person, not someone else': at [37].
43 *Johnson Tiles No 5* [2003] VSC 27, [830] (Gillard J).

Given the above findings, it is of particular significance for present purposes to identify the policy factors or considerations underpinning the imposition of liability in cases of negligently inflicted economic loss, the approach or methodology of the members of the High Court to questions of recovery in such cases, and the 'factors' or 'salient features' indicative of the duty of care.

2 *Indeterminate Liability*

Turning to the relevant policy factors or considerations,[44] Gaudron J in *Perre* emphasised 'the law's concern to avoid the imposition of liability "in an indeterminate amount for an indeterminate time to an indeterminate class"'.[45] Justice McHugh explains the meaning of indeterminacy in the following terms:

> it is not the size or number of claims that is decisive in determining whether potential liability is so indeterminate that no duty of care is owed. Liability is indeterminate only when it cannot be realistically calculated. If both the likely number of claims and the nature of them can be reasonably calculated, it cannot be said that imposing a duty on the defendant will render that person liable 'in an indeterminate amount for an indeterminate time to an indeterminate class'.[46]

This policy factor or consideration was recently applied by Gillard J in *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd*[47] where the applicants sued in negligence

44 A useful summary of the policy considerations and factors relevant to imposing a duty of care identified by the members of the High Court in *Perre* is contained in the judgment of Branson J in *Dovuro* (2000) 105 FCR 476, 482-5. The High Court proceedings in *Dovuro* (2003) 215 CLR 317 are described at below n 185. The policy considerations and factors are considered in detail and applied by Gillard J in *Johnson Tiles No 5* [2003] VSC 27, [755], [852]-[1220]. For further discussion of the relevant policy considerations and factors in *Perre*, see also *McKellar v Container Terminal Management Services Ltd (No 2)* [2000] FCA 1608, [50]-[63] (Weinberg J) ('*McKellar*'); *Graham Barclay Oysters Pty Ltd v Ryan* (2000) 102 FCR 307, 381-4 (Lindgren J) ('*Graham Barclay Oysters No 1*'); *Reynolds v Katoomba RSL All Services Club Ltd* (2001) 53 NSWLR 43, 45-52 (Spigelman CJ); *Ilievska-Dieva v SGIO Insurance Ltd* [2000] WASCA 161, [13]-[29] (Wallwork J); *Papadopoulos v Hristoforidis* [1999] NSWSC 1017, [14]-[15] (Wood CJ); *Johnson Tiles Pty Ltd v Esso Australia Pty (No 2)* [2001] VSC 292, [61]-[84] (Gillard J) ('*Johnson Tiles No 2*'); *Natcraft Pty Ltd v Det Norske Veritas* [2001] QSC 348, [43]-[54] (Chesterman J) ('*Natcraft*'); *Shalhoub v Buchanan* [2002] NSWSC 622, [23]-[31] (Simpson J); *Valleyfield Pty Ltd v Primac Ltd* [2003] QCA 339, [115]-[121] (Jerrard JA); *Fortuna Seafoods Pty Ltd (As Trustee for the Rowley Family Trust) v The Ship 'Eternal Wind'* [2005] QSC 4, [8]-[30] (Douglas J) ('*Fortuna Seafoods*'). For further analysis of the decision in *Perre*, see also Peter Cane, 'The Blight of Economic Loss: Is There Life After *Perre v Apand*?' (2000) 8 *Torts Law Journal* 246; Jim L R Davis, 'Liability for Careless Acts or Omissions Causing Purely Economic Loss: *Perre v Apand Pty Ltd*' (2000) 8 *Torts Law Journal* 123; Bruce Feldthusen, 'Pure Economic Loss in the High Court of Australia: Reinventing the Square Wheel?' (2000) 8 *Tort Law Review* 33.

45 *Perre* (1999) 198 CLR 180, 199 (Gaudron J) who cites *Bryan v Maloney* (1995) 182 CLR 609, 618 (Mason CJ, Deane and Gaudron JJ) ('*Bryan*'), in turn citing *Ultramares Corporation v Touche*, 174 NE 441, 444 (1931) (Cardozo CJ). See also *Perre* (1999) 198 CLR 180, 221 (McHugh J), 267-8 (Kirby J), 299, 303 (Hayne J), 322 (Callinan J). Justice Gaudron's statement of indeterminacy is also cited by Branson J in *Dovuro* (2000) 105 FCR 476, 482. See also Hazel Carty, *An Analysis of the Economic Torts* (2001) 240-1; Feldthusen, above n 44, 34, 46-9.

46 *Perre* (1999) 198 CLR 180, 221 (footnote omitted). See also *Perre* (1999) 198 CLR 180, 303 (Hayne J). In *Woolcock Street Investments* (2004) 216 CLR 515, the facts of which are set out in the footnote at n 141, McHugh J explains that indeterminacy is *not* problematic in cases of pure economic loss caused by a defective structure because '[l]iability will ordinarily be restricted to the owner of the building when damage manifests itself': at 548.

47 *Johnson Tiles No 5* [2003] VSC 27.

for financial loss arising out of an explosion at Esso's Longford Gas Plant in Victoria which in turn caused gas supplies to the applicants to be temporarily halted. Esso conceded that its negligence caused the explosion.[48] Esso was the producer and processor of natural gas and supplied gas to the State's distribution system. The gas was supplied by Esso to a statutory body (Gascor) pursuant to a sale contract and this was re-supplied to various gas retailers. These retailers, again under contract, re-supplied various classes of end users.[49] The applicants comprised three classes of end users who suffered financial loss as a result of the temporary halting of supply – 'Business Users' (which included Johnson Tiles), 'Domestic Users' and 'Stood-down Workers'.[50] The damage claimed included both physical damage (and consequential economic loss) and pure economic loss. In the latter respect, Johnson Tiles sought compensation for various matters including expenses to prevent physical damage to mixing tanks, expenses in closing and restarting plant, loss of future profit and additional expenses (such as overtime salaries) to replenish tile stocks.[51] Some Domestic Users incurred pure economic loss which included purchasing electric appliances for use during the halting of supply[52] and Stood-down Workers comprised employees of end users who lost pay after being temporarily stood-down.[53]

Justice Gillard considered the individual components of indeterminate liability – the number of plaintiffs, amount, and duration of time. In addition to the observations of McHugh J set out above, Gillard J considered that *Perre* established, among other things:

> a general rule, the issue of indeterminacy is to be determined immediately prior to the negligent act ... It is not fatal to the recognition of a duty of care that the members of the class cannot be identified with complete accuracy ... [and the] ... Defendant's knowledge need not be limited to individual persons; liability can be determinate when the tortfeasor could have ascertained the identity of the specific class of persons likely to be [a]ffected.[54]

Of the three components, Gillard J considered the 'time factor' to be much less important compared to the number of potential plaintiffs, the former being determined by reference to limitation of actions statutes:

> When the principle is closely analysed in the context of the facts in the *Ultramares* case, the important feature which raises the real concern is the indeterminacy of the number of claimants. The time factor is governed by limitation legislation and it would indeed be a unique case if one could ever realistically calculate the size of any claim at the time of the negligent act.[55]

48 Ibid [791].
49 Ibid [16]-[20].
50 Ibid [5]-[13].
51 Ibid [565]-[616].
52 Ibid [636]-[637].
53 Ibid [666]-[669].
54 Ibid [904] (footnotes omitted). His Honour lists the individual components at [892], [909].
55 Ibid [906].

Applying the indeterminate liability components, his Honour considered that 'commercial/industrial gas customers' (a class of end user), which totalled over 43,000 in number, were a determinate class as Esso knew the nature of the use to which these businesses put the gas and also knew that halting supply would prevent these businesses producing goods or providing other services (with consequential lost profit).[56] In this respect, his Honour considered that Esso '[i]f it wished ... had the necessary resources to make enquiries to determine the identity of such users ... and the nature of the business'.[57] Similarly, the amount of the potential liability was not indeterminate as Esso had the 'means of knowing the likely number of claimants, would know the types of harm likely to be suffered and could make a rough and ready estimate of the likely quantum of damage'.[58] Finally, his Honour stated that *time* had 'no relevance' on the facts of the case as any harm was suffered during the interruption and the *Limitation of Actions Act 1958* (Vic) applied.[59] His Honour made similar findings in respect of the Domestic Users, whom his Honour held to be a determinate class despite totaling more than 1.3 million in number.[60]

3 *Proportionality*

Justice McHugh in *Perre* also emphasises the related concept of disproportionate penalties:[61]

> it is a policy of *proportionality*, not indeterminacy that prevents a court from imposing liability. The number of claims or their size, therefore, does not of itself raise any issue of indeterminacy. Indeterminacy depends upon what the defendant knew or ought to have known of the number of claimants and the nature of their likely claims, not the number or size of those claims.[62]

56 Ibid [915].
57 Ibid [917]-[918].
58 Ibid [921].
59 Ibid [923]. *Woolcock Street Investments* (2004) 216 CLR 515 concerned a claim for pure economic loss caused by a defective structure. In that case, McHugh J, at 555, identified as a policy factor against the imposition of a duty of care the consideration of '[c]ircumventing the policy of limitation legislation'. His Honour noted (at 555) that to bring an action in negligence, it was necessary for the relevant defect to become 'manifest' which may be a considerable time after the building was erected. His Honour contrasted this with the action for breach of contract for the erection of the same building which accrues at the time of breach. His Honour concludes: 'To allow an action in tort to be brought more than six or even twelve years after the negligent act has occurred when it could not have been brought in contract flies in the face of these rationales of the statutes of limitation': at 557.
60 *Johnson Tiles No 5* [2003] VSC 27, [924]-[927].
61 This term is taken from Robert L Rabin, 'Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment' (1985) 37 *Stanford Law Review* 1513, 1534.
62 *Perre* (1999) 198 CLR 180, 221-2 (emphasis added). Justice Gummow identifies some of the reasons behind a policy of proportionality stating that it may be 'unfair to the defendant whose careless slip may be completely out of proportion to the wide extent of the economic consequences. Enterprise may be discouraged and competition stifled': at 241. Justice Callinan discusses proportionality at 329-30. See also Rabin, above n 61, 1534, 1535. See also Stapleton, above n 16, 255, who cites this reference from Rabin and also cites Harvey Perlman, 'Interference with Contract and Other Economic Expectancies: a Clash of Tort and Contract Doctrine' (1982) 49 *University of Chicago Law Review* 61, 70-2. For the application of this consideration, see *Johnson Tiles No 5* [2003] VSC 27, [1206]-[1210]. In *Woolcock Street Investments* (2004) 216 CLR 515, McHugh J notes that, again, proportionality is not problematic in cases of pure economic loss caused by defective structures for reasons which include that 'the loss in value or the cost of repairs to the defective work is likely to bear a proportionate relationship to the contract price for doing or advising in respect of the building work': at 554.

4 *'Ripple Effect' on Contractual Relationships – Constructive Knowledge*

In *Perre*, McHugh J draws upon Stapleton in describing the 'ripple effect' that may occur in cases of pure economic loss: 'economic loss can "ripple" down a chain of parties; for example, the loss of profits which D causes P may in turn cause loss of profits to P's supplier and in turn to that supplier's suppliers, etc'.[63] In this respect, McHugh J suggests that 'the courts must be careful in using *constructive knowledge* to extend the class to whom a duty is owed'.[64]

Consequently, his Honour considered that 'second line' or 'ripple effect' victims are unlikely to be within the relevant class.[65] Of particular relevance to this article's consideration of the unlawful interference tort (and the tort of interference with contractual relations), his Honour states that:

> While the defendant might reasonably foresee that the first line victims might have *contractual and similar relationships with others*, it would usually be stretching the concept of determinacy to hold that the defendant could have realistically calculated its liability to second line victims.[66]

Accordingly, McHugh J expresses caution in the adoption of constructive knowledge in cases of negligent interference with contract. In this respect, the 'intention' element of the tort of interference with contractual relations will be examined below to contrast the operation of the concept of constructive knowledge or recklessness in that tort for the purposes of determining the range of potential plaintiffs. It will be demonstrated that constructive knowledge in the interference with contract tort has the opposite effect to that which McHugh J warns against in negligence – that is, to widen the range of potential plaintiffs.[67] The operation of the 'constructive knowledge' principle, to the extent that it is applicable at all in the unlawful interference tort, will also be considered in this respect.[68]

63 *Perre* (1999) 198 CLR 180, 221 (McHugh J) who cites Stapleton, above n 16, 255 (footnotes omitted). The 'ripple effect' is also discussed in Rabin, above n 61, 1533. See also the observation of Blackburn J in *Cattle* set out in the footnote at n 12.

64 *Perre* (1999) 198 CLR 180, 222 (emphasis added). His Honour states: 'To intrude questions of constructive knowledge of the risk into the duty question in every case of pure economic loss would run the risk of reinstating reasonable foreseeability as the criterion of duty in many cases': at 231 (footnote omitted). His Honour here cites, Feldthusen, 'Liability for Pure Economic Loss: Yes, But Why?', above n 16, 93-4. Constructive knowledge in the context of the intentional tort of interference with contractual relations is discussed in Part II(D) below.

65 *Perre* (1999) 198 CLR 180, 223. In *Johnson Tiles No 5* [2003] VSC 27, the facts of which are described in the text at above n 46-52, Esso sought to argue, at [909]-[912], that, due to the series of agreements, end users were 'third-line victims' after Gascor and the gas retailers. This was rejected by Gillard J who considered that the end user 'suffered the direct loss and for all intents and purposes, was the first-line victim' as it was intended to be the 'ultimate' user and no other parties in the series of contracts *used* the gas. By contrast, Gillard J held, at [938]-[939], that the 'Stood-down Workers', being employees of end users, 'are a true "ripple effect" victim' and so were not owed a duty of care. See also his Honour's observations at [848].

66 *Perre* (1999) 198 CLR 180, 223 (emphasis added).

67 See discussion in Part II(D) below.

68 See discussion in Part II(E) below.

5 *Protection of Legitimate Business Conduct or 'Autonomy of the Individual'*

Turning to another policy factor relevant to the negligence tort – what Anderson calls the policy of 'avoiding unnecessary interference with legitimate commercial freedoms'[69] – Gaudron J in *Perre* considered that:

> in a competitive commercial environment, 'a duty to take reasonable care to avoid causing mere economic loss to another ... may be inconsistent with community standards in relation to what is ordinarily legitimate in the pursuit of personal advantage'.[70]

Her Honour considered that in such an environment, relevant 'special' factors needed to be present in order for a duty to be found.[71] Justice Hayne similarly identified this policy factor or consideration,[72] while McHugh J considered that:

> Competitive acts not prohibited by law are legitimate unless they fall within the ambit of one of the economic torts to which I referred in *Hill v Van Erp*. *Ordinary competitive conduct imposes no duty to protect others from economic loss*. At the other end of the spectrum, conduct involving deceit, duress *or intentional acts prohibited by law* could seldom, if ever, be regarded as done in the legitimate protection or pursuit of one's interests.[73]

However, his Honour considered that a defendant did not 'automatically' owe a duty of care on the sole ground that its activities were illegal or 'in breach of law'.[74]

69 Anderson, above n 16, 47. This factor is also referred to as 'autonomy of the individual' in the case law. See, eg, *Woolcock Street Investments* (2004) 216 CLR 515, 548 (McHugh J).

70 *Perre* (1999) 198 CLR 180, 200 (footnote omitted). Her Honour cites *Bryan* (1995) 182 CLR 609, 618 (Mason CJ, Deane and Gaudron JJ) among other High Court authorities. See also *Chapman v Luminis Pty Ltd (No 5)* (2001) 123 FCR 62, 149; *Johnson Tiles No 5* [2003] VSC 27, [956]-[964] (Gillard J). Gaudron J also made the same observation in *Hill trading as R F Hill & Associates v Van Erp* (1997) 188 CLR 159 (*'Hill v Van Erp'*). In that case, a solicitor's negligence relating to the witnessing of a will caused an intended beneficiary to lose her proposed entitlement and so caused pure economic loss. Her Honour considered that: 'Moreover, the duty asserted by [the intended beneficiary] is co-extensive with the duty owed to [the testatrix] and ... not inconsistent with community standards as to what is legitimate in the pursuit of a personal advantage': at 193.

71 *Perre* (1999) 198 CLR 180, 200. The factors identified by the Court as indicative of a duty of care are discussed in Part I(E) below. This is also cited by Branson J in *Dovuro* (2000) 105 FCR 476, 482.

72 *Perre* (1999) 198 CLR 180, 299. Again, this is also cited by Branson J in *Dovuro* (2000) 105 FCR 476, 485. See also Feldthusen, above n 44, 34.

73 *Perre* (1999) 198 CLR 180, 224-5 (emphasis added). See also *Perre* (1999) 198 CLR 180, 290-1 (Kirby J). In *Woolcock Street Investments* (2004) 216 CLR 515, McHugh J explains that the 'autonomy of the individual' factor does not prevent imposition of a duty of care in cases of pure economic loss caused by defective structures because '[t]hose involved in [the design and construction of] the building are already under a duty to the first owner to avoid physical injury to the owner's person and property. Consequently, imposing a duty to avoid economic loss to the first or a subsequent owner is not inconsistent with the pursuit of the legitimate interests of those who design or construct the building': at 547 (footnote omitted). By contrast, see the comments of Callinan J, at 592, for a different aspect of the autonomy consideration which weighs against the imposition of such a duty.

74 *Perre* (1999) 198 CLR 180, 224-5.

D *Proximity and Methodology in Novel Cases of Pure Economic Loss*

Before turning to the factors the High Court considered determinative of a duty of care in pure economic loss circumstances, this article will now briefly examine some of the observations of the Court in *Perre* in regard to proximity and the Court's approach to the imposition of a duty of care in novel categories of case.[75]

1 *Decline of the Three-Stage* Caparo *Test*

By contrast to the other Justices, only Kirby J considered the proper approach was to adhere to the *Caparo* three-stage test of foreseeability, proximity and policy.[76] His Honour considered that proximity was an ingredient in some of the judgments in *Caltex Oil* through the factor of *actual or constructive knowledge of harm* to the plaintiff *as an individual*.[77]

As noted in separate articles by Anderson and Baron,[78] Gleeson CJ dismisses the three-stage test in *Caparo* of 'foreseeability, proximity, and a situation in which the court considers it fair, just and reasonable that the law should impose a duty'.[79] The Chief Justice cites part of the speech of Lord Bridge of Harwich in that case where his Lordship considered that proximity and fairness were not capable of 'precise definition as would be necessary to give them utility as practical tests' and were 'little more than convenient labels to attach to the features of different specific situations' where the law recognised a duty of care.[80] The Chief Justice appears to favour an incremental approach noting that Lord Bridge had approved Brennan J's approach in this regard.[81]

Justice McHugh stated that 'this Court no longer sees proximity as the unifying criterion of duties of care'.[82] In criticising the three-stage *Caparo* test, his Honour

75 For a detailed examination of the history and status of proximity in the imposition of a duty of care in cases of pure economic loss see, in particular, Baron's detailed examination of 'the development and demolition of the concept of "proximity"' in Adrian Baron, 'The "Mystery" of Negligence and Economic Loss: When *is* a Duty of Care Owed?' (2000) 19 *Australian Bar Review* 167, 171-9. See also Phegan, above n 3. An overview of different approaches to the imposition of a duty of care in Australia is set out by Kirby J in *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 622-9 (*'Graham Barclay Oysters No 2'*). See also Dietrich, above n 16, 78-80. That the actions in *Perre* were novel is questioned in Feldthusen, 'Pure Economic Loss in the High Court of Australia: Reinventing the Square Wheel?', above n 44, 41-6.

76 *Perre* (1999) 198 CLR 180, 275. His Honour maintains this approach in the context of the duty of care of statutory authorities in *Crimmins v Stevedore Industry Finance Committee* (1999) 200 CLR 1, 79-86 (*'Crimmins'*).

77 *Perre* (1999) 198 CLR 180, 282-3.

78 A useful summary of the observations of the members of the Court on proximity and each Justice's approach to the development of the law is contained in Anderson, above n 16, 38-44, 48-51, and in Baron, above n 75, 183-8.

79 *Perre* (1999) 198 CLR 180, 193-4.

80 Ibid, citing *Caparo* [1990] 2 AC 605, 617-8. Similarly, Hayne J, at 301-2, criticised the use of a test which included imposing a duty where it was 'fair, just and reasonable' citing Stapleton's view that '[w]ithout more, these are just labels'. See Jane Stapleton, 'Duty of Care Factors: a Selection from the Judicial Menus', in Peter Cane and Jane Stapleton (eds), *The Law of Obligations, Essays in Celebration of John Fleming* (1998) 59, 62.

81 *Perre* (1999) 198 CLR 180, 193-4.

82 Ibid 209-10.

questioned the usefulness of proximity[83] and, similarly to Gleeson CJ, concluded that an incremental approach was preferred.[84]

Justice Callinan considered that the decision in *Caltex Oil* made it unnecessary to consider the test in *Caparo*[85] and referred to Stephen J's observation in *Caltex Oil* that the case law would eventually identify 'some general area of demarcation between what is and is not a sufficient degree of proximity'.[86]

More recently in *Sullivan v Moody*,[87] five of the Justices of the High Court (in the absence of Kirby J) clearly stated that the three-stage *Caparo* approach did 'not represent the law in Australia'.[88] Their Honours there stated that proximity now gave 'little practical guidance in determining whether a duty of care exists in cases that are not analogous to cases in which a duty has been established'.[89]

Finally, and noting the disapproval of the *Caparo* three-stage test in *Sullivan v Moody*, Kirby J in *Graham Barclay Oysters No 2* 'relinquishes' this approach, although with some reluctance.[90]

2 *The Incremental Methodology to Categories of Negligence*

As discussed above, both Gleeson CJ and McHugh J in *Perre* favoured an incremental approach in determining questions of imposing a duty of care. Similarly to Gleeson CJ, Gaudron J also stated that Brennan J in *Sutherland Shire Council v Heyman*[91] adopted the approach of using 'novel categories of negligence incrementally and by analogy with established categories'[92] and observes that:

> It may well be that, at this stage, the notion of proximity can serve no purpose beyond signifying that it is *necessary to identify a factor or factors of special significance* in addition to the foreseeability of harm before the law will impose liability for the negligent infliction of economic loss.[93]

83 Ibid 211.
84 Ibid 216-7.
85 Ibid 325.
86 Ibid 325-6, citing *Caltex Oil* (1976) 136 CLR 529, 576.
87 (2001) 207 CLR 562.
88 Ibid 579 (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ). For various criticisms of this decision, see Christian Witting, 'The Three-stage Test Abandoned in Australia – Or Not?' (2002) 118 *Law Quarterly Review* 214, 217-8.
89 *Sullivan v Moody* (2001) 207 CLR 562, 578. Their Honours cite *Hawkins v Clayton* (1998) 164 CLR 539, 555-6 (Brennan J); *Hill v Van Erp* (1997) 188 CLR 159, 210 (McHugh J); *Crimmins* (1999) 200 CLR 1, 96-7 (Hayne J).
90 *Graham Barclay Oysters No 2* (2002) 211 CLR 540, 626. His Honour there notes various criticisms of the decision in *Sullivan v Moody* (2001) 207 CLR 562 noted in Witting, above n 88, 215, 220-1. Witting defends the three-stage test at 218-9. See also Kirby J's hopes for a return to the *Caparo* approach in *Woolcock Street Investments* (2004) 216 CLR 515, 572-3.
91 (1985) 157 CLR 424 ('*Heyman*').
92 *Perre* (1999) 198 CLR 180, 197. For the passage quoted in the text, her Honour cites *Heyman* (1985) 157 CLR 424, 481.
93 *Perre* (1999) 198 CLR 180, 198 (footnotes omitted and emphasis added). This passage is also cited by Gray J in *CLT v Connon* (2000) 77 SASR 449, [83] ('*Connon*'). This passage is also highlighted by Anderson, above n 16, 40.

As noted by Rana,[94] in relation to the appropriate methodology, Gaudron J appears to favour a 'categories' approach concluding that 'in time, there will develop a sufficient body of case law from which it is possible to discern different categories for which the special circumstances that call a duty of care into existence can be articulated'.[95]

It appears that an 'overriding' incremental methodology will be applied to the approach of identifying the relevant 'factors' or 'salient features' for imposing a duty of care. For example, in *Crimmins*, McHugh J warns that if:

> Left unchecked, this [factors] approach becomes nothing more than the exercise of a discretion ... In my opinion, *adherence to the incremental approach imposes a necessary discipline upon the examination of policy factors* with the result that the decisions in new cases can be more confidently predicted, by reference to a limited number of principles capable of application throughout the category.[96]

It is to the 'salient features' approach, now favoured by the High Court, that this article now turns.

3 *The 'Salient Features' or 'Factors' Approach*

As to the appropriate approach in imposing a duty of care in cases of pure economic loss, Gummow J in *Perre* favoured the 'salient features' approach adopted by Stephen J in *Caltex Oil* where '[h]is Honour isolated a number of "salient features" which combined to constitute a sufficiently close relationship to give rise to a duty of care'.[97] His Honour considered that:

> In determining whether the relationship is so close that the duty of care arises, attention is to be paid to the particular connections between the parties ... There is no simple formula which can mask the necessity for examination of the particular facts.[98]

As discussed above, Kirby J in *Graham Barclay Oysters No 2* has recently 'relinquished' the *Caparo* three-stage approach to determining questions of imposing a duty of care in novel cases. In the context of the question of imposing a duty to exercise statutory powers, his Honour considers that this will 'invoke a consideration of the multitude of special features of the relationship between the parties that ... the multi-factorial or 'salient features' approach requires'.[99]

94 Rana, above n 20, 51.
95 *Perre* (1999) 198 CLR 180, 198.
96 *Crimmins* (1999) 200 CLR 1, 34 (emphasis added). For various criticisms of the practice of 'incrementalism', see the observations of Lindgren J in *Graham Barclay Oysters No 1* (2000) 102 FCR 307, 390-1.
97 *Perre* (1999) 198 CLR 180, 254. His Honour cites *Caltex Oil* (1976) 136 CLR 529, 576-7 (Stephen J). See also Rana, above n 20, 52.
98 *Perre* (1999) 198 CLR 180, 253.
99 *Graham Barclay Oysters No 2* (2002) 211 CLR 540, 628.

4 *Intentional Conduct and the Duty of Care*

Finally, and of particular relevance to this article's consideration of the relationship between negligence and the intentional torts, Hayne J in *Perre* took an approach which considered *intentional* conduct and the policy of protecting legitimate business dealings discussed previously. His Honour asks:

> what would have been the position if the respondent had deliberately (rather than negligently) engaged in the conduct ... *if that deliberate conduct would have been illegal or would have made the respondent tortiously liable to the appellants (or some of them) then it is conduct that would fall outside the boundaries of acceptable commercial dealing. If, by contrast, deliberate conduct would not have been illegal and would not have made the respondent tortiously liable to any of the appellants, there seem very powerful reasons to think that no duty to take care should be imposed in such circumstances.* To put the matter another way, if deliberate conduct is neither unlawful nor tortious, why should the same kind of conduct (engaged in carelessly rather than deliberately) be tortious?[100]

His Honour considered that *intentionally* importing the seeds into South Australia was illegal (and also suggested that *careless* conduct may have breached the relevant Act but did not consider that question).[101] Accordingly, his Honour considered that imposing a duty of care did not prevent Apand undertaking legitimate activities.[102]

As a result, his Honour did not continue to consider whether such deliberate conduct would also be *tortious* in the context of the economic torts.[103]

5 *No Unifying Principle but 'Salient Features' Approach Preferred*

In light of the divergent approaches identified above, it is apt to note that Wood CJ in the New South Wales Supreme Court has observed that '[i]t appears to be an impossible, if not a fruitless exercise, to search for a single touchstone or unifying principle which would detect the existence of a duty of care'.[104]

In distilling the relevant approach, Finkelstein J in *Dovuro* suggested that:

100 *Perre* (1999) 198 CLR 180, 306 (emphasis added). His Honour considered, at 306, such an inquiry to be 'consistent with the development of the common law in relation to deliberate interference with the trade of another'.

101 Ibid 306-7 (emphasis added).

102 Ibid 307. As noted in Part I(B), the *Fruit and Plant Protection Act 1968* (SA) banned Apand from bringing the diseased seed into South Australia.

103 Whether the facts in *Perre* would give rise to an action under the unlawful interference tort is considered in hypothetical example 1 in Part III below.

104 *Palmer v RTA* [2001] NSWSC 846, [356]. See also the observations of Kirby J in *Graham Barclay Oysters No 2* (2002) 211 CLR 540, 617. His Honour here cites Witting, above n 88, 214. See also the observations of Gray J in *Connon* (2000) 77 SASR 449, which are also cited by Perry J in *Edwards v Olsen* [2000] SASC 438, [433].

> Perhaps the test that will gain acceptance will be along the lines that a duty will be imposed on a defendant when he knows that his negligence will cause damage to members of a known or ascertainable class who were particularly vulnerable to that damage.[105]

However, it appears clear that in determining whether a duty of care will be imposed in novel cases, the 'salient features' approach will be preferred. In this respect, Kirby J has himself acknowledged 'the "multi-factorial" approach now favoured by this Court for determining the existence of a duty of care by reference to "salient features" of the facts'.[106]

Recently, however, Gillard J in *Johnson Tiles No 5* appears to adopt a test which is a *combination* of proximity and the salient features approach. His Honour states that he adopts as the 'proper approach' that of Kirby J in *Perre*[107] and states:

> In my view, the *three-step methodology* of reasoning is –
>
> (i) Reasonable foreseeability of injury;
>
> (ii) Whether there is a relationship of proximity; and
>
> (iii) Identification and consideration of competing salient features for and against the finding of a duty of care.[108]

His Honour further observed that a

> failure to prove the first two elements would negate a duty of care. However, the finding of reasonable foreseeability and proximity would not establish a duty of care unless the salient features, after proper consideration, were in favour of a duty of care.[109]

Agreeing with the observations of Professor Fleming, his Honour appears to use proximity in the sense of 'an umbrella covering factors of legal policy and the learned author states that they ought to be specifically and clearly articulated'.[110] In this respect, his Honour cites the following passage of Kirby J in *Perre*:

105 *Dovuro* (2000) 105 FCR 476, 502. See also *McKellar* [2000] FCA 1608, [62]-[63] (Weinberg J).

106 *Graham Barclay Oysters No 2* (2002) 211 CLR 540, 620 (footnote omitted). His Honour here cites Witting, above n 88, 217 (who in turn refers to *Perre* (1999) 198 CLR 180, 253 (Gummow J)). Witting suggests, at 217-8, a problem in relation to this approach: 'is a level of indeterminacy in the weighing of "salient features". This is because the search for features such as physical closeness, knowledge, control and vulnerability need not "add up" to anything. Courts will ostensibly be required to make their decisions based upon mere intuition about the overall weightiness of the factors found to be present'. Justice Kirby observes in *Graham Barclay Oysters No 2* (2002) 211 CLR 540: 'Thus we seem to have returned to the fundamental test for imposing a duty of care, which arguably explains all the attempts made so far. That is, a duty of care will be imposed when it is reasonable in all the circumstances to do so': at 628-9. See also his Honour's comments in *Dovuro* (2003) 215 CLR 317, 350.

107 *Johnson Tiles No 5* [2003] VSC 27, [744], citing *Perre* (1999) 198 CLR 180, 284 (Kirby J).

108 Ibid [745] (emphasis added).

109 Ibid [754].

110 Ibid [741]. His Honour cites, at [740], John G Fleming, *The Law of Torts* (9th ed, 1998) 202.

> If ... proximity were to be confined to its original historical purposes as a measure of 'nearness and closeness' between the parties in dispute, it could yet provide a meaningful gateway in addition to reasonable foreseeability of harm, to afford the starting point for the allocation of a legal duty of care or exemption from its burden. Then, it would remain necessary ... to weigh candidly the competing policy considerations relevant to the imposition of a legal duty of care.[111]

However, it is relevant to note that his Honour appears to adopt the *second* step of proximity despite noting the observations of the High Court in *Sullivan v Moody* that 'it gives little practical guidance in determining whether a duty of care exists in cases that are not analogous to cases in which a duty has been established'.[112] Given that the High Court in that case considered the three-stage test did 'not represent the law in Australia'[113] and Kirby J's own abandonment of the test in *Graham Barclay Oysters No 2*, it is submitted that Gillard J has adopted part of that test – the requirement of proximity – that no longer needs be satisfied and on that ground may be contrary to authority.

Of course, Gillard J's test – if proximity should mean no more than policy factors which should be 'clearly articulated' – may have no *practical* difference to the 'salient features' approach. In other words, the salient features are used in a sense to show that something in addition to reasonable foreseeability of injury made the parties 'near' in a legal sense. Yet, with respect to his Honour, his Honour appears to *apply* proximity in a traditional sense as applied to cases of personal injury or property damage and *consequential* economic loss likening the contractual chain to that in cases of defective goods:

> Indeed, the relationship [between Esso and the gas customers] is indistinguishable from the relationships in *Donoghue's* case and *Grant's* case. However, there is a greater degree of directness and closeness in the present case than in those cases. When the manufacturer puts out into the public domain his product, he has no idea who may purchase and when a person may purchase the product for use ... Here, Esso supplied a product on a continuing basis to customers and the product was continually available for use by those consumers when they chose. In my view, this is a clear case of a relationship of proximity ...[114]

Somewhat contrary to his earlier observation, his Honour also states that in '[a]pplying the proximity test, I am excluding any policy factors'.[115] This would tend to suggest, it is submitted, that his Honour's use of proximity is in a traditional sense and not significantly different from that in the three-stage *Caparo* test. As submitted above, this would appear an unnecessary step on

111 *Johnson Tiles No 5* [2003] VSC 27, [751] citing *Perre* (1999) 198 CLR 180, 284 (Kirby J).
112 Ibid [738], citing *Sullivan v Moody* (2001) 207 CLR 562, 578.
113 *Sullivan v Moody* (2001) 207 CLR 562, 579 (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ). For various criticisms of this decision, see Witting, above n 88, 217-8.
114 *Johnson Tiles No 5* [2003] VSC 27, [846].
115 Ibid [848].

current authority in a consideration of the imposition of a duty of care. This is demonstrated, it is further submitted, by his Honour's observations in relation to the 'Stood-down Workers'. His Honour considered that proximity existed in that instance because 'Esso was well aware ... that the interruption of the gas supply causing a shut down of a business could lead to some workers being stood down without pay'.[116] However, it is difficult to discern what, if anything, this added to his Honour's observations relating to the foreseeability of injury to these applicants:

> it was reasonably foreseeable, taking into account the knowledge of Esso, that stood down workers would suffer damage if the supply of gas was stopped to their employers, namely, they would be stood down and suffer loss of pay.[117]

Accordingly, the purpose of the following section of this article will be to discuss the relevant 'factors' or 'salient features' used by the Court in *Perre* to impose a duty of care in cases of pure economic loss. In this respect, Stapleton has stated that '[t]he bald phrase "relationship of proximity" has no content'[118] and concluded that '[w]hat is needed is the unmasking of whatever specific factors in each individual case weighed with judges in their determination of duty'.[119]

E *'Salient Features' or 'Factors' Determinative of the Duty of Care*

In *Johnson Tiles No 5*, Gillard J considered that the cases established the following salient features, here stated in his Honour's own words:

- Reliance by plaintiff and undertaking of responsibility by defendant;
- A regime of contracts between various parties in a supply chain;
- A statutory regime regulating the supply of a service;
- Whether the imposition of a duty of care would impose liability 'in an indeterminate amount or an indeterminate time to an indeterminate class';
- Whether a finding of a duty of care would be inconsistent with community standards in relation to what is ordinarily legitimate in the pursuit of personal advantage;
- The knowledge of the tortfeasor of an ascertainable class of persons likely to suffer harm if the tortfeasor was negligent;

116 Ibid [849]-[850].

117 Ibid [837]. As noted previously, his Honour found no duty of care extended to the Stood-down Workers on the policy consideration ground that they were not 'first line victims' and suffered loss as a result of the 'ripple effect'. See discussion in footnote 65 above.

118 Stapleton, 'Duty of Care Factors: a Selection from the Judicial Menus', above n 80, 61. For an excellent discussion and critique of the various factors relevant to the imposition of a duty of care, see Stapleton, 'Duty of Care Factors: a Selection from the Judicial Menus', above n 80; and Harvey, above n 16, 604-15.

119 Ibid 62. See also Harvey, above n 16, 598.

- Whether the claimants are vulnerable persons unable to protect themselves from harm;
- Whether a duty would impair the legitimate pursuit by the tortfeasor of its own commercial interest.[120]

Several of the above have already been considered under the *policy* 'factors' or 'considerations' applied by the High Court in imposing a duty of care.[121] The purpose of this section is to consider various salient features in more detail for the purposes of identifying the overlap which exists between some of the features and for comparison with the intentional torts referred to in Part II.

1 *Avoiding Indeterminate Liability – Actual or Reasonable Knowledge of Harm to an Individual or Ascertainable Class*

In *Perre*, Gleeson CJ considered that:

> *knowledge (actual, or that which a reasonable person would have)* of an individual, or an ascertainable class of persons, who is or are reliant, and therefore vulnerable, is a significant factor in establishing a duty of care.[122]

Accordingly, while Gleeson CJ's statement in *Perre* includes constructive knowledge (in the sense described previously of the knowledge that the reasonable person in the position of the defendant would have) to extend the potential range of plaintiffs, the reference to an 'individual' or an 'ascertainable class' serves to reduce (or eliminate) the risk of indeterminate liability.[123] As noted above, his Honour considered that Apand's internal memoranda evidenced 'actual foresight of the likelihood of harm, and knowledge of an ascertainable class of vulnerable persons'.[124] The Chief Justice further considered that these factors, combined with the respondent's 'control' over the experiment and the 'physical propinquity' of the Perre and Sparnon farms, avoided any countervailing consideration of indeterminate liability.[125]

120 *Johnson Tiles No 5* [2003] VSC 27, [755] (footnotes omitted).
121 See discussion in Part I(C).
122 *Perre* (1999) 198 CLR 180, 194. See also Feldthusen, 'Pure Economic Loss in the High Court of Australia: Reinventing the Square Wheel?', above n 44, 34. Professor Feldthusen criticises the 'ascertainable class' concept in *Perre* at 47-9. Similarly, McHugh J in *Perre* noted that the duty was not limited to cases of actual knowledge: Knowledge of harm to the plaintiff is a minimum requirement. However, in my opinion, the indeterminacy issue does not require that the defendants's knowledge be limited to individual persons who are known to be in danger of suffering harm from the defendant's conduct. Its liability can be determinate even when the duty is owed to those members of a specific class whose identity could have been ascertained by the defendant': at 222 (emphasis added). This statement is quoted and applied in *Fortuna Seafoods* [2005] QSC 4, [25]-[26] (Douglas J). In *Tepko Pty Ltd v Water Board* (2001) 206 CLR 1, ('*Tepko*'), the Chief Justice and Gummow and Hayne JJ noted in respect of *Perre* that 'Significant matters for the existence of the duty of care to the appellants in that case ... included foresight of the likelihood of harm and knowledge or means of 'knowledge of an ascertainable class of vulnerable persons unable to protect themselves against that harm': at 18 (footnote omitted and emphasis added).
123 See discussion in Part I(C).
124 *Perre* (1999) 198 CLR 180, 194-5.
125 Ibid 195. See also the application of this factor in *Johnson Tiles No 5* [2003] VSC 27 discussed at above n 47-60.

Justice Hayne similarly noted that the majority in *Caltex Oil* held that:

> pure economic loss was recoverable if the defendant had *knowledge (or the means of knowledge)* that a particular person (not merely as a member of an unascertained class) would be likely to suffer economic loss as a consequence of the defendant's negligence.[126]

As noted in the overview of the judgments in *Perre*, some difference of opinion arose in relation to which of the Perre entities were entitled to succeed, two of the Justices holding that no duty of care extended to the Perres' processing interests. Among those minority Justices on this point, McHugh J and Hayne J, there was a difference of opinion as to which processing interests, if any, were within the ascertainable class.

The 'Perre interests' included the growing activities of Warruga farm and the interest of Vineyards, the owner of a processing plant.[127] Vineyards leased this plant to Warruga for processing potatoes. Vineyards' claim was for loss of 'the benefit of its tenancy with Warruga and the opportunity to re-let the land for five years'.[128] Justice McHugh considered that the ascertainable class should be limited to 'the owners of, and the growers of potatoes on, land within 20 kilometres of the Sparnons where potatoes grown on that land were exported to Western Australia'.[129] However, his Honour considered that *no* processors of potatoes – whether inside or outside the 20 kilometre zone – were within the ascertainable class. While it was reasonably foreseeable that some potato processors were within the 20 kilometre quarantine zone affected by the Western Australian regulations

> some of them might easily be outside the area but process potatoes grown within the area. To include the processors within the class would be to engage in a very artificial process. It is logically impossible to include in the class

126 *Perre* (1999) 198 CLR 180, 304-5 (emphasis added). His Honour cites *Caltex Oil* (1976) 136 CLR 529, 555 (Gibbs J), 576-8 (Stephen J), 593 (Mason J). *Dovuro* (2000) 105 FCR 476, the facts of which are set out in the text at above n 179-80, concerned a claim for pure economic loss by farmers who had purchased canola seeds in which undesirable weed seeds were also found. Justice Branson in the Full Court of the Federal Court considered that 'Dovuro had actual foresight of the likelihood of harm if it caused or allowed certified canola seed, contaminated by the seed of weeds not established in the Western Australian wheat belt, to be distributed without warning to farmers in that area': at 485. Her Honour further considered the 'limited and ascertainable' class of vulnerable farmers comprised 'the ultimate purchasers of the limited amount of Karoo canola seed imported by Dovuro from New Zealand who farmed in the Western Australian wheat belt': at 485-6. In the High Court proceedings in *Dovuro* (2003) 215 CLR 317 which are described in the footnote at above n 182, Kirby J described the ascertainable class in similar terms at 349. Justices Hayne and Callinan, however, observed in relation to the class that 'they would be persons vulnerable to loss if care were not taken, although it may be that assumptions about the respective vulnerabilities of experienced large scale farmers and a seed supplier should not be made too readily': at 368.

127 A detailed description of the different 'Perre interests' and the nature of their losses is set out by McHugh J at *Perre* (1999) 198 CLR 180, 204-5, and is also contained in Feldthusen, 'Pure Economic Loss in the High Court of Australia: Reinventing the Square Wheel?', above n 44, 35-7.

128 *Perre* (1999) 198 CLR 180, 205 (McHugh J). See also Feldthusen, 'Pure Economic Loss in the High Court of Australia: Reinventing the Square Wheel?', above n 44, 36.

129 *Perre* (1999) 198 CLR 180, 234.

> those who processed potatoes produced within the 20 km area or even those whose plant was within the area but to exclude from the class those who otherwise harvested, cleaned, washed, graded or packed potatoes with equipment or in premises within 20 km of an infected property.[130]

Accordingly, his Honour excluded from the class any losses of Warruga derived from processing potatoes as well as Vineyards' claim altogether. However, McHugh J allowed the action by a related Perre interest, Rangara Joint Venture, even though it *directly* supplied *only* Warruga. His Honour considered that this entity 'effectively grew' potatoes for Western Australia through supply to Warruga.[131]

By contrast, Hayne J, in discussing indeterminate liability, considered that liability was not indeterminate where:

> it was possible to identify those who *would* be directly affected by the conduct concerned at the time of the act or omission that is said to be negligent, and it was known to the person alleged to have been negligent that that was possible ...[132]

Accordingly, his Honour considered which interests Apand could have identified as being 'directly affected' by the regulations. His Honour considered the operation of the regulations extended to potatoes grown inside the zone and, in addition, to potatoes processed with affected equipment or at affected premises.[133] The determinate class therefore included not only growers inside the zone but also 'any processor who handled potatoes from that area, and any grower who had potatoes processed with [the relevant] equipment'.[134]

In concluding which Perre interests were owed a duty of care, his Honour considered only Warruga was directly affected by the operation of the regulations. His Honour noted that Rangara Joint Venture 'did not *itself* sell potatoes for export to Western Australia' but only to Warruga and considered that Vineyards did not grow or process potatoes at all.[135]

130 Ibid 234.

131 Ibid. The nature of Rangara Joint Venture's loss is described in detail by Feldthusen, 'Pure Economic Loss in the High Court of Australia: Reinventing the Square Wheel?', above n 44, 36.

132 Ibid 303 (emphasis in original).

133 Ibid 304.

134 Ibid 303.

135 Ibid 308 (emphasis added). See also Feldthusen, 'Pure Economic Loss in the High Court of Australia: Reinventing the Square Wheel?', above n 44, 37. By contrast to McHugh and Hayne JJ, Gummow J, for example, considered that the duty of care extended to all the Perre business interests (at 260). His Honour considered: 'Apand was aware ... of the threat to crops posed by the use of infected seeds by "growers" but, in respect of the 20 km buffer zone, the threat was perceived as one to interstate and export sales. Vineyards and each of the individual appellants had interests in or related to land, the value of which was to some measure attached to the availability of the crops grown or processed by those appellants for projection into the course of the export trade to Western Australia. The joint venture would seem to have been at risk of a decline in the value of potatoes grown for supply to Warruga': at 260-1. Kirby J disagreed with Hayne J stating: 'The evidence ... demonstrates the closely integrated nature of the operations of the several Perre interests in the growing and processing of potatoes. Not only were their respective properties physically proximate (abutting or facing as each did the Warruga Farms property), they were all inextricably interconnected with the Warruga Farms business ... Damage

2 *Protection of Legal Rights*

As discussed previously, Gaudron J in *Perre* adopted a 'categories' approach and considered that the 'protection of legal rights' was a category of liability for pure economic loss.[136] Her Honour concludes that:

> In my view, where a person knows or ought to know that his or her acts or omissions may cause the loss or impairment of legal rights possessed, enjoyed or exercised by another, whether as an individual or as a member of a class, and that that latter person is in no position to protect his or her own interests, there is a relationship such that the law should impose a duty of care on the former to take reasonable steps to avoid a foreseeable risk of economic loss resulting from the loss or impairment of those rights.[137]

In contrast to Gaudron J, however, McHugh J rejected this formulation on the ground that the 'right' lacked definition. His Honour appeared to accept within the definition only 'proprietary, equitable and contractual' rights while noting that Gaudron J's judgment in *Hill v Van Erp*[138] suggested that a 'right' included 'anything which is not prohibited [and therefore] is permitted'.[139] Of particular relevance to this paper's examination of the relationship between negligence and the unlawful interference tort, his Honour concludes:

> The Perres no doubt had a *right to trade*, and that is a right that in various circumstances the law will protect, but not by imposing duties of care on others simply because they are in a position to control the enjoyment of the plaintiff's right to trade.[140]

(*footnote 135 cont'd*) to Warruga Farms inevitably and immediately caused damage to Perre's Vineyards, the individual Perre family members and Rangara ... *it would be highly artificial to divide some of the members of this integrated commercial operation from others*': at 291-2 (emphasis added). The observations of Gummow and Kirby JJ in *Perre* relating to the 'ascertainable class' issue were recently considered in *Fortuna Seafoods* [2005] QSC 4 where Douglas J considered a claim for pure economic loss arising from a collision between two vessels. The claim was by a company ('Fortuna Seafoods') related to another company ('Fortuna Fishing'), the latter being the owner of one of the vessels. Fortuna Seafoods was 'claiming as a separate loss the profit it would have earned from processing and selling seafood that it obtained from Fortuna Fishing and sold as its agent': at [1]. Justice Douglas, in considering whether Fortuna Seafoods was within the ascertainable class, first considered whether the two companies were in a 'joint venture' but concluded that this classification was too uncertain to be applied as a general rule for extending the duty: at [16]-[19]. However, Douglas J, after noting, at [19], the 'close relationship' between the relevant shareholders and the 'common control' and 'interlinked operation' of the companies, relied on the judgement in *Perre* of Gummow J (at 260) and the italicised statement of Kirby J set out above to find that Fortuna Seafoods was within the ascertainable class. See also Douglas J's conclusion at [30].

136 *Perre* (1999) 198 CLR 180, 200-1.

137 Ibid 202. See also her Honour's judgment in *Hill v Van Erp* (1997) 188 CLR 159, 198-200. The above passage is also cited by Branson J in *Dovuro* (2000) 105 FCR 476, 482-3, her Honour there noting that '[n]o other member of the High Court expressed support for the principle so formulated by her Honour'. See also *McKellar* [2000] FCA 1608, [58]–[59] (Weinberg J).

138 (1997) 188 CLR 159. The facts of this case are described at above n 70.

139 *Perre* (1999) 198 CLR 180, 213.

140 Ibid 214 (emphasis added and footnote omitted).

3 *Vulnerability and Knowledge of the Nature and Size of the Potential Risk*

Justice McHugh in *Perre* instead stressed a combination of factors being vulnerability, the defendant's knowledge of the nature and size of the potential risk, indeterminacy of liability and whether the defendant was acting legitimately:

> What is likely to be decisive, and always of relevance, in determining whether a duty of care is owed is the answer to the question, 'How *vulnerable* was the plaintiff to incurring loss by reason of the defendant's conduct?' So also is the *actual knowledge* of the defendant concerning that *risk and its magnitude*. If no question of *indeterminate liability* is present and the defendant, having *no legitimate interest* to pursue, is aware that his or her conduct will cause economic loss to persons who are *not easily able to protect themselves* against that loss, it seems to accord with current community standards ... to require the defendant to have the interests of those persons in mind before he or she embarks on that conduct.[141]

141 Ibid 220 (emphasis added). This is also cited by Branson J in *Dovuro* (2000) 105 FCR 476, 483-4. See also McHugh J's statement in the text at above n 73. See also Stapleton, above n 16, 257; Feldthusen, 'Pure Economic Loss in the High Court of Australia: Reinventing the Square Wheel?', above n 44, 49-50. While a discussion both of cases concerning pure economic loss caused by defective structures and the present state of the decision in *Bryan v Maloney* (1995) 182 CLR 609 is beyond the scope of this article, 'vulnerability' is an important factor in such cases. In *Woolcock Street Investments* (2004) 216 CLR 515, the appellant was the subsequent purchaser of a commercial premises comprising a warehouse and offices. The respondent engineers designed the foundations of the building for the original owner and, prior to construction, recommended that geotechnical examination of the soil be undertaken. The tests were not conducted because the original owner did not want to pay for them. No inspection of the building for defects was undertaken by the subsequent purchaser prior to purchasing the building although the purchaser did obtain a report from the local council under the *Building Act 1975* (Qld). After the purchase of the building, damage to the foundations was detected. Chief Justice Gleeson, Gummow, Hayne and Heydon JJ in a joint decision explained the meaning of 'vulnerability': 'Since *Caltex Oil*, and most notably in *Perre v Apand Pty Ltd*, the vulnerability of the plaintiff has emerged as an important requirement in cases where a duty of care to avoid economic loss has been held to have been owed. "Vulnerability", in this context, is *not to be understood as meaning only that the plaintiff was likely to suffer damage* if reasonable care was not taken. Rather, "vulnerability" is to be understood as *a reference to the plaintiff's inability to protect itself* from the consequences of a defendant's want of reasonable care, either entirely or at least in a way which would cast the consequences of loss on the defendant': at 531 (emphasis added and footnote omitted). Their Honours cite Jane Stapleton, 'Comparative Economic Loss: Lessons from Case-Law-Focused "Middle Theory"' (2002) 50 *UCLA Law Review* 531, 558-9. Justice McHugh explained the concept in terms which identified considerations which could cause a plaintiff to be considered vulnerable: 'Indeed, the issue of the purchaser's vulnerability to economic loss is the *critical issue* in determining whether those involved in the construction of commercial premises owe a duty of care to the purchaser. In this context, vulnerability to risk means *not that the plaintiff was exposed to risk* but that by reason of *ignorance or social, political or economic constraints*, the plaintiff was not able to protect him or herself from the risk of injury': at 549 (emphasis added). In the case of 'knowledge of the risk and its magnitude', McHugh J considered, at 550, that the respondent engineers' requests for soil testing evidenced knowledge that the soil could subside and the potential size of that problem. For an application of the factors of 'dependence' and 'vulnerability', see *Johnson Tiles Pty Ltd v Esso Australia Ltd* [2000] FCA 1837, [30]-[49] (Merkel J) ('*Johnson Tiles No 4*'). *Johnson Tiles No 4* also concerned the facts described in the text at above nn 47-53. On a pleading motion, Esso sought to argue, at [31]-[32] that it owed no duty of care to Johnson Tiles on the ground that Johnson Tiles was 'not dependent upon Esso but ... on one or more of the State entities ... [who] had actual or constructive knowledge of, and controlled, the relevant risk' of an interruption. Justice Merkel considered, at [43], that Esso's gas production facility and the distribution system were

In *Johnson Tiles No 5*, Gillard J considered that while end users 'were vulnerable, in the sense that if the gas supply was stopped, they could suffer economic loss ... equally they knew that there was the possibility of an interruption'.[142] Accordingly, his Honour considered that these users could have properly ascertained the possible damage and the action necessary to avoid it.[143] In this respect, his Honour considered whether 'industrial/commercial' end users could have protected themselves by installing substitute plant and equipment and concluded this was a possible protective measure which suggested that those end users were not vulnerable.[144]

In *Perre*, McHugh J also considered that '[v]ulnerability will often include, but not be synonymous with, concepts of *reliance* and *assumption of responsibility*'.[145] The aspect of reliance and assumption of responsibility is further considered next in the context of the 'contractual background' of the plaintiff's dealings and the defendant's conduct.

4 *Vulnerability and the 'Contractual Background'*

Noteworthy for the purposes of the comparison between the principles applicable to negligently inflicted economic loss and those applicable to the unlawful interference tort, McHugh J in *Perre* suggests that the question of vulnerability may be affected by the 'contractual background' of the plaintiff's dealings and, in particular, whether *contractual warranties* are available:

> In determining whether the plaintiff was vulnerable, an important consideration will be whether the plaintiff could easily have protected itself

(*footnote 141 cont'd*) 'inextricably linked' and queried the suggestion that users were vulnerable to only one segment of the distribution system. His Honour also considered, at [44], that the suggestion that the 'State entities controlled the ... risk [of interruption] may explain why those entities are also liable, but not why Esso is *not* liable' (emphasis in original). Further, at [47], his Honour stated that such State entities' actual or constructive knowledge of 'deficiencies in the gas production and distribution system does not afford a proper basis for contending that there was no dependence upon Esso or *no* vulnerability to its conduct' (emphasis in original). See also *Johnson Tiles No 2* [2001] VSC 292 and *Johnson Tiles No 5* [2003] VSC 27. For the rejection of a duty of care on the grounds of absence of 'vulnerability', see *Matland Holdings Pty Ltd v NTZ Pty Ltd* [2004] FCA 710, [146]–[153] (Kenny J). See also *Natcraft* [2001] QSC 348, [53] (Chesterman J); *Syredv BGC (Australia)* [2004] WASC 87. For an application of 'vulnerability' in the context of the duty of care of statutory authorities, see *Crimmins* (1999) 200 CLR 1, 24-5 (Gaudron J), 40-4 (McHugh J); *Edwards v Olsen* [2000] SASC 438. For an application of 'vulnerability' in the context of a claim for pure economic loss for negligent misstatement arising from an alleged omission by a landlord to inform a tenant that the property was contaminated and therefore unsuitable for use as a school, see *Noor Al Houda Islamic College Pty Ltd v Bankstown Airport Ltd* [2005] NSWSC 20, [218]-[222] (Hoeben J).

142 *Johnson Tiles No 5* [2003] VSC 27, [1036].

143 Ibid [1041].

144 Ibid [1055]-[1070], [1110]. His Honour similarly concluded, at [1111]-[1113], that 'domestic' end users were not vulnerable as they could have bought 'fairly inexpensive' electrical appliances to protect themselves. In this respect, Gillard J's judgment demonstrates that *vulnerability* examines whether the plaintiff could have reasonably adopted protective measures and not merely that it could have suffered harm as a result of the defendant's act or omission and so is consistent with the later observations of the High Court in *Woolcock Street Investments* (2004) 216 CLR 515 set out at above n 141.

145 *Perre* (1999) 198 CLR 180, 228 (emphasis added). See also Stapleton, 'Duty of Care and Economic Loss: A Wider Agenda', above n 16, 284.

> against the risk of loss by protective action, particularly by obtaining contractual warranties ... Taking these steps will often be a more efficient way of dealing with the risk of these losses than requiring defendants to have regard to the risk that others may suffer economic loss.[146]

In this respect, his Honour suggests that the Court 'should be *slow* ... to impose a duty of care' where this would be inconsistent with the recognised principles of a different area of law – in particular, contract law.[147]

The Chief Justice similarly noted that important in 'restraining' imposition of a duty of care where a contract exists was that

> a third party, C, may suffer financial harm as a result of conduct which is regulated by a contract between A and B. It may be that the consequences of such conduct, as between A and B, are governed and limited by the contract.[148]

In *Dovuro*, Branson J explains this statement to mean 'the potential unfairness in imposing on a party to a contract a tortious liability to a third party which involves a higher duty of care than that provided for by the contract'.[149] In this respect,

146 *Perre* (1999) 198 CLR 180, 226. The term 'contractual background' is taken from his Honour's judgment at 561. See also his Honour's similar comments in *Woolcock Street Investments* (2004) 216 CLR 515, 552. In *Woolcock Street Investments* (2004) 216 CLR 515, no inspection of the relevant warehouse building for defects was undertaken by the appellant, a subsequent purchaser, prior to purchasing the building. The purchaser did, however, obtain a report from the local council under the *Building Act 1975* (Qld). After the purchase of the building, damage to the foundations was detected. In rejecting the imposition of a duty of care on the grounds of the absence of "vulnerability", Gleeson CJ, Gummow, Hayne and Heydon JJ observed: 'no warranty of freedom from defect was included in the contract by which the appellant bought the land, and ... there was no assignment to the appellant of any rights which the vendor may have had against third parties in respect of any claim for defects in the building ... The appellant's pleading and the facts ... are silent about whether the appellant could have sought and obtained the benefit of terms of that kind in the contract': at 533. In addition, their Honours considered that a certificate of compliance under the *Building Act 1975* (Qld) issued by the local council 'says nothing about what other investigations might have been undertaken or might have revealed': at 533. Justice McHugh, at 533, considered that it would be 'surprising' if the original owner or later buyers of a commercial building were not able to obtain warranties from the relevant parties. His Honour, after describing the various contractual protections and professional inspections that may be available to the buyer of a commercial premises (at 558-9), rejected the imposition of a duty of care (at 559-60). Justice Callinan discussed various protections available to a purchaser, at 589, and concluded that '[i]t is quite wrong however to assert that the appellant *or indeed any purchaser* is vulnerable': at 592 (emphasis added). See also his Honour's similar statement at 587-8. For a recent discussion of the principles applicable to the imposition of a duty of care in the case of a defective structure, including the application of *Perre*, *Bryan v Maloney* and *Woolcock Street Investments* to a subsequent purchaser of a *private* residence, see *Moorabool Shire Council v Taitapanui* [2004] VSC 239. See also *Actew Corporation Ltd v Mihaljevic* [2004] ACTSC 59.

147 *Perre* (1999) 198 CLR 180, 226-7 (emphasis added). Carty also notes that: 'The other major policy that is cited to justify the non-imposition of a duty in the area of pure economic loss is the perceived need not to override the "contractual matrix" that links the parties. Thus the courts may refuse to apply the tort of negligence where the contract framework behind the economic loss is deemed to provide the answer – and a balanced answer that the tort would disrupt': Carty, *An Analysis of the Economic Torts*, above n 45, 241-2 (footnotes omitted). Carty cites, among others things, John Fleming, 'Tort Law in a Contractual Matrix' (1995) 33 *Osgood Hall Law Journal* 661. For an example of McHugh J's inconsistency principle in the context of a trustee's duty, see *Lukey v Corporate Investment Australia Funds Management Pty Ltd* [2005] FCA 298, [319]-[321] (Emmett J).

148 *Perre* (1999) 198 CLR 180, 192-3. The Chief Justice's statement was applied by Chesterman J in *Natcraft* [2001] QSC 348, [46].

149 *Dovuro* (2000) 105 FCR 476, 482. The facts of this case are set out in the text at above nn 179-80.

Branson J considered that a duty to warn purchasers of canola seed that the seeds may also contain quantities of undesirable weed seeds did not interfere with the principles of sale of goods law and was 'not a situation ... where it is realistically to be expected that farmers would protect themselves by obtaining contractual warranties'.[150]

However, McHugh J in *Perre* considers that a duty of care will not be *automatically* excluded on account of limitations in the contract.[151] This aspect was examined in *Johnson Tiles Pty Ltd v Esso Australia Ltd.*[152] As noted previously, gas was supplied by Esso to a statutory body (Gascor) pursuant to a sale contract and this was re-supplied to various gas retailers. These retailers, again under contract, re-supplied various classes of end users. The contract between Esso and Gascor contained a limitation of liability in respect of economic loss.[153] The end user agreements provided that the retailer was not liable for any interruption to supply except where due to its own fault.[154] In the Federal Court[155] proceedings of this matter, Esso submitted that:

> a contractual exclusion of liability in negligence for economic loss in a contract between A (eg, a producer of goods) and B (eg, a distributor) operates to exclude such liability in respect of C (eg, a purchaser of the goods from B) irrespective of whether C was, or ought to have been, aware of the contract or the terms of the contract by which B acquired the goods from A.[156]

In considering various authorities including the above statements of Gleeson CJ and McHugh J in *Perre*, Merkel J in *Johnson Tiles No 1* concluded:

> The above passages do not support the existence of a principle to the effect of that contended for by Esso. The current position in Australia appears to be that the contract, including any exclusionary clause, between A and B may be relevant to, but is not necessarily determinative of, A's liability in negligence for economic loss to C who has contracted with B but not A.[157]

150 Ibid 486-7. See, however, the observations of Hayne and Callinan JJ in the High Court proceedings in *Dovuro* (2003) 215 CLR 317, 347 set out in the footnote at above n 126. In *Johnson Tiles No 5* [2003] VSC 27, [1042]-[1049], Gillard J considered that the relevant end user agreements were '"take it or leave it" contracts' and so end users could not contract-out of the relevant exclusions. See also *Fortuna Seafoods* [2005] QSC 4, [27]-[28] (Douglas J).

151 *Perre* (1999) 198 CLR 180, 227 (footnote omitted).

152 (2000) 97 FCR 175 ('*Johnson Tiles No 1*'). The facts of this case are set out in the text at above nn 47-53.

153 *Johnson Tiles No 5* [2003] VSC 27, [1013].

154 Ibid [16]-[20], [185]-[188].

155 The Federal Court proceedings were transferred to the Supreme Court of Victoria pursuant to s 5(4) of the *Jurisdiction of Courts (Cross-Vesting Act) 1987* (Cth) and stayed. See *Johnson Tiles No 5* [2003] VSC 27, [27]-[28].

156 *Johnson Tiles No 1* (2000) 97 FCR 175, 181.

157 Ibid 183. Justice Merkel, at 183, also notes the following statement of Wilcox J in *McMullen v ICI Australia* (1997) 72 FCR 1, 81: 'The answer to this submission was given by Mason CJ, Deane and Gaudron JJ in *Bryan v Maloney* at 624: whatever may have been the position in other times or in other places, Australian law does not require "liability under the ordinary principles of negligence" to be excluded as between parties in a contractual relationship, notwithstanding the absence of any agreement between them to that effect. Even more so, I would suggest, does it require the exclusion of liability as between persons who have not entered into a relevant agreement.' Justice Merkel also cites, at 181-2, *Bryan* (1995) 182 CLR 609, 620-1, 624-5; *Hill v Van Erp* (1997) 188 CLR 159, 182-3. See also the judgment of French J in *Johnson Tiles Pty Ltd v Esso Australia Ltd* (2000) 104 FCR 564, 595-6 ('*Johnson Tiles No 3*').

In the Victorian Supreme Court proceedings, Gillard J considered that Esso had '*assumed the responsibility* of supplying gas to Gascor pursuant to a contract' and that these parties were aware that end users could suffer loss if gas was not delivered. However, while Esso, 'as the source, *assumed the responsibility* to the ultimate gas customer of providing an uninterruptable gas supply', due to the limitation of liability in the contract between Esso and Gascor, this 'assumption of responsibility was *qualified*'.[158] In addition, his Honour considered that while end users *relied* on both the retailer and Esso for gas, 'they knew that there was the ever present possibility of interruption ... [and so] it was a *qualified reliance*'.[159]

Secondly, as discussed above and apart from the vulnerability issue, the 'contractual matrix',[160] including the limitations of liability between the parties in the contractual chain, is also a salient feature relevant in its own right to the duty of care issue and this was also considered in *Johnson Tiles No 5*. After considering various authorities, Gillard J stated that:

> The cases support the propositions that the task undertaken pursuant to a contract may have a bearing on the existence or content of a duty of care, and that a court would be unlikely to recognise a duty of care if it was inconsistent with the terms of, and had the potential of interfering with that contract.[161]

His Honour held that there was no duty of care as this would be:

> inconsistent with the contractual obligation of Esso and the expectation of the gas customer. The recognition of such a duty of care goes further than Esso's contractual obligation and ... is inconsistent with it. It strikes at the very heart of the assumption of responsibility by Esso to supply gas to Gascor.[162]

158 *Johnson Tiles No 5* [2003] VSC 27, [1013]-[1014] (emphasis added).

159 Ibid [1021]-[1022] (emphasis added).

160 This term is taken from the judgment of Gillard J in *Johnson Tiles No 5* [2003] VSC 27, [1125], his Honour citing John Fleming, 'Tort in a Contractual Matrix' (1995) 3 *Tort Law Review* 12.

161 *Johnson Tiles No 5* [2003] VSC 27, [1140]. His Honour considers, among others, *Voli v Inglewood Shire Council* (1963) 110 CLR 74, 85 (Windeyer J); *Bryan* (1995) 182 CLR 609, 622 (Mason CJ, Deane and Gaudron JJ); *Hill v Van Erp* (1997) 188 CLR 159, 179 (Dawson J); *Sullivan v Moody* (2001) 207 CLR 562, 579-80. In *Woolcock Street Investments* (2004) 216 CLR 515, the facts of which are described at above n 141, Gleeson CJ, Gummow, Hayne and Heydon JJ observe: 'In this case ... it is not necessary to decide whether disconformity between the obligations owed to the original owner under the contract to build or design a building and the duty of care allegedly owed to a subsequent owner will necessarily deny the existence of that duty of care ... There would be evident difficulty in holding that the respondents owed the appellant a duty of care to avoid economic loss to a subsequent owner if performance of that duty would have required the respondents to do more or different work than the contract with the original owner required or permitted': at 532 (footnote omitted). See also McHugh J's observations at 554-5 and those of Callinan J at 592-3.

162 *Johnson Tiles No 5* [2003] VSC 27, [1145]. In *Dovuro* (2000) 105 FCR 476, 489, the facts of which are described in the text at above nn 179-89, Branson J held that no duty of care was owed by Cropmark (the New Zealand company which grew the contaminated canola seed under contract for Dovuro) to the relevant growers for reasons that included: 'to impose a duty of care to the ultimate purchasers of the seed upon Cropmark would subject Cropmark to duties beyond those that could arise under its contract with Dovuro. To do this would be to deprive Cropmark of the protection of contractual terms which may have been critical to its decision to enter into the contract, notwithstanding that the economic advantage to be derived by Cropmark under the contract is likely to have been calculated by reference to the terms of the contract.' See also *Natcraft* [2001] QSC 348, [46] (Chesterman J).

Consequently, his Honour considered that the parties' rights should be determined by the relevant supply contracts[163] equating *failure* to supply the gas with *supplying* a defective good (where, his Honour stated, a duty of care for pure economic loss is denied).[164]

5 *Vulnerability and the Availability of Insurance*

In *Johnson Tiles No 5*, Gillard J reviewed various authorities including *Caltex Oil* stating that '[i]t has always been the view that the fact that the defendant is insured or uninsured is irrelevant to recovery. Equally, the fact that the plaintiff is insured against loss is equally irrelevant.[165] In the case of the relationship between insurance and vulnerability, his Honour cites the following passage of McHugh J in *Perre*: 'Whether the plaintiff has purchased, or is able to purchase, insurance is, however, *generally not relevant* to the issue of vulnerability.'[166]

Esso had argued that the italicised phrase – 'generally not relevant' – did not exclude the possibility in all circumstances.[167] In this respect, Gillard J observed that the law was uncertain and that '[w]hether or not insurance is relevant to an issue in the present case depends upon the particular circumstances'[168] distinguishing between two situations. His Honour considered that insurance was *irrelevant* to the question of whether the plaintiff suffered any loss but was '*relevant* to the issue of vulnerability and *negates* the vulnerability'[169] stating:

> Insurance is relevant to the issue of vulnerability. Business interruption insurance is commonplace, is an option open to any business to protect its interests against business interruption and in my view, is relevant to the issue of whether there was a duty of care in the present proceeding.[170]

6 *Control and other 'Salient Features'*

In *Perre*, McHugh J expressed the link between *vulnerability* and *control* in imposing a duty of care:

> The degree and the nature of vulnerability sufficient to found a duty of care will no doubt vary from category to category and from case to case. Although each category will have to formulate a particular standard, the ultimate question will be one of fact. *The defendant's control of the plaintiff's right, interest or expectation will be an important test for vulnerability.*[171]

163 *Johnson Tiles No 5* [2003] VSC 27, [1148].
164 Ibid [1159]-[1160]. For a recent example of a case in which the terms of a lease were held *not* to exclude a duty of care in relation to economic loss for negligent misstatement arising from an alleged omission by a landlord to inform a tenant that the property was contaminated and therefore unsuitable for use as a school, see *Noor Al Houda Islamic College Pty Ltd v Bankstown Airport Ltd* [2005] NSWSC 20, [230]-[247] (Hoeben J).
165 *Johnson Tiles No 5* [2003] VSC 27, [1083]. His Honour cites *Caltex Oil* (1976) 136 CLR 529, 580, 581 (Stephen J).
166 Ibid [1088], citing *Perre* (1999) 198 CLR 180, 230 (emphasis of Gillard J).
167 Ibid [1090].
168 Ibid [1094].
169 Ibid [1095], [1101] (emphasis added).
170 Ibid [1103]. See also *Fortuna Seafoods* [2005] QSC 4, [28] (Douglas J).
171 *Perre* (1999) 198 CLR 180, 229.

The 'salient features' of the case identified by Gummow J for imposing a duty of care included that imposing a duty did not prevent Apand engaging in *legitimate* activities, Apand's actual or constructive knowledge that the Perres were within the 20 kilometre quarantine zone and its knowledge of the Western Australian regulations. Further, Apand commenced and controlled the experiment on the Sparnon farm and the Perres had no knowledge of the risk and were vulnerable.[172]

Similarly to Gummow J, Callinan J imposed a duty of care on the grounds of Apand's 'effective control' of the experiment, the 'geographical propinquity' of the properties and Apand's actual or constructive knowledge of the risk. In addition, the Perres could not protect themselves and the loss did not result from legitimate business conduct.[173]

In *Hill v Van Erp*, Gaudron J considered 'control' to be an important factor in imposing a duty of care[174] and, in the context of the duty of care of statutory authorities, Callinan J in *Crimmins* has observed that '[t]he right to control and actual control are important matters in determining whether a duty of care is owed'.[175]

7 *The Statutory Regime*

In *Johnson Tiles No 5*, Gillard J stated that the presence of a relevant 'statutory regime' was a salient feature in determining the duty of care, citing the following passage of McHugh J in *Perre*:

> In the twentieth century, many areas of economic activity are extensively regulated by legislation and regulations. The judgment of Brennan CJ in *Pyrenees* shows that the potential for interference with such a body of law is vitally important in determining whether a common law duty of care should be imposed on a defendant.[176]

In the case before his Honour, Gillard J considered that:

> The question is whether Parliament has exhaustively and extensively dealt with the regulation of the gas industry in this State, that a finding of a duty of care would run counter to the Legislature's control of the industry.[177]

172 Ibid 257-60.

173 Ibid 326-8. His Honour cites, at 325, Stapleton, 'Duty of Care Factors: a Selection from the Judicial Menus', above n 80, 88. See also Anderson, above n 16, 44.

174 *Hill v Van Erp* (1997) 188 CLR 159, 199. The facts of this case are set out in the footnote at above n 70. Her Honour considered that the appellant solicitor 'was in a position of control over the testamentary wishes of her client and, thus, in a position to control whether [the intended beneficiary] would have the right which the testatrix clearly intended her to have'.

175 *Crimmins* (1999) 200 CLR 1, 116. See also *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 558-9 (Gaudron, McHugh and Gummow JJ) ('*Brodie*'); *Graham Barclay Oysters No 2* (2002) 211 CLR 540, 558-9 (Gleeson CJ), 570-80 (McHugh J), 598 (Gummow and Hayne JJ). In *Johnson Tiles No 5* [2003] VSC 27, [1003]-[1012], Gillard J considered that although Esso had 'no power or control over the gas transmission system, the distribution system [or] the retail supply', it had 'complete and sole control over the source of the supply' and this was the 'proximate cause of the losses'.

176 *Johnson Tiles No 5* [2003] VSC 27, [1166], citing *Perre* (1999) 198 CLR 180, 226. See also *Sullivan v Moody* (2001) 207 CLR 562, 579-80.

177 Ibid [1188].

Having previously examined in detail the provisions and history of Victorian gas industry legislation, his Honour concluded that Parliament had 'regulated all aspects of the gas industry from the supply of gas by Esso at the tailgate' and also denied a duty of care on this ground.[178]

The relevance of a statutory regime and the related concept of 'statutory pre-emption' – in the case of both the imposition of a duty of care and the intentional torts under consideration – is further discussed in Part III below.

8 *Expenditure to Avoid Future Physical Harm*

In *Dovuro*, the appellant Dovuro imported canola seed into Western Australia which was grown under contract in New Zealand by a New Zealand company, Cropmark. The seed was distributed to growers but was found also to contain three varieties of weed seeds (cleavers, redshank and field madder). The weeds could reduce both the quality and volume harvested of the oil in turn diminishing profits from the growing of the crops. There was no legislative or other regulatory requirement prohibiting the distribution of the relevant seeds. Both the Australian and Western Australian quarantine authorities had approved importation of the seeds. After the canola seeds were planted by a grower, Wilkins, the Agriculture Protection Board declared the seeds to be prohibited under the *Agriculture and Related Resources Protection Act 1976* (WA). Growers received from the relevant government department, AgWest, directions relating to the control of the weeds. However, no weeds were detected and prohibitions in relation to two of the weeds were later withdrawn.[179] In the Full Court of the Federal Court, Branson J described the economic loss as 'the cost of the adoption ... of more costly farming practices than would otherwise have been adopted to avoid the likelihood of injury arising from the planting of the contaminated ... seed'.[180]

After discussing the policy factors or considerations in *Perre*, Branson J noted an additional policy factor relating to those who incur expenses to avoid or reduce possible future *physical* damage:

> it would be difficult to justify a legal doctrine under which a person who acts promptly and responsibly to remedy a defect must do so at his or her own expense while another who allows the defect to develop and cause personal or physical injury may recover at law.[181]

Accordingly, her Honour considered that:

178 Ibid [1188]-[1189].

179 The facts are taken from *Dovuro* (2000) 105 FCR 476, 480-2 (Branson J) and (2003) 215 CLR 317, 321-2 (Gleeson CJ), 329-30 (McHugh J), 331-2 (Gummow J), 343-4 (Kirby J), 361-2 (Hayne and Callinan JJ).

180 *Dovuro* (2000) 105 FCR 476, 481-2.

181 Ibid 486. Branson J notes that this consideration is based on the judgment of La Forrest J in *Winnipeg Condominium Corporation No 36 v Bird Construction Co* (1995) 121 DLR (4th) 193, 212-3.

> If it be the case here, as I conclude that it is, that Dovuro owed Wilkins and the group members a duty of care to avoid actual damage to their land by causing exotic weeds to become established thereon, it would accord with good sense to find that Dovuro also owed them *a duty of care to avoid giving rise to a situation in which it would be reasonable and responsible of them to expend money to mitigate the risk of exotic weeds becoming established on their land.* No risk of the imposition of indeterminate and unreasonable liability arises in such circumstances. In this regard, it is not material in my view that there is no evidence that the risk would, if no preventative action had been taken, have given rise to the establishment of exotic weeds on the land on which the Karoo seed was sown ... *The important thing is whether the money spent to mitigate the risk was money reasonably spent.*[182]

Justice Finkelstein, after consideration of both the English and Canadian positions, similarly considered that a plaintiff could successfully claim for 'pure economic loss caused by a defective product which posed an actual threat of physical harm' and considered this also extended to the situation where the plaintiff suffers economic loss to prevent physical damage where there was 'not in fact a threat, but [the plaintiff] *believed on reasonable grounds* that the product would cause physical harm'.[183]

182 *Dovuro* (2000) 105 FCR 476, 486 (emphasis added). Her Honour's judgment at, 486-7, was specifically referred to by counsel for Dovuro in the application for special leave to appeal to the High Court which was granted. See Transcript of Proceedings, *Dovuro Pty Ltd v Wilkins* (High Couurt of Australia, 12 September 2002). The High Court proceedings in *Dovuro* (2003) 215 CLR 317 are described at below n 183. *Woolcock Street Investments* (2004) 216 CLR 515, the facts of which are set out in the footnote at above n 141, concerned a case of pure economic loss caused by defective foundations of a commercial premises. Justice Kirby, in dissent, observed: 'The common law undoubtedly provides that a person who suffers physical injury as the result of defective design or execution of building work may sue in tort. It would be anomalous if someone seeking to prevent such physical injury from happening could not recover the costs of doing so. Prevention is usually better than cure': at 563-4 (footnote omitted). His Honour cites as support for this a passage from the majority judgment in *Bryan* (1995) 182 CLR 609, 628.

183 *Dovuro* (2000) 105 FCR 476, 514 (emphasis added). See also his Honour's discussion of the English and Canadian case law at 510-4. In the High Court proceedings in *Dovuro* (2003) 215 CLR 317, the Court effectively avoided any definitive findings or statements of principle in relation to the duty issue, the majority judgments (McHugh, Gummow, Hayne and Callinan, and Heydon JJ) allowing Dovuro's appeal by holding there was no *breach* of the relevant duty of care, the minority judgments (Gleeson CJ and Kirby J) agreeing with the concurrent findings of breach by the trial Judge, Wilcox J, and the majority of the Full Court of the Federal Court (Branson and Gyles JJ). Accordingly, their Honours did not consider specifically the principles discussed by Branson and Finkelstein JJ in relation to expenditure to avoid future physical harm. Chief Justice Gleeson, at 321, refused to allow Dovuro to withdraw the concession it made at trial in relation to the duty issue and, at 328, considered the majority judgments in the Full Court as to breach did *not* involve 'clear error or injustice'. Justice Kirby also considered, at 348-9, that Dovuro's concession in relation to the duty of care should not be withdrawn and, at 349, agreed with Branson J that a finding that Dovuro owed no duty of care would be inconsistent with *Perre*. His Honour, at 350-3 and 357-8, disagreed with the majority of the High Court that the steps taken by the relevant governmental authorities in prohibiting the relevant weeds were not reasonably foreseeable. Justice McHugh also refused to allow Dovuro to argue the duty question and considered it to be 'identical in principle' to a manufacturer of goods. As to the nature of the loss, his Honour observed, without further elucidation: 'This was not a case where there was any basis for contending that the losses suffered by the consumers might fall outside the ordinary duty owed by a manufacturer to a consumer. *It was not a case where the Wilkins interests could succeed only on proof of a special duty to prevent economic loss to them*': at 328 (emphasis added). His

In *Johnson Tiles No 5*, one of the Business Users, Johnson Tiles, incurred additional electricity and wage costs associated with continuing to mix raw materials in its mixing tanks during the interruption to the gas supply caused by the explosion at Esso's Longford Gas Plant. The mixing tanks could possibly have been *physically* damaged if the liquid was allowed to harden. After considering various authorities, Gillard J considered that 'financial expenses incurred to avoid damage to property or person' were remedied as pure economic loss rather than 'property damage' and referred to the judgment of Finkelstein J in *Dovuro* in this regard.[184]

9 *Negligence Factors and the Intentional Torts*

Accordingly, the foregoing discussion in this section has examined various 'factors' or 'salient features' identified by the High Court in *Perre* as indicative of a duty of care in cases of negligently inflicted economic loss. This has included actual knowledge of the defendant or, of equal significance, the 'constructive knowledge' which will be imputed to the objective reasonable person in the position of the defendant. In this respect, further comparisons between negligence and the unlawful interference tort will be drawn in discussing the intention element in the interference torts and the treatment of foreseeable or inevitable harm in those torts. As will be shown below, while the features or factors considered in this section combine to establish the imposition of a duty of care in negligence, it is submitted that they do not, individually or in sum, amount to conduct or a state of mind which is *directed against* or *aimed at* the plaintiff – the requisite intention for the unlawful interference tort. That tort will now be examined.

(*footnote 183 cont'd*) Honour considered in relation to the *breach* question, at 328-30, that economic loss to growers because of the relevant authorities prohibiting the weeds was not reasonably foreseeable. Justice Gummow, at 334 and 336, considered the breach of duty issue and so did not explore the concession and duty questions. His Honour, at 338, agreed with Finkelstein J in the Full Court of the Federal Court that it was not reasonably foreseeable that the relevant weeds would be prohibited by the relevant authorities. Justices Hayne and Callinan considered, at 366, that Dovuro's position was 'not significantly different from that of a manufacturer'. After making the observations set out in the footnote at above n 126, their Honours stated that the 'critical question'was: 'to identify whether Dovuro knew or ought to have known that there was a risk of the sort of injury which it was alleged had been suffered – financial loss occasioned by pursuing a course of action recommended by government authorities to guard against the possible emergence of plants which had been declared to be harmful only after Dovuro had distributed the seed and the farmers had acquired it. Only if *that* sort of loss was reasonably foreseeable by Dovuro would the duty asserted by the Wilkins have been engaged': at 368 (emphasis in original). Their Honours concluded, at 372, that the loss was not reasonably foreseeable. Justice Heydon J, at 372, agreed with Gummow J and Hayne and Callinan JJ.

184 *Johnson Tiles No 5* [2003] VSC 27, [565], [572], [574].

III PART II – UNLAWFUL INTERFERENCE TORT

A *General Outline of Unlawful Interference Tort*

1 *Interference with Trade and Business by Unlawful Means and the 'Genus' of Economic Torts*

Other commentators have undertaken a detailed analysis of the origins of the unlawful interference tort and it is not intended to retrace those steps here.[185] However, it is apt to note that, while there remains much debate on this point, the unlawful interference tort under consideration – which requires the use of unlawful means – is considered by some judges and commentators to be the 'genus' of economic torts providing an encompassing framework in which all other economic torts can be placed or are 'species'. In *Merkur Island Shipping Corporation v Laughton*,[186] Lord Diplock considered that the evidence in that case constituted a common law tort of 'interfering with the trade or business of another person by doing unlawful acts'.[187] His Lordship continued:

> To fall within this genus of torts the unlawful act need not involve procuring another person to break a subsisting contract or to interfere with the performance of a subsisting contract ... Where, however, the procuring of another person to break a subsisting contract *is* the unlawful act involved ... this is but one species of the wider genus of tort.[188]

Lord Wedderburn considers that the 'genus' approach:

185 For a detailed examination of the origins and development of the unlawful interference tort, see J Kodwo Bentil, 'Improper Interference with Another's Business or Trade Interest as a Tort' (1993) *The Journal of Business Law* 519; Mark N Berry, 'Intentionally Causing Economic Loss by Unlawful Means: A Consideration of the Innominate Tort' (1988) 6 *Otago Law Review* 533; Hazel Carty, 'Unlawful Interference with Trade' (1983) 3 *Legal Studies* 193; Carty, 'Intentional Violation of Economic Interests: The Limits of Common Law Liability', above n 3; Carty, *An Analysis of the Economic Torts*, above n 45, 100-4; Patrick Elias and Keith Ewing, 'Economic Torts and Labour Law: Old Principles and New Liabilities' [1982] 41 *Cambridge Law Journal* 321; Gerald Henry Louis Fridman, 'Interference with Trade or Business – Part I' [1993] *Tort Law Review* 19 ('*Fridman Pt I*') and 'Interference with Trade or Business – Part II' [1993] *Tort Law Review* 99 ('*Fridman Pt II*'); Harry Jacques Glasbeek, '*Lumley v Gye* The Aftermath: An Inducement to Judicial Reform' (1975) 1 *Monash University Law Review* 187; Ronald Clive McCallum and Marilyn J Pittard, *Australian Labour Law Cases and Materials* (3rd ed, 1995) pt 6, ch 14; Richard J Mitchell, 'Liability in Tort for Causing Economic Loss by the Use of Unlawful Means and its Application to Australian Industrial Disputes' (1976) 5 *Adelaide Law Review* 428; G A Owen, 'Interference with Trade: The Illegitimate Offspring of an Illegitimate Tort?' (1976) 3 *Monash University Law Review* 41; Sales and Stilitz, above n 2; Edward Irving Sykes, *Strike Law in Australia* (2nd ed, 1982) Ch 8, 236-8; Lord Wedderburn, *Clerk & Lindsell on Torts*, (17th ed, 1995) Ch 23, 1244-67. 'Unlawful interference' is the term adopted to describe the tort by Lord Wedderburn, this n 185, 1244.

186 [1983] 2 AC 570, 609-10 ('*Merkur Island Shipping*').

187 *Merkur Island Shipping* [1983] 2 AC 570, 609. See, eg, Lord Wedderburn, *Clerk & Lindsell on Torts*, above n 185, 1176-7, 1244-5. For a discussion of other possible formulations of the tort, see Mitchell, above n 185, 439-40; John Dyson Heydon, 'The Future of the Economic Torts' (1975) 12 *University of Western Australia Law Review* 1, 9-17. See also Sales and Stilitz, above n 2, 411, 430-1.

188 *Merkur Island Shipping* [1983] 2 AC 570, 609-10 (emphasis in original).

> attempts to draw together the threads of the different torts whilst maintaining the principle of *Allen v Flood*. It requires that liability be imposed on the defendant only where he has *intentionally* violated, or procured the violation of, a legal right or has intentionally used, or threatened to use, *unlawful means*.[189]

Carty,[190] by contrast, appears to accept that certain economic torts, such as 'direct and indirect interference with contract' and intimidation,[191] may well be able to be placed within the 'genus' tort but otherwise rejects the 'genus' classification.[192] The learned author, however, concedes the usefulness of the genus approach.[193]

The *unlawful means* requirement of *Allen v Flood* – central to the suggested 'genus' tort of unlawful interference – is discussed further below.[194] The *unlawful means* aspect of another 'species' of the suggested 'genus' tort – intimidation – will also be briefly considered.

2 *Overview of Elements*

Fridman notes that Neill LJ in *Associated British Ports v Transport and General Workers' Union*[195] adopted the definition of the tort given by Henry J in *Barretts & Baird (Wholesale) Ltd v Institution of Professional Civil Servants*.[196] The passage cited by Neill LJ is:

> The basic ingredients of that tort are common ground; first that there should be interference with the plaintiffs' trade or business ... secondly, that there should be the unlawful means ... thirdly that that should be with the intention to injure the plaintiffs ... and, fourthly, that the action should in fact injure [the plaintiffs].[197]

Sales and Stilitz state that, 'in a paradigm case', the plaintiff (P) sues for loss which results 'as a consequence of unlawful conduct engaged in or threatened by the defendant (D) against a third part[y] (X), with the intention of harming P'.[198]

189 Lord Wedderburn, *Clerk & Lindsell on Torts*, above n 185, 1176-7 (footnotes omitted and emphasis added). His Lordship cites *Allen v Flood* [1898] AC 1 ('*Allen v Flood*'). See also Elias and Ewing, above n 185, 336.
190 See generally, Carty, *An Analysis of the Economic Torts*, above n 45, 100-4.
191 Ibid 103. In the case of intimidation, the author cites W V Horton Rogers, *Winfield and Jolowicz on Tort* (15th ed, 1998) 650.
192 Carty, *An Analysis of the Economic Torts*, above n 45, 103. See also Chs 3 and 10. The learned author cites Sales and Stilitz, above n 2, 412.
193 Carty, *An Analysis of the Economic Torts*, above n 45, 103.
194 See discussion in Section B of this Part.
195 [1989] 3 All ER 796 ('*Associated British Ports*'). See *Fridman Pt II*, above n 185, 104.
196 [1987] 1 IRLR 3 ('*Barretts & Baird*').
197 *Associated British Ports* [1989] 3 All ER 796, 806-7, citing *Barretts & Baird* [1987] 1 IRLR 3, 6.
198 Sales and Stilitz, above n 2, 412.

3 *Unlawful Interference Tort Does Not Require Breach of Contract*

In *Daily Mirror Newspapers Ltd v Gardner*,[199] Lord Denning MR stated that:

> I have always understood that if one person interferes with the trade or business of another, and does so by unlawful means, then he is acting unlawfully, *even though he does not procure or induce any actual breach of contract. Interference by unlawful means is enough.*[200]

Similarly, Lord Diplock in *Merkur Island Shipping*, states that '[t]o fall within this genus of torts the unlawful act need not involve procuring another person to break a subsisting contract or to interfere with the performance of a subsisting contract'.[201]

The unlawful means and intention elements of the tort are further examined below.

4 *General Outline of the Tort of Interference with Contractual Relations*

For the purposes of the examination of the intention element of the *unlawful interference tort*, reference will also be made to the intention element of the tort of *interference with contractual relations*.[202] While this article will adopt a strict separation between these two torts, differing approaches exist in this regard. While an examination of this distinction is beyond the scope of this article, it is apt to note that the '*indirect*' form of the tort of interference with contractual relations – *which also requires unlawful means* – is considered by some authoritative commentators and judges to be the unlawful interference tort and this is also reflected in the cases.[203]

Accordingly, a brief definition of the interference with contractual relations tort will be given. There are two basic forms of the interference with contract tort.

Cane describes the 'direct' form of the tort as arising where a third party fails to perform a contract made with the plaintiff due to the defendant's 'direct persuasion' or 'direct disablement'.[204] *Lumley v Gye*[205] is, of course, the most well

199 [1968] 2 QB 762 ('*Daily Mirror Newspapers*').

200 *Daily Mirror Newspapers* [1968] 2 QB 762, 783 (emphasis added). See also Elias and Ewing, above n 185, 334-5; and Sykes, above n 185, 236. In *Daily Mirror Newspapers,* the plaintiff newspaper publishers sold papers to its wholesalers who in turn supplied retailers. The wholesalers' margin of 35 per cent was shared between the wholesaler and retailer (the latter receiving most of this). The publishers reduced the wholesale margin which would also reduce the retail margin. In response, the retailers' federation boycotted the plaintiffs for one week by sending 'stop notices' to the wholesalers. Lord Denning MR considered, at 782, the stop notices breached the *Restrictive Trade Practices Act 1956* (UK) and, therefore, at 783, to be 'unlawful means' for the purposes of the unlawful interference tort.

201 *Merkur Island Shipping* [1983] 2 AC 570, 609. See also Carty, 'Intentional Violation of Economic Interests: The Limits of Common Law Liability', above n 3, 262.

202 This is discussed further in Section D of this Part.

203 See Lord Wedderburn, *Clerk & Lindsell on Torts*, above n 185, 1180-1; Sales and Stilitz, above n 2, 435.

204 Peter Cane, *Tort Law and Economic Interests* (1st ed, 1991), 118.

205 *Lumley v Gye* (1853) 118 ER 749.

known example of the direct form where a singer, as a result of persuasion by the defendant's offer of more money, failed to perform her singing contract.

5 *'Indirect' Interference with Contract and the Unlawful Interference Tort* – J T Stratford & Son Ltd v Lindley

In relation to the 'indirect' form, Mitchell states that:

> [T]o prove an indirect interference with contract, a plaintiff must prove:
>
> (i) that the defendant's conduct was 'unlawful';
>
> (ii) that the defendant's unlawful conduct caused the plaintiff loss through an interference with the plaintiff's contract;
>
> (iii) that this loss was caused intentionally by the defendant;
>
> (iv) that the defendant had some knowledge of the contract with which he was interfering.[206]

Commonly, the 'unlawful means' in a case of *indirect interference with contractual relations* involves inducing or procuring the breach of labour agreements of a target in order to (intentionally) interfere with the target's agreements with customers or suppliers.[207]

However, such an act may also be considered unlawful means in the *unlawful interference tort.* In the well-known case of *J T Stratford & Son Ltd v Lindley,* a trade union directed its members not to handle any empty barge of the appellant company, Lord Reid considering that this made it 'practically impossible for the appellants to do any new business with the barge hirers. It was not disputed that such interference with business is tortious if any unlawful means are employed'.[208]

In relation to the 'unlawful means', Lord Reid further held that 'the respondents threatened to induce the men ... to break their contracts and thereby threatened to use unlawful means to interfere with the appellant's business'.[209]

6 *The Unlawful Interference Tort in Australia*

Sykes notes that the unlawful interference tort was acknowledged by the dicta of Else-Mitchell J in *Sid Ross Agencies Ltd v Actors and Announcers Equity of Australia.*[210] In that case, the plaintiff agency was licensed under the *Industrial Arbitration Act 1940* (NSW). The defendant union's list of 'approved' agencies left out the plaintiff. The plaintiff alleged that this stopped clubs 'by unlawful means' from using the plaintiff's services.[211] Else-Mitchell J considered that:

206 Mitchell, above n 185, 449-50 (footnotes omitted).
207 See Lord Wedderburn, *Clerk & Lindsell on Torts*, above n 185, 1211-2.
208 *J T Stratford & Son Ltd v Lindley* [1965] AC 269, 324 (*'Stratford v Lindley'*).
209 Ibid 325.
210 Sykes, above n 185, 237, citing *Sid Ross Agency Pty Ltd v Actors & Announcers Equity Association of Australia* [1971] 1 NSWLR 760, 767 (*'Sid Ross Agencies'*).
211 *Sid Ross Agencies* [1970] 2 NSWR 47, 49, 52.

> There can, I think, be no doubt in light of the authorities ... that a right of action is available to a person who suffers damage as a result of interference by another with his trade or business by unlawful means and that this may be so even through [sic] the interference does not entail the procurement or inducement of an actual breach of contract.[212]

His Honour considered, however, that he should not decide if the tort existed or its limits.[213]

In *Ansett Transport Industries (Operations) Pty Ltd v Australian Federation of Air Pilots*,[214] the defendant pilot union gave its members an instruction requiring that pilots only perform their duties from 9:00 am to 5:00 pm as part of an industrial campaign to secure higher wages. The plaintiff airlines alleged that this instruction amounted to, among other things, interference with contractual relations and interference with trade or business by unlawful means.[215] Justice Brooking noted that, as he was hearing the case at first instance, he should not examine the relevant principles or review authorities if there was binding or persuasive precedent.[216] His Honour referred to various authorities including *Stratford v Lindley*, *Daily Mirror Newspapers* and Lord Diplock's formulation in the *Merkur Island Shipping* case and concluded: 'What the law is in Australia on this subject must await the authoritative determination of the High Court, but my duty is to apply the law as laid down by the House of Lords.'[217]

In *Mengel*, a majority of the High Court recognised the 'emergence' of the tort but, by implication, did not determine whether it existed in Australia:

> More recent developments in the United Kingdom suggest the emergence *in that country* of a tort of interference with trade or business interests by an unlawful act directed at the person injured, although not necessarily done for the purpose of injuring his or her interests.[218]

212 Ibid 52. The authorities referred to by Else-Mitchell J are *Rookes v Barnard* [1964] AC 1129 ('*Rookes v Barnard*'); *Stratford v Lindley* [1965] AC 269; *Daily Mirror Newspapers* [1968] 2 QB 762; *Morgan v Fry* [1968] 2 QB 710.

213 *Sid Ross Agencies* [1970] 2 NSWR 47, 52.

214 [1991] 1 VR 637 ('*Ansett*'). For a detailed analysis of this case, see Kathleen McEvoy and Rosemary Owens, 'The Flight of Icarus Legal Aspects of the Pilots' Dispute' (1990) 3 *Australian Journal of Labour Law* 87.

215 Ibid 641-2.

216 Ibid 666-7.

217 Ibid 667. See also, McEvoy and Owens, above n 214, 110. His Honour also refers to *Lonrho Plc v Fayed* [1990] 2 QB 479 ('*Lonrho v Fayed*'). Lord Justice Dillon there states that '[h]ere the existence of this tort is recognised, but the detailed limits of it have to be refined': at 489.

218 *Mengel* (1995) 185 CLR 307, 342-3 (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ) (emphasis added and footnote omitted). The facts of *Mengel* are set out in the text at below nn 268-271. See also *Patrick Stevedores Operations Pty Ltd v The Maritime Union of Australia* [1998] WASC 120 ('*Patrick Stevedores*'), discussed in the footnote at below n 286. There, Parker J states that '[a]n interference with trade or business by unlawful means has been recognised as an actionable tort': at 13. His Honour cites *Ansett* [1991] 1 VR 637, 666-8; *Pinky's Pizza Ribs on the Run Pty Ltd v Pinky's Seymour Pizza & Pasta Pty Ltd* (1997) ATPR 41-600; *Binalong Pty Ltd v Conservation Council of South Australia Incorporated* (1994) ATPR 41-312, 42, 161; *Mengel* (1995) 185 CLR 307. See also *Guiseppe Emanuele v Anthony Robert Hedley* [1998] 709 FCA ('*Guiseppe Emanuele*'), discussed in the footnote at below n 417; *News Ltd v Australian Rugby Football League Ltd*(1996) 64 FCR 410 ('*News Limited*').

More recently in *Sanders v Snell*,[219] the High Court again avoided any definitive statement relating to the tort's existence in Australia and confined its comments to one element of the tort.[220]

The High Court's discussion of the tort of interference with trade or business by unlawful means in *Mengel* and *Sanders v Snell* was later considered by the Supreme Court of Queensland in *Deepcliffe Pty Ltd v The Council of the City of Gold Coast*.[221] After referring to *Mengel* and *Sanders v Snell*, Williams JA concluded that '[i]n the light of the reasoning of the High Court in those two authorities it is not for this Court, in my view, to hold that such a tort does exist in Australian law'.[222]

More recently, a decision of the Federal Court of Australia in 2003 and the subsequent appeal in that proceeding in 2004 dismissed a claim under the unlawful interference tort on the *assumption* (without deciding) that the tort is recognised in Australia.[223]

7 *A 'Species' of the 'Genus' Tort - Intimidation and* Rookes v Barnard

While a detailed consideration of the tort of intimidation[224] is beyond the scope of

219 (1998) 196 CLR 329 ('*Sanders v Snell*'). The facts of this case are set out in the text at below nn 272-6.

220 Ibid 341 (Gleeson CJ, Gaudron, Kirby and Hayne JJ). Their Honours state: 'We do not think it is necessary to decide in this case whether a tort of interference with trade or business interests by an unlawful act should be recognised in Australia. For present purposes, it is enough to consider one element of that tort: the element of unlawful act': at 341. This is also noted by Hedigan J in *Gibson Chemicals Ltd v S A Sopura NV* [1999] VSC 203, [75] (Hedigan J) and in *Sita Qld Pty Ltd v State of Queesland* [1999] FCA 793, [69] (Dowsett J) ('*Sita v Queensland*'). The facts of *Sita* are described in the text at below nn 329-30. See also *Spectrum Decorating Pty Ltd v State of South Australia* [2000] NSWSC 971, [31] ('*Spectrum Decorating*'); *Spotwire Pty Ltd v Visa International Service Association Inc* [2003] FCA 762 , [68] (Bennett J) ('*Spotwire No 1*').

221 [2001] QCA 342.

222 Ibid [74]. See also the comments of McMurdo P at [25]. Special leave to appeal from this decision to the High Court was refused. See Transcript of Proceedings, *Deepcliffe Pty Ltd v The Council of the City of Gold Coast* (High Court of Australia, 26 June 2002). See also *News Limited* (1996) 64 FCR 410, 517, where the Federal Court of Australia also declined to determine whether the unlawful interference tort is established in Australia. In an application for leave to appeal to the High Court in 2001, Hayne J refers to the existence of the unlawful interference tort as being 'unanswered' by the High Court. See Transcript of Proceedings, *Palmer-Bruyn & Parker Pty Ltd v Parsons* (High Court of Australia, Hayne J, 21 June 2001).

223 See *Scott v Pedler* [2003] FCA 650 (Gray ACJ); *Scott v Pedler* [2004] FCAFC 67 (Gyles, Conti and Allsop JJ). Relevant aspects of these decisions are further discussed in at below nn 275, 337, 380. A claim was also made under the unlawful interference tort in *Cultivaust Pty Ltd v Grain Pool Pty Ltd* [2004] FCA 638 (Mansfield J). While his Honour's judgment notes the respondent's argument that 'Australian law does not recognise a cause of action for intentional infliction of harm caused by an unlawful act': at [267], it is submitted that it is not clear that his Honour is specifically considering the unlawful interference tort as his Honour states that '[t]he circumstances in which there may arise a cause of action for unlawful interference *with contractual relations* may be uncertain: see eg *Sanders v Snell* (1998) 196 CLR 326; *Ansett Transport Industries (Operations) Pty Ltd v Australian Ferderation of Air Pilots* [1991] 2 VR 636': at [270] (emphasis added). See also his Honour's comments at [296] and [299] where his Honour also refers to 'unlawful interference with contractual relations'. In any event, no detailed discussion of either cause of action takes place as his Honour concludes, on the facts, that there was no interference. See his Honour's judgment at [268], [275], [293]-[295].

224 See generally Lord Wedderburn, *Clerk & Lindsell on Torts*, above n 185, 1221-44.

this article, it has been noted above[225] that it is considered by some commentators to be a 'species' of the 'genus' tort of unlawful interference with trade and therefore contains a similar unlawful means requirement to that tort.

The leading case on intimidation is *Rookes v Barnard*[226] where the tort was confirmed by the House of Lords. Lord Reid here stated:

> The question in this case is whether it was unlawful for [the employees] to use a *threat* to break their contracts with their employer as a weapon to make him do something which he was legally entitled to do but which they knew would cause loss to the plaintiff ... In my judgment, to cause such loss [to the plaintiff] by *threat* to commit a tort against a third person if he does not comply with their demands is to use unlawful means to achieve their object.[227]

In *Rookes v Barnard*, members of a union decided to 'inform' BOAC that, unless the appellant (a draughtsman who had cancelled his membership of the union and would not join again) was 'removed from the design office', strike action 'will take place'. BOAC eventually terminated the appellant's employment (satisfying the relevant legal requirements). An agreement had previously been reached between representatives of the relevant employers and employees in the industry prohibiting strikes or lockouts and this was a part of all contracts between BOAC and its employees. Thus, as observed by Lord Reid in the House of Lords, 'if they had withdrawn their labour ... they would have been in breach of their contracts'.[228] Lord Reid formulated the question before the House of Lords as whether the employees' *threat* to breach their employment contracts was unlawful means even though BOAC was acting lawfully in dismissing him and observed:

> That *threat* was to cause loss to BOAC by *doing something which they had no right to do, breaking their contracts* with BOAC. I can see no difference in principle between a *threat* to break a contract and a threat to commit a tort.[229]

Importantly for the purposes of the present discussion of the unlawful interference tort, Lord Reid emphasised that, for the tort of intimidation to be made out, unlawful means must also be employed. Adopting the unlawful means requirement from *Allen v Flood*,[230] his Lordship observed that:

> So long as the defendant only threatens to do what he has a legal right to do he is on safe ground. At least if there is no conspiracy he would not be liable to anyone for doing the act, whatever his motive might be, and it would be absurd to make him liable for threatening to do it but not for doing it. But I agree with Lord Herschell (*Allen v Flood*) that there is a chasm between doing

225 See the passage by Lord Wedderburn in the text at above n 189.
226 *Rookes v Barnard* [1964] AC 1129.
227 Ibid 1167 (emphasis added).
228 Ibid 1166. The facts are summarised from the judgment of Lord Reid at 1164-6.
229 Ibid 1168 (emphasis added).
230 *Allen v Flood* [1898] AC 1.

> what you have a legal right to do and doing what you have no legal right to do, and there seems to me to be the same chasm between threatening to do what you have a legal right to do and threatening to do what you have no legal right to do.[231]

B *'Unlawful Means' in the Unlawful Interference Tort*

Again, it is not intended here that an exhaustive examination of the relevant authorities take place as this has been undertaken by other commentators.[232] The purpose of this section is to identify the general policy considerations underpinning the unlawful interference tort, to identify the purpose of the unlawful means element and to examine contrasting approaches to the operation of that element.

1 *Policy Underpinning Unlawful Interference Tort and Rationale for the 'Unlawful Means' Requirement*

Important for the purposes of the present comparison is that the central policy factor or consideration identified in negligence – *the avoidance of indeterminate liability* – does not arise in the case of the unlawful interference tort, or the intentional torts generally, because of the operation of the intention element, discussed below, that the unlawful means must be *directed against* or *aimed at* the plaintiff. Heydon is of the same view stating:

> The objections to the recovery of negligently inflicted financial loss do not apply to intentionally inflicted loss. There is no risk of a wide field of plaintiffs since in most of the economic torts the plaintiff must in some sense have been specifically aimed at by the defendant.[233]

Judicial support for this may be found in *Hill v Van Erp* where Gaudron J observes in relation to various intentional torts (in particular, interference with contractual relations) that:

> [T]he policy questions which necessitate that there be a special relationship of proximity in cases of pure economic loss do not arise. No question arises as to the possibility of liability in an indeterminate amount for an indeterminate time to an indeterminate class ... Nor is there any question of liability for actions which, by community standards, are legitimate in the pursuit of personal advantage.[234]

As Gaudron J's observations indicate, another policy factor or consideration in negligence discussed previously – *the protection of legitimate business conduct*

231 *Rookes v Barnard* [1964] AC 1, 1168 (footnote omitted).
232 See especially Carty, 'Intentional Violation of Economic Interests: The Limits of Common Law Liability', above n 3, 265-73; Carty, *An Analysis of the Economic Torts*, above n 45, 109-17; Elias and Ewing, above n 185, 336-41; *Fridman Pt II*, above n 185, 106-10; Mitchell, above n 185, 440-9; Lord Wedderburn, *Clerk & Lindsell on Torts*, above n 185, 1248-67.
233 Heydon, *Economic Torts*, above n 3, 8-9.
234 *Hill v Van Erp* (1997) 188 CLR 159, 198.

or what Anderson describes as 'avoiding unnecessary interference with legitimate commercial freedoms'[235] – does not operate to deny the imposition of liability in the case of the unlawful interference tort because of the operation of the unlawful means requirement. It is submitted that there are several aspects underpinning the unlawful means requirement in this respect.[236] First, and quite apart from any commercial or industrial considerations, the courts should not be seen to be condoning or enforcing unlawful (whatever the precise limits of that concept) or otherwise illegitimate conduct in the same way that the law of contract is reluctant to enforce agreements which are illegal, fraudulent or obtained under duress.[237] Second, when such conduct is underpinned by an 'elevated' intentional element as in the unlawful interference tort – and not merely by inadvertence or carelessness – then the court's justification for intervention is arguably even more compelling than in the case of the negligence tort. In this respect, Sales and Stilitz[238] seize upon the intention element to render the defendant's conduct tortious.[239]

Third, the unlawful means requirement is a recognition by the courts that competitive conduct (necessitating the infliction of some economic harm to trade rivals) is the prime basis or underpinning of a capitalist society and, as such, should not be impeded or discouraged by unlawful conduct engaged in intentionally. In this respect, Berry suggests that the 'nebulous concept' of unlawful means is used to distinguish, as a matter of policy, between 'legitimate as opposed to illegitimate competitive trade rivalry'[240] and Lord Wedderburn is of a similar view.[241]

Finally, and flowing from this, it is submitted that the unlawful means requirement is also a recognition by the courts that, in a commercial or industrial environment, there will often be an anti-social nature to the competitive conduct of businesses or industrial actors and that, similar to the first rationalisation, courts cannot be seen as condoning intentional behaviour in breach of existing law or otherwise unlawful. On this view, and short of such intentional and unlawful behaviour, the courts could arguably be viewed as accepting any

235 Anderson, above n 16, 47. See also discussion in Part I(C) above.

236 The author gratefully acknowledges the policy considerations or rationalisations at below nn 237-42 suggested to the author and formulated by Mr Keith Akers, Research Assistant, Department of Business Law and Taxation, Monash University. In this respect, see Bentil, above n 185, 519-29; Berry, above n 185, 547-8; Carty, *An Analysis of the Economic Torts*, above n 45, 122-8, Elias and Ewing, above n 185, 321-2, Heydon, *Economic Torts*, above n 3, 1-10, 123-34; Sales and Stilitz, above n 2, 412-3, 417, 420, 423.

237 See the comments of McHugh J in *Perre* set out in the text at above n 73. See also Carty's discussion of 'unlawful means as torts and breaches of contract' in Carty, *An Analysis of the Economic Torts*, above n 45, 127-8.

238 See the learned authors' 'paradigm case' in the text at above n 198.

239 Sales and Stilitz, above n 2, 412. The learned authors support their view with several passages from *Allen v Flood* [1898] AC 1, 96 (Lord Watson) and *Quinn v Leathem* [1901] AC 495, 534-5, 537 (Lord Lindley).

240 Berry, above n 185, 533. See also Bentil, above n 185, 519-20; *Fridman Pt II*, above n 185, 119; Heydon, *Economic Torts*, above n 3, 123.

241 Lord Wedderburn, *Clerk & Lindsell on Torts*, above n 185, 1250-1 (footnote omitted). The operation of the unlawful interference tort in the context of labour law is considered by Elias and Ewing, above n 185. See also Heydon, *Economic Torts*, above n 3, 9.

consequential social harm as a necessary evil of the autonomy granted to act lawfully.[242]

Australian (and English) courts have therefore refused to impose liability under the unlawful interference tort in the absence of unlawfulness of the requisite kind.[243] In *Giraffe World Australia Pty Ltd v Australian Competition & Consumer Commission*,[244] Lindgren J stated that '[t]here is no cause of action of "intentional infliction of economic harm"'.[245] As authority for this proposition, his Honour cited a passage from *Sanders v Snell*, which in part stated that '[t]he element of unlawfulness is essential to the definition of the tort. Otherwise, conduct of the most unremarkable kind would be tortious'.[246]

In this respect it is relevant to note that, while the 'prima facie' tort doctrine in the United States requires intentional conduct, the element of 'unlawful means' does not form part of the tort. Prosser and Keeton describe the prima facie tort doctrine in the following terms:

> Proof of the intentional interference and resulting damage establishes what the New York courts have called a 'prima facie tort', casting upon the defendant the burden of avoiding liability by showing that his conduct was privileged.[247]

The majority of the High Court in *Sanders v Snell*[248] trace the prima facie tort

242 For example, Bentil, above n 185, 519, observes that businesses 'may tend, from time to time, to resort to approaches or measures, some of them bordering on sharp or fraudulent practices, for the purpose of realising such objectives [profitable market share]. In general, the law tends to recognise the principle of freedom of commerce or trade, even though some individual interests may be detrimentally affected.'

243 The rationale and policy underpinning which particular conduct should amount to unlawful means in various formulations of the unlawful interference tort is considered in detail by Carty, *An Analysis of the Economic Torts*, above n 45, 122-8; Heydon, *Economic Torts*, above n 3, 123-34; Sales and Stilitz, above n 2, 414-25.

244 [1998] 1560 FCA ('*Giraffe World*'). In that case, the Australian Competition & Consumer Commission claimed (at 5) that Giraffe World had breached various sections of the *Trade Practices Act 1974* (Cth) ('TPA') including s 52 (misleading and deceptive conduct). Giraffe World alleged that by initiating proceedings and issuing a media release the ACCC had 'intentionally inflicted economic harm on the Applicant': at 17.

245 Ibid 17.

246 *Sanders v Snell* (1998) 196 CLR 329, 341 (Gleeson CJ, Gaudron, Kirby and Hayne JJ). See *Giraffe World* [1998] 1560 FCA, 17 (Lindgren J). Lindgren J also cites *Allen v Flood* [1898] AC 1, 126-7 (Lord Herschell), 172 (Lord Davey); *McKernan v Fraser* (1931) 46 CLR 343, 358-9 (Dixon J), 369-70 (Evatt J).

247 See W Page Keeton (ed), *Prosser and Keeton on The Law of Torts* (5th ed, 1984) Ch 24, 1010 (footnotes omitted). The authors note that under the Second Restatement of Torts, 'the prima facie tort analysis is discarded in favour of a rule that may put the burden on the plaintiff to prove his case rather than on the defendant to justify his actions': 1011. For a discussion of the 'privilege' in this doctrine, see Lord Wedderburn, 'Torts Out of Contracts: Transatlantic Warnings' (1970) 33 *Modern Law Review* 309, 312; Keeton (ed), above n 247, 1010. See also Dan B Dobbs, 'Tortious Interference with Contractual Relationships' (1980) 34 *Arkansas Law Review* 335, 349; Peter Thomas Burns 'Tort Injury to Economic Interests: Some Facets of Legal Response' [1980] LVIII *Canadian Bar Review* 103, 151. See also generally Donald C Dowling, 'A Contract Theory for a Complex Tort: Limiting Interference with Contract Beyond the Unlawful Means Test' (1986) 40 *University of Miami Law Review* 487; *Fridman Pt II*, above n 185, 119-20; Heydon, *Economic Torts*, above n 3, 128-32; Justice Oliver Wendell Holmes Jr, 'Privilege, Malice and Intent' (1894) 8 *Harvard Law Review* 1; Perlman, above n 62.

248 *Sanders v Snell* (1998) 196 CLR 329, 342.

doctrine to the judgment of Bowen LJ in *Mogul Steamship Co v McGregor Gow & Co*.[249] In *Mogul*, Bowen LJ considered that intentional conduct calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade, is actionable if done without just cause or excuse.[250]

However, as noted by the High Court in *Sanders v Snell* (and by several commentators), both the abandonment of 'motive' as the basis of the tort and the requirement of 'unlawful means' following *Allen v Flood* preclude adoption of the prima facie tort in English or Australian law in its present form.[251]

2 *'Unlawful Means' for the Unlawful Interference Tort – Overview*

An overview of the relevant law relating to 'unlawful means' is made difficult because, as Mitchell has observed:

> Little effort has been made at judicial level to determine, or categorise, in even the most general terms, the meaning of the term 'unlawful' in the context of tort cases. Once the 'unlawful' requirement was established it appears that the courts continued with its application on an *ad hoc* basis ... one is simply left with the authorities, fragmented and inconsistent as they are.[252]

The learned writer considers that the requisite 'unlawful means' includes 'the commission of all torts' and '[c]ommon law crimes containing tortious elements'.[253] In *Root Quality Pty Ltd v Root Control Technologies Pty Ltd*,[254] Finkelstein J stated that the 'unlawful act could include any civil wrong such as breach of contract, tort, breach of statute or breach of trust'.[255]

As is well known, inducing or procuring the breach of labour agreements of a target is, accordingly, unlawful means for this tort.[256] Also, in respect of tortious conduct, Bagshaw notes that 'the "unlawful means" need not in themselves amount to a tort to the plaintiff'.[257]

249 (1889) 23 QBD 598 ('*Mogul*').

250 Ibid 613 and cited in *Sanders v Snell* (1998) 196 CLR 329, 342.

251 See the judgment of the majority of the High Court in *Sanders v Snell* (1998) 196 CLR 329, 342 (Gleeson CJ, Gaudron , Kirby and Hayne JJ) who quote from *Allen v Flood* [1898] AC 1, 92 (Lord Watson). See also, eg, Heydon, *Economic Torts*, above n 3, 124, 130; Heydon, 'The Future of the Economic Torts', above n 187, 14; Carty, 'Intentional Violation of Economic Interests: The Limits of Common Law Liability' above n 3, 265; Carty, *An Analysis of the Economic Torts*, above n 45, 123.

252 Mitchell, above n 185, 442-3. See also Carty, 'Intentional Violation of Economic Interests: The Limits of Common Law Liability', above n 3, 265.

253 Mitchell, above n 185, 445.

254 [2000] FCA 980.

255 Ibid [121].

256 Lord Wedderburn, *Clerk & Lindsell on Torts*, above n 185, 1211-2, 1251. See also the discussion in the text at above nn 206-9.

257 Roderick Bagshaw, 'Can the Economic Torts be Unified?' (1998) 18 *Oxford Journal of Legal Studies* 729, 730. The author continues: 'If the defendant's means of causing the economic loss did themselves amount to a tort to the plaintiff ... then there would be no real benefit for the plaintiff in relying on the general economic tort rather than the straightforward tort which the means constituted ... The general economic tort provides an additional scope of tort protection for plaintiffs because it is parasitic on means that are defined as unlawful otherwise than because they amount to torts to the plaintiff.'

3 *Breach of Legislative Provisions and 'Unlawful Means' – Divergent Approaches*

Despite wide statements relating to 'breach of statute' such as those of Finkelstein J above, whether a breach of legislation which has *criminal* consequences constitutes unlawful means for the purposes of the tort has led to divergent approaches. The first approach, which Lord Wedderburn calls the 'construction' test, is the well-known test for the tort of 'breach of statutory duty'.[258]

A contrasting formulation is suggested by Lord Denning in *Torquay Hotel Co Ltd v Cousins*:[259]

> I have always understood that if one person deliberately interferes with the trade or business of another, and does so by *unlawful means, that is, by an act which he is not at liberty to commit*, then he is acting unlawfully, even though he does not procure or induce any actual breach of contract. If the means are unlawful, that is enough.[260]

This formulation has been criticised by various commentators for its width and uncertainty.[261] Fridman, however, discusses the judgments of Butler-Sloss LJ and Stuart-Smith LJ in *Associated British Ports*[262] and the decision of Brooking J in the *Ansett* case as supporting this approach.[263]

After reviewing the relevant authorities, Sales and Stilitz accordingly state that:

258 Lord Wedderburn, *Clerk & Lindsell on Torts*, above n 185, 1254-5. His Lordship cites *Gouriet v Union of Post Office Workers* [1978] AC 435; *Lonrho v Shell Petroleum Co Ltd (No 2)* [1982] AC 173 (*'Lonrho v Shell'*). The 'construction' test in *Lonrho v Shell* is also noted by Berry, above n 185, 546; Cane, above n 204, 121; Carty, 'Intentional Violation of Economic Interests: The Limits of Common Law Liability', above n 3, 269-271; McEvoy and Owens, above n 214, 116; and Lord Wedderburn, 'Rocking the Torts', above n 3, 225.

259 *Torquay Hotel Co Ltd v Cousins* [1969] 2 Ch 106 (*'Torquay Hotel'*).

260 Ibid 139. See also Lord Wedderburn, *Clerk & Lindsell on Torts*, above n 185, 1255-6 who calls this the 'general' approach.

261 See, eg, Carty, 'Intentional Violation of Economic Interests: The Limits of Common Law Liability', above n 3, 266-7, 279; *Fridman Pt II*, above n 185, 106; Mitchell, above n 185, 445.

262 *Associated British Ports* [1989] 3 All ER 796, cited in *Fridman Pt II*, above n 185, 107-8.

263 *Fridman Pt II*, above n 185, 110. Cane, too, notes the suggestion that the unlawful act is required to be 'independently actionable' but considers 'any such rule would render tort liability for causing loss by unlawful means largely superfluous'. See Cane, *Tort Law and Economic Interests*, above n 204, 121. Recently, in *Dresna Pty Ltd v Misu Nominees Pty Ltd* [2004] FCAFC 169 (*'Dresna'*), the Full Court of the Federal Court considered whether various alleged breaches of the TPA constituted unlawful means for the purposes of the tort of *conspiracy by unlawful means*. Justices Keifel and Jacobson considered that: 'If a breach of statute was capable of founding the "*unlawful means*" used by conspirators it would not seem to matter that the statute did not also give a private right to the person injured, in our respectful view. The question whether a contravention of statute can amount to the relevant "*unlawful means*" is a distinct question': at [15] (emphasis added). Their Honours then adopt the 'general' approach to unlawful means described in the text and footnote at above n 260 being 'an act which they are not at liberty to commit' citing Anthony M Dugdale (ed), *Clerk and Lindsell on Torts* (18th ed, 2000) [24]-[77]. Accordingly, their Honours concluded, at [18]-[19], that failure to comply with an undertaking under s 87B of the TPA could 'arguably' amount to unlawful means. For further discussion of the elements of the tort of *conspiracy by unlawful means*, including the position relating to breach of legislative provisions as unlawful means, see *Fatimi Pty Ltd v Bryant* [2002] NSWSC 750 (Campbell J); *Fatimi Pty Ltd v Bryant* [2004] NSWCA 140 (Handley, Giles and McColl JJA).

> Indeed, it would appear that even a breach of a statutory duty which is neither a contravention of a penal statute, nor gives rise to an independent cause of action, will suffice to establish liability, provided it is committed by D with the requisite intent to harm P.[264]

Accordingly, the authors are led to propose 'means which D is not, according to law, at liberty to employ' to describe the relevant element.[265]

4 *The High Court and 'Unlawful Means'*

(a) The Principle in Beaudesert Shire Council v Smith

As is well known, the majority of the High Court in *Mengel* overruled the decision in *Beaudesert Shire Council v Smith*.[266] However, while a detailed examination of that decision is beyond the scope of this article, the majority judgment in *Mengel* considered the *unlawful act* component of that principle.

In *Beaudesert*, the respondent had been granted a licence under *The Water Acts of 1926* (Qld) to pump water from the Albert River for irrigation purposes. For the purposes of building a road, the Beaudesert Shire Council removed 12,000 yards of gravel from the river bed which dissipated the existing water-pool available for the respondent's pump. The respondent sought damages of 20,000 pounds and recovered 5,000 pounds in the Supreme Court of Queensland. The High Court held that:

> [I]ndependently of trespass, negligence or nuisance but by an action for damages upon the case, a person who suffers harm or loss as the inevitable consequence of the unlawful, intentional and positive acts of another is entitled to recover damages from that other.[267]

(b) Beaudesert *overruled in* Mengel

In *Mengel*, the respondents borrowed $3 million to purchase a property proposing to repay part of the relevant loan the following year by selling cattle. Two inspectors of the Northern Territory Department of Primary Industry and Fisheries placed 'movement bans' on cattle from the property on account of brucellosis. The respondents were prevented from selling the animals and incurred expenses to feed and agist them. It was later discovered that the inspectors' acts were unauthorised by the relevant statute.

264 Sales and Stilitz, above n 2, 416. The authors cite, among others, *Daily Mirror Newspapers* [1968] 2 QB 762; *Brekkes Ltd v Cattel* [1972] Ch 105; *Associated British Ports* [1989] 1 WLR 939, 961F-H (Butler-Sloss LJ), 966H (Stuart-Smith LJ).

265 Sales and Stilitz, above n 2, 414.

266 (1969) 120 CLR 145 ('*Beaudesert*'). The facts are summarised from the judgment of Taylor, Menzies and Owen JJ at 148-9.

267 Ibid 156 (Taylor, Menzies and Owen JJ). For the well-known critiques of this decision, see Gerald Dworkin and Abraham Harari, 'The *Beaudesert* Decision – Raising the Ghost of the Action upon the Case' (1967) 40 *Australian Law Journal* 296; Gerald Dworkin, 'Intentionally Causing Economic Loss – *Beaudesert Shire Council v Smith* Revisited' (1974) 1 *Modern Law Review* 4. In defence of the decision, see R J Sadler, 'Whither *Beaudesert Shire Council v Smith*?' (1984) 58 *Australian Law Journal* 38 and the defence by Deane J in *Mengel* (1995) 185 CLR 307, 365-9.

The majority in *Mengel* stated that the decision in *Beaudesert* considered an unlawful act was an 'act forbidden by law' rather than 'an unauthorised act in the sense of an act that is ultra vires and void'.[268] In relation to the facts in *Mengel*, the majority considered that:

> It is not possible to discern from the facts of this case an act forbidden by law which caused harm to the Mengels. Nor is it easy to discern an unauthorised act ... but what happened was that the Inspectors told the Mengels that there were movement restrictions when, in fact and in law, there were none. That did not involve an act forbidden by law in any relevant sense. Nor did it require authority in a way justifying its description as 'unauthorised'.[269]

The majority of the High Court in *Mengel* observed that the *Beaudesert* principle could apply in the absence of a duty of care or intention to harm. The principle in *Beaudesert* was accordingly overruled '[s]ubject to the qualification that there may be cases in which there is liability for harm caused by unlawful acts *directed against* a plaintiff or the lawful activities in which he or she is engaged'.[270]

For the purposes of the unlawful act required by the unlawful interference tort, however, the majority in *Mengel* observed only that '[i]t seems to be accepted that this embryonic or emerging tort does not extend to all unlawful acts and that, at least in that regard, it is in need of further definition'.[271]

(c) Sanders v Snell

In *Sanders v Snell*, Mr Snell was the Executive Officer of the Norfolk Island Government Tourist Bureau. The initial appointment was for two years and was later amended by the Bureau to be open-ended. Mr Snell's contract was terminated shortly thereafter on the instruction of the new Minister for Tourism and he brought an action against the Minister for interference with contractual relations (and misfeasance in public office). The majority concluded that the Minister's failure to give procedural fairness before directing the Bureau to dismiss Mr Snell was *not* unlawful means for the purposes of the unlawful interference tort.[272]

After noting the judgment of Bowen LJ in *Mogul*,[273] the majority stated:

268 *Mengel* (1995) 185 CLR 307, 336 (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ). Deane J agreed stating that 'unlawful' was used in the *Beaudesert* principle 'in the sense of "contrary to law" as distinct from either invalid or unauthorised': at 362. The facts are summarised from the majority judgment at 328-34.

269 *Mengel* (1995) 185 CLR 307, 337 (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ).

270 Ibid 343, 345 (emphasis added). The overruling of the *Beaudesert* principle on the intention ground is discussed at below nn 331-40. This passage is also cited in *Scott v Secretary, Department of Social Security* [2000] FCA 1241, [16] (Beaumont and French JJ) ('*Scott v DSS*').

271 *Mengel* (1995) 185 CLR 307, 343.

272 *Sanders v Snell* (1998) 196 CLR 329, 342-4 (Gleeson CJ, Gaudron, Kirby and Hayne JJ). The facts are summarised at 332-8.

273 *Mogul* (1889) 23 QBD 598, 612. See discussion in the text at above nn 249-50.

> 'Infringement of some right' may well be a useful description of what is meant by saying ... an unlawful act ... But it may be doubted that 'infringement of some right' is, or is always, a sufficient description of what is unlawful means for the purposes of the economic torts generally or the tort now under consideration.[274]

After referring to the majority judgment in *Mengel*, the majority in *Sanders v Snell* concluded that:

> Their rejection of *Beaudesert* is, however, consistent with confining what is an unlawful act for the purposes of this tort (if, that is, the tort is to be recognised in this country). It is also consistent with (or at least not inconsistent with) excluding from the definition of what is an unlawful act for this purpose acts whose only 'unlawful' aspect is that they are unauthorised in the sense that they are ultra vires and void.[275]

Their Honours considered that, if 'ultra vires and void' acts were not excluded,

> the tort of interference with trade or business interests by unlawful act would cover the whole of the field now covered by the tort of misfeasance in public office or would cover that field and much more, thereby extending the liability of public officers very greatly.[276]

C *The 'Intention' Element of the Unlawful Interference Tort*

1 *Unlawful Means 'Directed Against' or 'Aimed At' the Plaintiff*

In relation to the 'intention' element, Lord Wedderburn writes that the unlawful means must be 'in some sense directed against the plaintiff or intended to harm the plaintiff'.[277]

As discussed above, this intention formulation – that the unlawful conduct be *directed against* or *aimed at* the plaintiff – avoids the countervailing policy factor

274 *Sanders v Snell* (1998) 196 CLR 329, 343 (Gleeson CJ, Gaudron, Kirby and Hayne JJ). See also *Spectrum Decorating* [2000] NSWSC 971, [32]; *Sita v Queensland* [1999] FCA 793, [72] (Dowsett J); *Spotwire No 1* [2003] FCA 762, [68] (Bennett J).

275 *Sanders v Snell* (1998) 196 CLR 329, 344 (Gleeson CJ, Gaudron, Kirby and Hayne JJ). See also *Scott v Pedler* [2003] FCA 650, [78]–[79] (Gray ACJ). There, the applicants alleged that the respondents, who were officers of the Department of Social Security, had failed to make various decisions in relation to the granting, reviewing or changing of the benefit rate of certain pensions. Gray ACJ noted: 'It appears from what their Honours [in *Sanders v Snell*] said that, if the tort is recognised in Australia, it requires that there be an act which is unlawful in the sense of being prohibited by law. It is not sufficient that the act be unauthorised in the sense that it is *ultra vires* and void. ... To the extent to which they [the applicants] rely on positive acts ... those acts were in no sense unlawful. It cannot be said that a failure to reach the state of satisfaction as to fulfilment of criteria is an unlawful act in any sense': at [78]-[79] (emphasis in original).

276 *Sanders v Snell* (1998) 196 CLR 329, 344. The tort of misfeasance in public office is discussed in Part II(F) below.

277 Lord Wedderburn, *Clerk & Lindsell on Torts*, above n 185, 1246 who cites *Lonrho v Fayed* [1990] 2 QB 479, 488-9 (Dillon LJ), 491-2 (Ralph Gibson LJ). For an excellent discussion of the requisite state of mind in the unlawful interference tort, see especially Sales and Stilitz, above n 2, 425-30.

or consideration in negligence of 'indeterminate liability'.[278] In this respect, Cane explains that:

> The requirement of intention to injure serves another purpose: without it, a defendant might be faced with a very large number of actions brought by unsuccessful competitors or by 'incidental victims' of D's activities ...[279]

2 *Interference Tort Does Not Require a 'Predominant Purpose' to Harm the Plaintiff*

Returning to the formulation of intent, Brooking J in *Ansett*[280] reviewed various authorities relating to whether a 'predominant purpose' or 'predominant intention' to harm was required including *Van Camp Chocolates Ltd v Aulsebrooks Ltd*[281] and *Barretts & Baird*.[282] His Honour considered that the 'proper course' was to follow the Court of Appeal in *Lonrho v Fayed* in which no predominant purpose to harm the plaintiff was required.[283] Justice Brooking

278 See discussion in Part I(C).

279 Cane, *Tort Law and Economic Interests*, above n 204, 120. In *Dresna* [2004] FCAFC 169, the Full Court of the Federal Court considered the unlawful means aspect of the tort of *conspiracy by unlawful means*. Dresna alleged that the vendor of a supermarket and Dresna were parties to a contract to sell to Dresna the supermarket. It also alleged that the vendor, the eventual purchaser and the lessor of the relevant building had conspired to injure Dresna by negotiations which resulted in the lessor failing to assign the lease to Dresna and granting a lease to the eventual purchaser. Justices Keifel and Jacobson considered Dresna's submission in relation to the intention element, Dresna arguing that 'it should be sufficient for it to establish that the lessor intended to injure whichever independent supermarket operator was awarded the contract to the [relevant] business. It should not matter if its specific identity was not known at the time the alleged conspiracy was entered into ... [because] there could be only one victim, even if the class from which that victim comes is to an extent indeterminate': at [8]. In rejecting the submission, their Honours' distinguished a situation in which 'every member of the class to whom the conspiracy might have been directed was ascertainable': at [11]. Their Honours also referred, at [12], to *Lonrho v Shell* [1982] AC 173, discussed in the text at below n 302. Their Honours noted that, in that case, the relevant conduct was not 'aimed at' Lonrho citing W V Horton Rogers, *Winfield and Jolowicz on Tort* (16th ed, 2002) 649. For further discussion of the intention element of the tort of *conspiracy by unlawful means*, see *Fatimi Pty Ltd v Bryant* [2002] NSWSC 750 (Campbell J); *Fatimi Pty Ltd v Bryant* [2004] NSWCA 140 (Handley, Giles and McColl JJA); *Biscayne Partners Pty Ltd v Valance Corp Pty Ltd* [2003] NSWSC 874 (Einstein J) ('*Biscayne Partners*').

280 *Ansett* [1991] 1 VR 637, 667-8.

281 [1984] 1 NZLR 354 ('*Van Camp Chocolates*'). Justice Brooking notes that this case required that 'an intent to harm the plaintiff's economic interests must be a cause of the defendant's conduct'.

282 [1987] 1 IRLR 3. Justice Brooking notes that this case required 'that the defendant's predominant purpose be injury to the plaintiff rather than the advancement of his own interests'.

283 *Ansett* [1991] 1 VR 637, 668. In *Lonrho v Fayed* [1990] 2 QB 479, Lonrho was a substantial shareholder of House of Fraser Plc. Lonrho agreed with the Secretary of State for Trade and Industry not to increase its shareholding until approval from a report by the Monopolies and Mergers Commission. A company controlled by the Fayeds commenced a public offer for the shares in House of Fraser Plc. This takeover was not considered by the Commission (see 485-6). Lonhro allegedthat the decision not to seek Commission approval was due to fraud and 'a complete misrepresentation of the commercial standing and worth of the Fayeds': at 486. Lord Justice Dillon considered that '[n]o predominant purpose to injure is required where ... the wrongful interference has been by the practice of fraud on a third party, aimed specifically at the plaintiff' at 488-9. See also *Lonrho Plc v Fayed* [1992] 1 AC 448, 468E-469A (House of Lords); Carty, *An Analysis of the Economic Torts*, above n 45, 105. More recently, in *Dresna* [2004] FCAFC 169, discussed in the footnote at above n 263, the Full Court of the Federal Court considered whether certain alleged misrepresentations made to the Australian Competition and Consumer Commission constituted 'unlawful means' for the purposes of the tort of *conspiracy by unlawful means*. After discussing *Lonrho v Fayed* and other authorities, and relying on the views of Heydon, *Economic Torts*, above n 3, 68-70, Keifel and Jacobson JJ considered, at [27]-[29] that it was 'arguable' that such misrepresentations could amount to unlawful means. The position that the unlawful interference tort does not require a predominant purpose to harm the plaintiff is similar in the tort of *conspiracy by unlawful means*. See *Fatimi Pty Ltd v Bryant* [2004] NSWCA 140 [16]-[17] (Handley JA with whom McColl JA agreed at [83]).

concludes on this point:

> I am satisfied that the conduct of the defendants concerned was directed against the plaintiffs in the sense that the sole reason for the giving of the directive was the intention to bring pressure to bear on the plaintiffs ...[284]

While Fridman considers this to be obiter,[285] the High Court in the passage from *Mengel* noted above recognised that the tort *as developed in the United Kingdom* required the unlawful act be 'directed at the person injured, although not necessarily done for the purpose of injuring his or her interests'[286] but did not consider this element of the tort in *Sanders v Snell*.

3 *Foreseeable Harm Not Sufficient for Intention in Unlawful Interference Tort*

Of relevance to this article's comparison between negligence and the unlawful interference tort, relevant authorities in the latter tort have also considered the question of recovery for *foreseeable*, as opposed to intentional, loss. In this respect, both Lord Wedderburn[287] and Carty[288] reject foreseeable loss as being sufficient.

In support, Carty[289] cites a passage from the decision of Cooke J in *Van Camp Chocolates* and adopted by Henry J in *Barretts & Baird.* In *Van Camp Chocolates*, a case concerning misuse of confidential information relating to the production of health food bars obtained during failed licensing negotiations, it was conceded that 'an intent to harm [the plaintiff] ... was not a causative element in the defendant's conduct'.[290] Justice Cooke held that:

> The essence of the tort is deliberate interference with the plaintiff's interests by unlawful means. If the reasons which actuate the defendant to use unlawful means are wholly independent of a wish to interfere with the plaintiff's business, such interference being no more than an incidental

284 *Ansett* [1991] 1 VR 637, 668.
285 *Fridman Pt I*, above n 185, 38.
286 See passage cited at above n 218. *Patrick Stevedores* [1998] WASC 120 concerned a picket line manned by members of the defendant Maritime Union of Australia preventing entry to the plaintiff's harbour facility. In relation to the unlawful interference tort, Parker J notes that it is necessary that the unlawful acts 'have been directed against the plaintiff with the intention of causing injury, but that does not need to have been the predominant purpose': at 13. His Honour there cites, among others, *Ansett* [1991] 1 VR 637; *Mengel* (1995) 185 CLR 307. His Honour considered that the MUA's 'interference with the movement of trucks to and from the Patrick premises ... was a strategy directed to the interference with, and harm to, the plaintiffs in their business'. His Honour noted that even though the MUA's actions were 'directed primarily to other Patrick companies ... it was known to the MUA ... that the stevedoring activities of Patricks were at the material times being conducted by the plaintiffs'.
287 Lord Wedderburn, *Clerk & Lindsell on Torts*, above n 185, 1246 (footnotes omitted). Lord Wedderburn cites, among others, *McLaren v British Columbia Institute of Technology* (1979) 94 DLR (3d) 411, 416 (Taylor J); *Barretts & Baird* [1987] 1 IRLR 3; *Van Camp Chocolates* [1984] 1 NZLR 354.
288 Carty, 'Intentional Violation of Economic Interests: The Limits of Common Law Liability', above n 3, 274.
289 Ibid 275.
290 *Van Camp Chocolates* [1984] 1 NZLR 354, 359.

> consequence foreseen by and gratifying to the defendant, we think that to impose liability would be to stretch the tort too far.[291]

Accordingly, Cooke J considered the intentional element was not made out as 'such an intention was not a contributing cause of [the defendant's] conduct'.[292]

In *Barretts & Baird*, a trade union for 'fatstock officers' who approved meat at abattoirs decided on strike action. Justice Henry held that the strikes caused interference to the abattoir's business[293] and that inducing breaches of the relevant employment contracts of the fatstock officers constituted unlawful means.[294] However, the requisite intention was not satisfied as there was 'no evidence of any independent ... desire to injure the plaintiffs at whose premises [the fatstock officers] work'.[295] While damage to the plaintiffs was 'an unavoidable by-product of that withdrawal of labour and was a readily foreseeable consequence and, perhaps, in the case of some FOs, a not undesired consequence', this was not enough.[296]

By way of contrast, Carty observes that, in *Falconer v NUR*,[297] the strike action was considered by the Court to be aimed at the relevant rail passengers even though its ultimate target was British Rail.[298]

4 *Authorities on Intention and 'Reasonable' Consequences*

Despite the above discussion, it is also to be noted in relation to foresight or 'probable consequences', that Woolf LJ has observed in *Lonrho v Fayed* that:

> [F]requently it will be fully appreciated by a defendant that a course of conduct that he is embarking upon will have a particular consequence to a plaintiff, and the defendant will have decided to pursue that course of conduct knowing what the consequence will be. Albeit that he may have no desire to bring about that consequence in order to achieve what he regards as his ultimate ends, from the point of view of the plaintiff, whatever the motive of the defendant, the damage which he suffers will be the same. *If a defendant has deliberately embarked upon a course of conduct, the probable consequences of which to the plaintiff he appreciated, I do not see why the plaintiff should not be compensated.*[299]

291 Ibid 360 (Cooke J). This passage is also quoted by Carty, 'Intentional Violation of Economic Interests: The Limits of Common Law Liability', above n 3, 275.
292 Ibid 360.
293 *Barretts & Baird* [1987] 1 IRLR 3, 8.
294 Ibid 9-10.
295 Ibid 10.
296 Ibid. See also Sales and Stilitz, above n 2, 429.
297 [1986] IRLR 331 cited in Carty, 'Intentional Violation of Economic Interests: The Limits of Common Law Liability', above n 3, 275.
298 Carty, above n 3, 275-6. See also Sales and Stilitz, above n 2, 428-9, who provide a similar explanation.
299 *Lonrho v Fayed* [1990] 2 QB 479, 494 (emphasis added).

Sales and Stilitz consider that Woolf LJ's formulation in *Lonrho v Fayed* is 'too broad' observing that:

> On this approach, D's conduct need not be directed against P at all. Any adverse consequences to P may be wholly incidental to D's principal aim, and yet the mental element of the tort would still be made out. In practice, this approach would catch a wide range of competitive commercial activity, since it will usually be foreseeable to D that any (unlawful) action taken to improve his own market position will be likely to harm his competitors.[300]

The authors consider that Woolf LJ's formulation would result in 'unacceptably wide-ranging liability'[301] and is inconsistent with *Lonrho v Shell.*[302] In *Lonhro v Shell*, the *Southern Rhodesia Act 1965* (UK) and an Order in Council banned the sale of petroleum to Southern Rhodesia and this prevented the use of a pipeline owned by Lonrho. Lonrho alleged that Shell and BP's actions in selling petroleum to Southern Rhodesia assisted the regime to maintain independence and extended the ban on the pipeline. Sales and Stilitz note that the defendant's conduct was not 'directed against' Lonrho and that 'any harm ... was incidental to their primary motivation of improving their own positions'.[303] In fact, Lord Diplock's judgment in the case expresses the claim by Lonrho as 'an innominate tort, committed by Shell and BP severally, of causing *foreseeable loss* by an unlawful act'[304] leading several commentators to conclude that the case did not concern intended or deliberate loss.[305]

Carty, too, considers that 'targeted harm' and not merely 'inevitable harm' is required in order to ensure that 'liability ... [is] limited to acceptable proportions'.[306] Indeed, the learned author has revisited this question including a consideration of the views of Heydon, Weir, Sales and Stilitz and Woolf LJ (in

300 Sales and Stilitz, above n 2, 426.

301 Ibid 426-7.

302 Ibid 427 citing *Lonrho v Shell* [1982] AC 173. The following facts are summarised from the judgment of Lord Diplock at 181-2.

303 Sales and Stilitz, above n 2, 427. However, where the relevant intention – that the conduct is 'aimed at' the plaintiff - is present, the result will be otherwise even where the 'predominant purpose' is to protect or improve the defendant's interests because, as explained in the text at above nn 280-6, the unlawful interference tort does not require a 'predominant purpose' to harm the plaintiff. In this respect, in *Fatimi Pty Ltd v Bryant* (2004) 59 NSWLR 678, a case concerning the related tort of *conspiracy by unlawful means*, Handley JA, at 682 (with whom McColl JA agreed), quoted the following passage from Lord Bridge in *Lonrho v Fayed* [1992] 1 AC 448: 'But when conspirators *intentionally injure the plaintiff* and use unlawful means to do so, it is no defence for them to show that their primary purpose was to further or protect their own interests; it is sufficient to make their action tortious that the means used were unlawful': at 465-6 (emphasis added).

304 *Lonrho v Shell* [1982] AC 173, 183 (emphasis added).

305 Lord Wedderburn, 'Rocking the Torts', above n 3, 228; Sales and Stilitz, above n 2, 416; Carty, 'Intentional Violation of Economic Interests: The Limits of Common Law Liability', above n 3, 269. See also Elias and Ewing, above n 185, 327, 350.

306 Carty, 'Intentional Violation of Economic Interests: The Limits of Common Law Liability', above n 3, 280. In *Biscayne Partners* [2003] NSWSC 874, Einstein J, in discussing the intention element for the related tort of *conspiracy by unlawful means*, set out, at [119], the discussion of the intention element of this tort by Campbell J in *Fatimi Pty Ltd v Bryant* [2002] NSWSC 750, [176]-[181]. The passage from *Fatimi* quoted by Einstein J in *Biscayne Partners* reads: 'This element of "*intent to injure*" needs to be understood, in my view, as referring to the real purpose

Lonhro v Fayed)[307] as well as other authorities again concluding in favour of 'targeted harm'.[308]

D *The 'Intention' Element in the Tort of Interference with Contractual Relations*

1 *Rationale for Examining 'Intention' in Interference with Contractual Relations*

As discussed previously,[309] although generally regarded as separate torts, the 'indirect' form of the tort of interference with contractual relations – which also requires unlawful means – is considered by some commentators to be the unlawful interference tort. This is the view of Lord Wedderburn who considers that the 'directed against' intention requirement is identical in both torts.[310]

Accordingly, it will be appropriate to review in brief the authorities in relation to the interference with contractual relations tort for the purposes of comparison with negligence concepts. Of course, as noted above, the 'indirect' form of the tort requires that unlawful means be used.[311]

2 *Overview of Australian Authorities on 'Intention' in Interference with Contractual Relations*

Beginning with English authority, Lord Diplock in *Merkur Island Shipping* stated that the intention element for the tort of interference with contractual relations is 'two-fold, (1) knowledge of the existence of the contract concerned and (2) intention to interfere with its performance'.[312] However, in *Stratford v Lindley*, Lord Pearce in the House of Lords stated that, in order to make out the intention element, the defendant need *not* 'know with exactitude all the terms of the contract' particularly where the relevant term was 'commonplace':

> The relevant question is whether they had sufficient knowledge of the terms to know that they were inducing a breach of contract. At present there is

(footnote 306 cont'd) which the conspirators are trying to achieve ... [T]he additional element of agreement to use unlawful means to effect the harm justifies lowering the bar from a "*principal purpose to harm*" to a "*purpose (not necessarily principal) to harm*" test. However, the "*purpose to harm*" must still be what is actuating the defendants in acting. That the defendants realise that damage to the plaintiff is a likely, or indeed an inevitable, consequence of their action is not enough to satisfy this element of the tort. Rather, damage to the plaintiff must be one of the things which the defendants are trying to achieve': at [181] (emphasis in original).' Justice Einstein in *Biscayne Partners* concluded on the facts of that case: 'This is not to say that the [defendants] are not shown on the evidence to have been involved in a calculated disregard of the rights of [the plaintiff] and in a cynical pursuit of benefit. That conduct does not amount to a purpose to harm': at [121].

307 Carty, *An Analysis of the Economic Torts*, above n 45, 105-8.

308 Ibid 106, 108.

309 See discussion at above nn 202-3, 206-9.

310 Lord Wedderburn, *Clerk & Lindsell on Torts*, above n 185, 1181. Lord Wedderburn justifies his view at 1247-8. See also Sales and Stilitz, above n 2, 435, ff 110.

311 *Root Quality Pty Ltd v Root Control Technologies Pty Ltd* [2000] FCA 980, [119] (Finkelstein J) citing *D C Thomson & Co Ltd v Deakin* [1952] Ch 646, 681-2.

312 *Merkur Island Shipping* [1983] 2 AC 570, 608. See also Lord Wedderburn, *Clerk & Lindsell on Torts*, above n 185, 1178.

> considerable indication that they had the knowledge. *Moreover, it seems unlikely that they would be ignorant of the simple commonplace obligation* of the hirers under the course of dealing whereby they had a duty to return the barges to the plaintiffs.[313]

Similarly, Lord Reid considered that the relevant knowledge could be 'reasonably inferred' from the circumstances:

> The respondents knew that barges were always returned promptly on the completion of the job for which they had been hired, and it *must have been obvious to them that this was done under contracts between the appellants and the barge hirers.* It was argued that there was no evidence that they were sufficiently aware of the terms of these contracts to know that their interference would involve breaches of these contracts. But I think that at this stage *it is reasonable to infer that they did know that.*[314]

In considering the knowledge and intention elements of this tort, the High Court in *Mengel* observed that:

> Subsequent developments in the United Kingdom have, to some extent, impinged upon the intentional element of that tort. Liability does not depend on whether there is a predominant intention to injure and it has been held that constructive knowledge of the terms of a contract is sufficient, so that a defendant may be liable if he or she recklessly disregards the means of ascertaining those terms. But it is still accurate to describe the tort as one that depends on an intention to harm for that is necessarily involved if a person knowingly interferes with the enjoyment by another of a positive legal right, whether such knowledge is actual or constructive.[315]

In *Sanders v Snell*, a majority of the High Court made the following observation relating to the relationship between the 'intention' and 'procuring' elements of the tort:

313 *Stratford v Lindley* [1965] AC 269, 332 (emphasis added). The facts of this case are set out in the text at above n 208.

314 Ibid 323-4 (emphasis added). See also, Lord Wedderburn, *Clerk & Lindsell on Torts*, above n 185, 1179-80.

315 *Mengel* (1995) 185 CLR 307, 342 (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ) (footnotes omitted). In relation to constructive knowledge, their Honours cite the well known passage of Lord Denning MR in *Emerald Construction Co Ltd v Lothian* [1966] 1 WLR 691, where his Lordship states that: 'Even if they did not know of the actual terms of the contract, but had the means of knowledge – which they deliberately disregarded – that would be enough. Like the man who turns a blind eye. So here, if the officers deliberately sought to get this contract terminated, heedless of its terms, regardless whether it was terminated by breach or not, they would do wrong. For it is unlawful for a third person to procure a breach of contract knowingly, or recklessly, indifferent whether it is a breach or not': at 700-1. In *Root Quality* [2000] FCA 980, Finkelstein J after citing *Mengel* states: 'Thus the defendant must have ordered or procured the doing of what he knew would be a wrongdoing: *Short v The City Bank of Sydney* (1912) 15 CLR 148 at 160; *Fightvision Pty Ltd v Onisforou* (1999) 47 NSWLR 473 at 509-12. Constructive knowledge following from a reckless disregard of the facts will suffice': at [136]. See also *Australian Rugby Union Ltd v Hospitality Group Pty Ltd* [2000] FCA 823, [125] (Gyles J) ('*Australian Rugby Union*'); *Bruce Small No 1 Pty Ltd v Minister for Natural Resources* [1999] QSC 38, [17]-[18] (Muir J); *Spotwire No 1* [2003] FCA 762, [63]-[70] (Bennett J).

> But the tort of inducing or procuring a breach of contract is *not established by demonstrating only that the alleged tortfeasor hoped or wished that the contract would or might be breached.* To establish an inducing or procuring of breach, something more must be shown than that the alleged tortfeasor harboured an uncommunicated subjective desire that the contract would or might be breached.
>
> Showing what the tortfeasor desired may well be very relevant to the issue of the intention with which the alleged tortfeasor acted, *but it is necessary to consider what was done, as well as what was desired.* To persuade or direct a contracting party to terminate the contract lawfully is not to procure a breach of the contract.[316]

To conclude this discussion of the interference with contract tort, the decision of Sheller, Stein and Giles JJA in the New South Wales Court of Appeal in *Tszyu v Fightvision Pty Ltd; Fightvision Pty Ltd v Onisforou*[317] highlights the distinction between 'negligence' on the one hand and 'recklessness' or 'constructive knowledge' on the other. Their Honours considered that:

> The requirement that the defendant have sufficient knowledge of the contract is a requirement that he have sufficient knowledge to ground an intention to interfere with contractual rights. *Ignorance of the existence of the contract or of its terms born of inadvertence or negligence is not enough.* On the other hand, reckless indifference or wilful blindness to the truth may lead to a finding of the necessary intention.[318]

As noted by this passage and the High Court in *Mengel*,[319] constructive knowledge in the interference tort arises from a 'reckless disregard' or 'wilful blindness' of the means of ascertaining the terms of a contract. This, as noted by Sheller, Stein and Giles JJA, however, does not include imposing liability for interference with

316 *Sanders v Snell* (1998) 196 CLR 329, 339 (Gleeson CJ, Gaudron, Kirby and Hayne JJ) (emphasis added). For further discussion and application of the last sentence of this quote, see *Spotwire Pty Ltd v Visa International Service Association (No 2)* [2004] FCA 571, [80]-[84] (Bennett J) ('*Spotwire No 2*').

317 (1999) 47 NSWLR 473 ('*Tszyu v Fightvision*'). In that case, Bill Mordey's Classic Promotions Pty Ltd, Mr Tszyu (a boxer) and Mr Lewis (Tszyu's trainer) entered into a written agreement which provided for an option to extend the agreement. Another company, Fightvision Pty Ltd (also controlled by Mr Mordey), claimed (and was held) to have replaced Bill Mordey's Classic Promotions by novation of the contract. Fightvision later attempted to extend the agreement. However, Mr Tszyu's advisers replied with instructions that denied any agreement stood between the relevant parties and returning Fightvision's cheque for $1.00. Mr Tszyu, however, had retained a cheque for $100,000 from Fightvision paid to him after a bout. Fightvision sued Mr Tszyu for breach of the agreement and the other defendants for interference with Fightvision's contractual relations with Mr Tszyu (see [1]-[6], [10], [23]-[29], [47]-[54]).

318 *Tszyu v Fightvision* (1999) 47 NSWLR 473, 512 (emphasis added). For a detailed discussion of the intentional element in the interference with contractual relations tort, see *Allstate Life Insurance Co v Australia and New Zealand Banking Group* (1995) 58 FCR 26, 37-45 (Lindgren J, with whom Lockhart and Tamberlin JJ agreed). See also *Australian Rugby Union* [2000] FCA 823, [119] (Gyles J); *Biscayne Partners Pty Ltd v Valance Corp Pty Ltd* [2003] NSWSC 874, [100]-[101] (Einstein J); *Peter Tao Zhu v Sydney Organising Committee for the Olympic Games* [2001] NSWSC 989, [163]-[167] (Bergin J); *Spotwire No 2* [2004] FCA 571, [66]-[73] (Bennett J).

319 See passage quoted in the text at above n 315.

contractual relations where the relevant interference is due to 'negligence' or 'inadvertence'.

E *'Recklessness' and the Unlawful Interference Tort*

1 *'Constructive Knowledge' Does Not Satisfy 'Directed Against' Requirement*

Hiley and Lindsay, in discussing the majority judgment's observations in *Mengel* in relation to the unlawful interference tort, suggest that:

> They stated that the necessary intention to harm exists where 'a person knowingly interferes with the enjoyment by another of a positive legal right, whether such knowledge is actual or constructive'. If this is a sufficient definition of the element that the unlawful act must be 'directed against' the plaintiff, it appears to support a wide interpretation of that element. It appears to require only knowledge that a right is being interfered with and not an intention, whether predominant or not, to interfere.[320]

With respect to the authors, the majority's observations in relation to constructive knowledge appear to have been made in relation to 'subsequent developments' in the tort of interference with contract and *not* the unlawful interference tort. The majority's discussion of the unlawful interference tort does not begin until the paragraph *after* the statement in relation to constructive knowledge quoted by the authors in the above passage.[321] The majority's reference to a 'positive legal right' in that passage is, it is submitted, properly seen as a reference to the plaintiff's *contractual* relations. Accordingly, the majority do not express any opinion on whether other trade or business interests are within the 'positive legal right' proposition they have made and therefore, it is submitted, their Honour's judgment does not equate 'constructive knowledge' with the requirement in the unlawful interference tort that the unlawful act be 'directed against' the plaintiff.

Where the action brought is for *indirect* interference with contract (which, as noted above, Lord Wedderburn and Sales and Stilitz consider may be seen as the unlawful interference tort),[322] then the authors' statement is correct – constructive knowledge of another's 'positive legal right' – in this case, the 'target's' *contractual* relations – will suffice to ground an action based on *Emerald Construction Co Ltd v Lothian*.[323] However, as Mitchell reminds us, where an action for indirect interference with contract is instead brought under the unlawful interference tort, 'it would be irrelevant whether or not the defendant had *any* knowledge of the plaintiff's contractual relations'.[324]

320 Graham Hiley QC and Alan Lindsay, 'Tort Liability Clarified: *Northern Territory of Australia v Mengel*' (1995) 18 *University of Queensland Law Journal* 334, 336 (footnote omitted).
321 *Mengel* (1995) 185 CLR 307, 342-3.
322 See discussion in the text and footnotes at above nn 202-3, 206-9, 310.
323 [1966] 1 All ER 1013. See discussion in the footnote at above n 315.
324 Mitchell, above n 185, 450 (emphasis added).

The above discussion is not intended to dismiss the substantial point raised by Hiley and Lindsay – and very relevant to this article's comparison of negligence with the intentional torts – as to whether constructive knowledge of another's 'right to trade' will constitute the intentional element that the unlawful act be 'directed at' the person injured. In this respect, Berry specifically considers whether recklessness would constitute the intentional element and concludes that:

> From the historical development of the innominate tort it is clear that the intentional harm inflicted by the defendant must be *aimed at* a specific person, the plaintiff. To relax that requirement by permitting recklessness to be substituted for intention would change the character of the tort as it has been formulated.[325]

This conclusion would also accord with the views of Sales and Stilitz and Carty discussed previously – that, without more, actual knowledge of 'inevitable harm' does not constitute the intentional element of the tort.[326] Constructive knowledge of such harm must therefore do so even less. Cane, too, recognises that '[i]t is not enough that D failed to take reasonable care to prevent injury to P'[327] and continues '[i]t must follow that wrongs which can be committed negligently or entirely without fault could not constitute unlawful means for the purposes of these torts'.[328]

It appears that an attempt to plead negligence (and misfeasance in public office and breach of statutory duty) as the relevant 'unlawful acts' occurred in *Sita v Queensland.* In that case, Sita purchased two bus lines and a licence under the *State Transport Act 1960* (Qld) for services from Brisbane to Coolangatta. Subsequently, Queensland Rail, in conjunction with another bus line, began a train and connecting bus route from Brisbane to the Gold Coast. Sita argued the respondents' actions were unlawful and 'constrained Sita to refrain from carrying on its existing business to its full potential for profit'.[329] After noting the High Court's judgment in *Sanders v Snell*, Dowsett J states:

> Sita seeks to avoid this difficulty by asserting that the conduct complained of was relevantly unlawful because it ... was negligent or in breach of statutory duty ... As to negligence and breach of statutory duty, there is the further difficulty ... that most of the acts complained of occurred prior to Sita's commencing business.[330]

However, his Honour does not appear to consider whether an act committed negligently could in fact amount to unlawful means in the absence of the relevant conduct being directed at the plaintiff.

325 Berry, above n 185, 543-4 (emphasis added).
326 See discussion in the text at above nn 299-308.
327 Cane, *Tort Law and Economic Interests*, above n 204, 124.
328 Ibid ff 65. Cane here notes *Nichols v Richmond Corporation* [1983] 4 WWR 169 to the contrary.
329 *Sita v Queesland* [1999] FCA 793, [66].
330 Ibid [77].

2 Beaudesert *and Intention in the Unlawful Interference Tort*

As discussed above, the High Court in *Mengel* overruled the principle in *Beaudesert*. Of relevance to a consideration of the intention element of the unlawful interference tort, however, are the High Court's observations in relation to the intention element of that principle.

Sykes has observed that the principle formulated in *Beaudesert* encompassed *negligent* acts:

> The High Court thought it was enough that the Council should have foreseen the consequences to him. In other words an element of negligence is introduced. On this footing, commission of an illegal act may involve a civil tort if the doer of the act should have foreseen that the plaintiff would be affected.[331]

In *Kitano v The Commonwealth of Australia*,[332] Mason J observes that the *Beaudesert* principle did *not* require 'the existence of an intention on the part of the defendant to cause harm to the plaintiff' and that all that was needed was that 'the act is intentional and its inevitable consequence is to cause loss to the plaintiff'.[333] In this respect, Elias and Ewing considered that the principle provided 'incidental victims' with a cause of action resulting in 'an unreasonably wide class of plaintiffs'.[334]

However, in considering whether acts or omissions committed negligently could constitute unlawful means, it is relevant to note that, unlike the action identified in *Beaudesert* which requires a *positive act*,[335] *omissions* can found the tort of unlawful interference. Burns' discussion of *Acrow Ltd v Rex Chainbelt Inc*[336] highlights that in that case '[t]he court acknowledged that for the purposes of this tort, an omission to act would constitute an interference'.[337]

In overruling the *Beaudesert* principle, however, the majority of the High Court

331 Sykes, above n 185, 237-8.

332 (1974) 129 CLR 151.

333 Ibid 174. This point is also raised by Sadler, above n 267, 43. See also Mitchell, above n 185, 452; Berry, above n 185, 539.

334 Elias and Ewing, above n 185, 327-8. By way of comparison to the 'prima facie tort', Heydon, *Economic Torts*, above n 3, notes that the *Beaudesert* tort 'is narrower than the prima facie tort doctrine in requiring an unlawful act, but much wider in requiring no intention to injure the plaintiff, merely an intentional doing of the unlawful act': at 133. See also Heydon, 'The Future of the Economic Torts', above n 187, 16.

335 See discussion in the text at nn 266-7.

336 [1971] 3 All ER 1175, cited in Peter Burns, 'Tort Injury to Economic Interests: Some Facets of Legal Response' [1980] LVIII *Canadian Bar Review* 103, 144.

337 Burns, above n 336, 144. By contrast, in *Scott v Pedler* [2003] FCA 650, the applicants alleged that the respondents, who were officers of the Department of Social Security, had failed to make various decisions in relation to the granting, reviewing or changing of the benefit rate of certain pensions. Acting Chief Justice Gray, in discussing the unlawful interference tort, appears to assume that it requires a positive act 'even if it be recognised in Australia, the applicants cannot rely on it in the present case. To the extent to which they rely on omissions, *they do not invoke the element of the tort that requires a positive act*. To the extent to which they rely on positive acts ... those acts were in no sense unlawful': at [79] (emphasis added). However, his Honour had earlier referred to that part of the judgment of Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ in *Mengel* referred to in the text at above n 340 which overruled the principle in

in *Mengel*[338] observed that the principle could apply in the absence of a duty of care or intention to harm concluding that:

> There may be cases involving breach of a duty of care which fall within the *Beaudesert* principle but, to that extent, the principle serves no useful purpose. And if there is no duty of care, it is anomalous, to say the least, to hold a person liable for harm which is not intentional and which he or she is under no duty to avoid.[339]

As discussed previously, the principle in *Beaudesert* was accordingly overruled '[s]ubject to the qualification that there may be cases in which there is liability for harm caused by unlawful acts *directed against* a plaintiff or the lawful activities in which he or she is engaged'.[340]

F *Intention in the Tort of Misfeasance in Public Office*

While a detailed examination of the tort of misfeasance in public office – also an intentional tort – is beyond the scope of this article, it is apt to note that there exists some debate in relation to the precise scope of the mental element in that tort[341] which mirrors the discussion in this article relating to the mental element in the unlawful interference tort. Accordingly, some observations in this respect will be made. In the case of the misfeasance tort, however, the intentional element appears to arise in relation to two aspects – first, as to the absence of *power* and, second, as to the *risk of harm* that ensues. Some difficulties can arise in interpretation of relevant authorities as the two aspects are not always considered separately.

(footnote 337 cont'd) *Beaudesert* except where an unlawful act was 'directed against' the plaintiff. Acting Chief Justice Gray suggested that this 'qualification ... appears to have been an attempt to describe what their Honours had earlier referred to as the "emerging tort"': at [78]. Accordingly, his Honour's suggestion that the unlawful interference tort required a positive act may well be more properly seen as a reference to the 'qualified' *Beaudesert* principle. In any event, it is submitted that the unlawful interference tort as developed in the United Kingdom is not limited in principle to a 'qualified' *Beaudesert* action and that Burns, above n 336, 144, cited in this footnote demonstrates that it is not limited in operation to positive acts.

338 For a discussion of this aspect of the decision in *Mengel* and the tort of misfeasance in public office, see generally Hiley and Lindsay, above n 320; Helen Jordan, 'Obituary for *Beaudesert Shire Council v Smith*' (1995) 2 *Deakin Law Review* 275; G Orr '*Northern Territory v Mengel*: The Rule in *Beaudesert Shire Council v Smith* Applied' (1994) 2 *Torts Law Journal* 219; G Orr, 'Abrogating the *Beaudesert* Aberration: The High Court on Government Liability in *Northern Territory v Mengel*' (1996) 15 *University of Tasmania Law Review* 136; Nicholas J Mullany, '*Beaudesert* Buried' 111 *Law Quarterly Review* 583; Case Note (1995) 111 *Law Quarterly Review* 44.

339 *Mengel* (1995) 185 CLR 307, 343 (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ).

340 Ibid 345 (emphasis added). The *Beaudesert* principle, subject to this 'qualification', was applied in *Scott v DSS* [2000] FCA 1241, [16] (Beaumont and French JJ). There, the appellants claimed that they were unlawfully refused certain pensions under the *Social Security Act 1991* (Cth) by the Department of Social Security. Their Honours rejected the claim on this ground and considered that there was 'nothing in the evidence to suggest that any actions of the respondents were in any way directed against the appellants': at [16].

341 For a detailed discussion of the mental element in the tort of misfeasance in public office, see Tina Cockburn and Mark Thomas, 'Personal Liability of Public Officers in the Tort of Misfeasance in Public Office – Part 2' (2001) 9 *Torts Law Journal* 245. For the misfeasance tort generally, see the references noted in above n 338.

Lord Steyn in *Three Rivers District Council v Governor and Company of the Bank of England*[342] states that the first two elements of the misfeasance tort require that the 'defendant must be a public officer' and the actions in question must involve the exercise of functions or powers as such an officer. In relation to the third element of the tort – the mental element – there appear to be two alternatives. The first, what Lord Steyn calls 'targeted malice', is where the public officer's 'conduct [is] specifically intended to injure a person'. The other alternative involves *knowledge* that the act is beyond power and *knowledge* of harm to the plaintiff. Here, it is in relation to the requisite type and degree of *knowledge* that debate centres.

In *Mengel*, the joint judgment of Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ emphasised the intentional nature of the tort stating that:

> [T]he weight of authority here and in the United Kingdom is clearly to the effect that it is a deliberate tort in the sense that there is no liability unless either there is an intention to cause harm or the officer concerned knowingly acts in excess of his or her power.[343]

In considering the requisite mental element of the tort, their Honours considered the tort was *not* made out merely by showing 'an act of a public officer which he or she knows is beyond power and which results in damage' and sought to limit the ambit of the mental element in a manner consistent with the intentional torts, particularly interference with contractual relations:

> [P]rinciple suggests that misfeasance in public office is a counterpart to, and should be confined in the same way as, those torts which impose liability on private individuals for the intentional infliction of harm. For present purposes, we include in that concept acts which are calculated in the ordinary course to cause harm, as in *Wilkinson v Downton*, or which are done with reckless indifference to the harm that is likely to ensue, as is the case where a person, having recklessly ignored the means of ascertaining the existence of a contract, acts in a way that procures its breach.[344]

Cockburn and Thomas quote the following passage from *Mengel* to suggest that their Honours *initially* appear to accept as sufficient for the tort that the risk of harm be *foreseeable*:

> However, it is sufficient for present purposes to proceed on the basis accepted as sufficient in *Bourgoin*, namely, that liability requires an act which the public officer knows is beyond power and which involves a foreseeable risk of harm.[345]

342 The summary of the three elements of the tort in this paragraph is taken from the judgment of Lord Steyn in *Three Rivers District Council v Governor and Company of the Bank of England* [2000] 3 All ER 1, 8 ('*Three Rivers*') which is discussed further below.
343 *Mengel* (1995) 185 CLR 307, 345.
344 Ibid 347 (footnote omitted).
345 Ibid quoted in Cockburn and Thomas, above n 341, 258.

Having favourably considered that, similarly to interference with contractual relations, 'there is much to be said for the view that' the mental element was 'not confined to actual knowledge but extends to the situation in which a public officer recklessly disregards the means of ascertaining the extent of his or her power',[346] their Honours then *rejected* the constructive knowledge argument that the mental element was satisfied where the relevant officer '*ought* to have known that he or she lacked power'.[347] In this respect, their Honours considered that this equated to an argument that a public officer was 'under a duty not to exceed his or her power if there is a risk of foreseeable harm'[348] and concluded that:

> [T]he argument that misfeasance in public office should be reformulated to cover the case of a public officer who ought to know of his or her lack of power can be disposed of shortly. So far as unintended harm is concerned, the proposed reformulation suffers the same defect in relation to the law of negligence as does the principle in *Beaudesert*, namely, it serves no useful purpose if there is a duty of care to avoid the risk in question and is anomalous if there is not. And it serves no purpose if the public officer is actuated by an intention to harm the plaintiff for that constitutes misfeasance in public office whether or not the officer knows that he or she lacks authority.[349]

Justice Brennan in *Mengel* expressed the requisite mental element as acting with:

> [T]he intention of inflicting injury or with knowledge that there is no power to engage in that conduct and that that conduct is calculated to produce injury ... [or] reckless indifference as to the availability of power to support the impugned conduct and as to the injury which the impugned conduct is calculated to produce.[350]

In this respect, his Honour makes clear that the requisite mental element applies to *both* aspects of *absence of power* and *risk of harm*:

> The state of mind relates to the character of the conduct in which the public officer is engaged – whether it is within power *and* whether it is calculated (that is, naturally adapted in the circumstances) to produce injury.[351]

Justice Brennan, like the joint judgment, rejects the concepts of 'constructive knowledge' and 'foreseeability' as applicable to the misfeasance tort:

346 *Mengel* (1995) 185 CLR 307, 347.
347 Ibid 347-8 (emphasis added).
348 Ibid 348.
349 Ibid. This is also described by Cockburn and Thomas, above n 341, 258.
350 *Mengel* (1995) 185 CLR 307, 357. In relation to the requisite element of 'malice', Deane J observed that: 'Such malice will exist if the act was done with an actual intention to cause such injury. The requirement of malice will also be satisfied if the act was done with knowledge of invalidity or lack of power and with knowledge that it would cause or be likely to cause such injury. Finally, malice will exist if the act is done with reckless indifference or deliberate blindness to that invalidity or lack of power and that likely injury': at 370-1 (footnote omitted).
351 Ibid 357 (emphasis added).

> The plaintiffs submit that the requisite elements of the cause of action are satisfied by 'constructive knowledge' of the absence of power to engage in particular conduct and foreseeability of the injury suffered by the plaintiff. This submission carries concepts familiar in the law of negligence into the tort of misfeasance in public office to which, in my opinion, those concepts are foreign ... But the tort of misfeasance in public office is not concerned with the imposition of duties of care ... Causation of damage is relevant; foreseeability of damage is not.[352]

Applying these principles in *Mengel*, no action in misfeasance could succeed, as found by Brennan J:

> The findings in the present case go no further than establishing that the directions were given without power ... there was no finding that the Inspectors were acting otherwise than in good faith; nor was there a finding either that they knew they had no power to give the relevant directions or that they were recklessly indifferent to the availability of that power.[353]

In *Three Rivers*, Lord Steyn's judgment[354] in the House of Lords identified the requisite *alternative* mental elements as:

> [1] the case of targeted malice by a public officer, ie conduct specifically intended to injure a person or persons...[and]
>
> [2] ... where a public officer acts knowing that he has no power to do the act complained of and that the act will probably injure the plaintiff. It involves bad faith inasmuch as the public officer does not have an honest belief that his act is lawful.[355]

His Lordship, after citing *Mengel* and New Zealand Court of Appeal authority,[356] accepted that 'reckless indifference' satisfied the *alternative* mental element: 'It can therefore now be regarded as settled law that an act performed in reckless indifference as to the outcome is sufficient to ground the tort *in its second form*'.[357]

In this respect, Cockburn and Thomas undertake a detailed examination of United Kingdom case law relating to the mental element of the misfeasance tort, including a consideration of the decision in *Three Rivers* and the subsequent proceedings in that case.[358] The learned authors conclude that:

> It may now be taken as settled that, so far as the UK jurisdictions are concerned, some mental state with respect to the damage is required ... It also

352 Ibid 358.
353 Ibid 360.
354 With whom, in respect of the misfeasance tort, Lord Hope of Craighead and Lord Millett agreed and Lord Hobhouse of Woodborough 'substantially' agreed.
355 *Three Rivers* [2000] 3 All ER 1, 8 (paragraph numbering added).
356 Lord Steyn cites *Garrett v Attorney-General* [1997] 2 NZLR 332; *Rawlinson v Rice* [1997] 2 NZLR 651.
357 *Three Rivers* [2000] 3 All ER 1, 9 (emphasis added).
358 [2001] 2 All ER 513 cited and discussed in detail in Cockburn and Thomas, above n 341, 256-7.

> seems clear that the appropriate test is subjective in that either an actual perception (knowledge or foresight) of the likelihood (probability rather than inevitability) of harm, or reckless indifference to such consequences, must be shown by the plaintiff ...[359]

In this respect, the learned authors conclude that, under United Kingdom case law, mere foreseeability of harm is not sufficient.[360]

More recently, in the subsequent Federal Court proceedings in *Sanders v Snell (No 2)*,[361] Black CJ, French and von Doussa JJ observed that, read together, the High Court's earlier decision in that case and *Mengel* required for the mental element:

> [A]n actual intent to cause injury; *or* ... actual knowledge that his action was beyond power or reckless indifference to that possibility coupled with knowledge of or reckless indifference to the possibility that his action would cause or be likely to cause injury.[362]

Chief Justice Black, and French and von Doussa JJ reviewed various authorities on the intention element including the judgment of Lord Steyn in the first *Three Rivers* decision. Consistent with the passage from *Mengel* set out above,[363] their Honours state that, to make out the 'targeted malice' alternative of the mental element, it was *not* necessary to show 'actual knowledge of unlawfulness on the part of the public officer' citing the observations of Lord Hobhouse in *Three Rivers* in this respect.[364] Applying this to the Minister's instruction to terminate Mr Snell's contract of employment, their Honours considered that there was no 'targeted malice'. Their Honours stated:

> [I]t is not enough ... to show that the public officer wanted to terminate the contract and acted in excess of power in doing so ... [as, otherwise,] any ultra vires decision by a public officer having a foreseen adverse effect on a person would constitute misfeasance in public office ...[365]

Their Honours further stated that it was necessary to find 'an intention to terminate the plaintiff's employment *as a means* of inflicting harm upon him' and '[t]he intention to inflict harm must be "the actuating motive" for the exercise of the power'.[366] Their Honours found there was no evidence of such intention relying on findings of fact in earlier proceedings that the Minister believed that Mr Snell was incompetent.[367]

359 Cockburn and Thomas, above n 341, 257.
360 Ibid 257 (footnote omitted).
361 (2003) 130 FCR 149.
362 Ibid 174 (emphasis added).
363 See passage in the text at above n 349.
364 *Sanders v Snell (No 2)* (2003) 130 FCR 149, 177-8.
365 Ibid 178.
366 Ibid (emphasis in original). Their Honours cite *McKellar v Container Terminal Management Services Ltd* (1999) 165 ALR 409, 459 (Weinberg J).
367 *Sanders v Snell (No 2)* (2003) 130 FCR 149, 178.

In relation to the alternative mental element, this was again not satisfied as there was no 'actual knowledge of want of power or reckless indifference to the absence of power based upon want of procedural fairness' because, on the facts, the Minister had received advice couched in terms of acting fairly towards Mr Snell and not on the basis of the legality of his proposed actions.[368]

IV PART III – COMPARISON OF ACTIONS AND ILLUSTRATIVE EXAMPLES

A *Overlapping Concepts But No 'Amalgamation' of Torts*

In view of the analysis set out in the foregoing Parts of this article, the purpose of this final Part will be to demonstrate the overlapping concepts which exist between negligent infliction of economic loss (as developed in *Perre* and subsequent cases), the unlawful interference tort and the tort of interference with contractual relations. The examination will suggest possible ways in which the two intentional torts could conceivably be subsumed within the negligence tort framework. However, this will be done only for the purposes of demonstrating the conceptual and practical difficulties with such a proposal and to conclude that the intentional torts should remain separate and distinct from the negligence framework. Hypothetical examples will also be suggested to demonstrate the separate operation of the negligence and intentional torts under consideration in particular factual situations.

B *The Nature of the 'Right' Protected*

As an obvious starting point, the three torts will usually involve similar forms of loss.[369] In this respect, *Perre* demonstrates that the negligence tort may *potentially* permit recovery for conduct which *negligently* interferes with the plaintiff's contractual relations with others or its trade or business interests. Professor Feldthusen has noted problems in identifying from the decision in *Perre* the exact nature of the economic loss in that case.[370] Despite this, and of relevance to the comparison to the intentional torts, Hayne J identifies the claim in *Perre* in terms of the 'loss of *future* sales':

> For present purposes, what is of particular significance is that in each case the loss allegedly suffered is a loss said to be caused by the growers and processor being prevented from directly or indirectly selling potatoes they had grown or processed into the Western Australian market. And the loss was said to be suffered because of the loss of *future* sales. No allegation was made that the

368 Ibid 179-81. For further discussion of the intention element in the tort of misfeasance in public office, including a discussion of the decisions in *Mengel*, *Three Rivers* and the subsequent proceedings in that case, see *Perrett v Williams* [2003] NSWSC 381. In that case, Wood CJ, at [521]-[522], adopts the explanation of the intention element set out in R J Sadler, 'Intentional Abuse of Public Authority: A Tale of *Three Rivers*' (2001) 21 *Australian Bar Review* 151.

369 See *Hill v Van Erp* (1997) 188 CLR 159, 197-8 (Gaudron J).

> outbreak ... prevented any appellant from performing any existing contract for the sale, supply or processing of potatoes.[371]

Accordingly, while Hayne J here notes that no breach of *existing* contracts was claimed, it is submitted that such a claim would have similarly succeeded provided, of course, that the relevant policy factors and 'salient features' for the imposition of a duty of care were satisfied.[372]

However, some conceptual disagreement exists in relation to the precise nature of the right or interest sought to be protected by both the negligence tort and the unlawful interference tort. In the case of negligent infliction of economic loss, and putting aside the general exclusionary rule,[373] this article has noted that there is some divergence as to whether a '*right to trade*' is, without more, a right which automatically attracts protection of a duty of care. As discussed previously, Gaudron J considered that loss or impairment of such a 'right' fell within a category of liability for pure economic loss.[374] Her Honour considered that a duty would be imposed:

> where a person knows or ought to know that his or her acts or omissions may cause the loss or impairment of legal rights possessed, enjoyed or exercised by another, whether as an individual or as a member of a class, and that that latter person is in no position to protect his or her own interests.[375]

Interestingly, this formulation (putting aside the vulnerability of the plaintiff's interests) shares some common ground with the well-known principle in the intentional torts identified by Lord MacNaghten in *Quinn v Leathem*[376] that 'a violation of a legal right committed *knowingly* is a cause of action'.[377] Justice Gaudron's formulation, however, encompasses both actual knowledge and, again, the familiar concept of what the reasonable person in the position of the plaintiff *ought* to know (constructive knowledge). In *Hill v Van Erp*, her Honour herself drew a similar comparison between negligence and the intentional torts stating that it was 'not legitimate to infringe the legal rights of others ... whether ... intentionally or negligently'.[378]

As noted previously, however, McHugh J did not consider that a 'right to trade' should attract a duty of care on the sole ground that a defendant can 'control' that right.[379]

370 Feldthusen, 'Pure Economic Loss in the High Court of Australia: Reinventing the Square Wheel?', above n 44, 35-6. Professor Feldthusen discusses the nature of the various claims in detail at 44-6.
371 *Perre* (1999) 198 CLR 180, 297 (emphasis in original).
372 As noted in the text at above nn 127-35, McHugh J and Hayne J considered that no duty of care was owed to the Perre's processing interests.
373 See discussion in Part I(A).
374 See discussion in the text at above nn 136-7.
375 *Perre* (1999) 198 CLR 180, 202, noted in the text at above n 137.
376 [1901] AC 495 ('*Quinn v Leathem*').
377 Ibid 510 (emphasis added) cited in Glasbeek, above n 185, 189; Owen, above n 185, 57.
378 *Hill v Van Erp* (1997) 188 CLR 159, 198.
379 See discussion in the text at above nn 138-40.

Some disagreement also exists in the case of the unlawful interference tort. Sales and Stilitz suggest that the tort of unlawful interference should apply to *any* cases of loss.[380] Accordingly, they suggest 'intentional infliction of harm by unlawful means' as the correct formulation of the tort.[381] Bentil, by contrast, observes that 'the decision of the Court of Appeal in *Fayed and Others* appears to suggest that the tort seeks to protect only business or commercial interests which are capable of giving rise to legal rights'.[382]

C *Overlap Between 'Intentional' Conduct and the Tort of Negligence*

While the discussion in Part II of this article demonstrates that even actual knowledge or foresight of 'inevitable harm' – in the absence of the requisite intent – is insufficient to found liability in the unlawful interference tort,[383] 'intentional' acts or omissions may, however, comprise 'negligent' conduct. Professor White has written that:

> 'Carelessness' cannot, however, be restricted – as Pollock suggests and Williams allows – to a 'failure to take precautions against harm'; it must include also a failure to *attend* to the likely risks involved in an action and to the appropriate precautions against them. Failure to take precautions ... may indicate lack of care, but it may equally indicate deliberate intent.[384]

In this respect, Fitzgerald states that 'in the law of tort ... different degrees of culpability are in general irrelevant' and that '[t]his being so, there is no absurdity in the law's refusal to distinguish between wilful negligence and non-wilful negligence'.[385] In an important distinction for the purposes of this article's consideration of negligence and the intentional tort, the author suggests

380 Sales and Stilitz, above n 2, 431. In *Scott v Pedler* [2003] FCA 650, the applicants alleged that the respondents, who were officers of the Department of Social Security, had failed to make various decisions in relation to the granting, reviewing or changing of the benefit rate of certain pensions. Acting Chief Justice Gray appears to assume, but without deciding, that the unlawful interference tort could extend to non-business interests: 'Further, if the tort exists in Australia, *and if it is not limited to interference with trade or business interests*, it nonetheless requires an intention on the part of the alleged tortfeasor to injure': at [79] (emphasis added). His Honour concluded (also at [79]) that the requisite intention was not made out. The applicants' appeal was dismissed. See *Scott v Pedler* [2004] FCAFC 67, [71], [95], [102]-[103] (Conti J with whom Gyles and Allsop JJ agreed).

381 Sales and Stilitz, above n 2, 411.

382 See Bentil, above n 185, 524.

383 See discussion in Parts II(C)-(F).

384 Alan R White, 'Carelessness, Indifference and Recklessness' (1961) 24 *Modern Law Review* 592, 593 (emphasis in original). Here, for the quoted phrase, the author cites Frederick Pollock, *Torts* (14th ed, 1939) Ch 11; Glanville Williams, *Salmond on Jurisprudence* (11th ed, 1957) 142 *et seq.* For a more detailed examination of the mental states and conduct which are implicit in notions of intentional and negligent conduct, see Holmes, above n 247; Henry W Edgerton, 'Negligence, Inadvertence, and Indifference; The Relation of Mental States to Negligence' (1926) 39 *Harvard Law Review* 849; P J Fitzgerald, 'Carelessness, Indifference and Recklessness: Two Replies Part I' (1962) 25 *Modern Law Review* 49; Alan R White, 'Carelessness and Recklessness – A Rejoinder' (1962) 25 *Modern Law Review* 437; Glanville Williams, 'Carelessness, Indifference and Recklessness: Two Replies Part II' (1962) 25 *Modern Law Review* 55; James Gordley, 'Responsibility in Crime, Tort, and Contract for the Unforeseeable Consequences of an Intentional Wrong: A Once and Future Rule?' in Cane and Stapleton (eds), above n 80, 175.

385 Fitzgerald, above n 384, 51.

modifying Pollock's formulation so that 'carelessness' is defined as 'failure to take precautions against harm, *provided that such failure is not due to the defendant's deliberately aiming at the harm*'.[386] It is here relevant to again highlight that this formulation adopts the dividing line between 'negligence' and the requisite intention in the unlawful interference tort – that the (unlawful) conduct be in some way *aimed at* or *directed against* the plaintiff.[387]

To demonstrate the overlap between 'intentional' conduct and the negligence tort, and to suggest a possible formulation for subsuming the intentional torts under consideration within the negligence framework, it is useful to briefly consider two decisions in California on recovery for negligently inflicted economic loss which appear, at first impression, to include elements of intentional conduct.

Prosser and Keeton note that in *J'Aire Corp v Gregory*[388] the California Supreme Court held the defendant liable in negligence in the absence of physical damage or separate tort[389] – which (ignoring Apand's breach of the *Fruit and Plant Protection Act 1968* (SA))[390] was also the case in *Perre*.

In *J'Aire*, the appellant was a party to a lease of a restaurant from the County of Sonoma. The lessor County contracted with the respondent builder to undertake building works at the restaurant. The appellant (successfully) argued that it had incurred lost profits of $50,000 due to the length of time taken in finishing the works.[391]

The Supreme Court's opinion was delivered by Bird CJ who stated:

> Even when only injury to prospective economic advantage is claimed, recovery is not foreclosed. Where a special relationship exists between the parties, a plaintiff may recover for loss of expected economic advantage through the negligent performance of a contract although the parties were not in contractual privity ...
>
> In each of the above cases, the court determined that defendants owed plaintiffs a duty of care by applying criteria set forth in *Biakanja v Irving*. Those criteria are (1) *the extent to which the transaction was intended to affect the plaintiff,* (2) *the foreseeability of harm to the plaintiff*, (3) *the degree of certainty that the plaintiff suffered injury*, (4) the closeness of the connection between the defendant's conduct and the injury suffered, (5) the moral blame attached to the defendant's conduct and (6) the policy of preventing future harm.[392]

386 Ibid 51-2 (emphasis added).
387 See discussion in Part II(C).
388 24 Cal 2d 799 (Cal, 1979) ('*J'Aire*') cited in Keeton (ed), above n 247, 1001. A detailed examination of this case in the context of recovery for negligently inflicted economic loss is contained in Rabin, above n 61.
389 Keeton (ed), above n 247, 1001-2.
390 See discussion in Part I(B).
391 *J'Aire*, 24 Cal 2d 799 (Cal, 1979). See also Rabin, above n 61, 1517.
392 Ibid (citation omitted and emphasis added). The omitted citation is to *Biakanja v Irving*, 49 Cal 2d 647 (Cal, 1958) ('*Biakanja v Irving*'). This case is cited in Godwin, above n 14, 694. These factors also appear in Rabin, above n 61, 1518, who cites 49 Cal 2d 647, 650 (Cal, 1979); and Godwin, above n 14, 694. See also Keeton (ed), above n 247, 1001-2, 1008-9.

Chief Justice Bird considered that the builder owed the tenant a duty of care, applying the first three criteria from *Biakanja v Irving* in the following way:

> (1) ... The contract could not have been performed without impinging on [the lessee's] business. Thus respondent's performance was intended to, and did, directly affect appellant. (2) Accordingly, it was clearly foreseeable that any significant delay in completing the construction would adversely affect appellant's business beyond the normal disruption associated with such construction ... (3) Further, appellant's complaint leaves no doubt that appellant suffered harm since it was unable to operate its business for one month and suffered additional loss of business while the premises were without heat and air conditioning ...[393]

Rabin considers the decision 'as no great surprise' and emphasises that the 'defendant was engaged specifically to confer a benefit on [the] plaintiff'.[394] Rabin contrasts the situations 'where the victim cannot be identified in advance with such confidence, or where the consequences for the plaintiff seem distinctly collateral as compared to the harm suffered by others'.[395]

However, despite the literal wording of the first element, it appears that this element cannot be equated to the 'directed at' requirement[396] of the unlawful means in the unlawful interference tort. Prosser and Keeton note that this element 'apparently does not require any intent to harm [the plaintiff], only a certainty that he would be affected'.[397] If, as this would imply, the first element is in fact more akin to the concept of foresight or knowledge of 'inevitable harm'[398] than intent, it is difficult to see what, if any, is the scope of operation of the third element – 'the degree of certainty that the plaintiff suffered injury'. This explanation would, however, appear to therefore exclude the case from application of the prima facie tort doctrine on the grounds of absence of the requisite intentional conduct. Anderson notes, however, that '[n]o State currently applies the *Biakanja* test'.[399]

D *Knowledge in Negligence and Interference with Contractual Relations*

A proposed 'amalgamated' tort which subsumed the two intentional torts into the negligence tort could conceivably allow recovery for the various forms of knowledge or intention examined – actual or constructive knowledge,

393 *J'Aire*, 24 Cal 2d 799 (Cal, 1979).
394 Rabin, above n 61, 1521. For a critique of the decision in *J'Aire*, see Gary T Schwartz, 'Economic Loss in American Tort Law: The examples of *J'Aire* and of Products Liability' (1986) 23 *San Diego Law Review* 37. The author notes '[w]hile Professor Rabin seems strongly sympathetic to the court's pure negligence analysis, I find that analysis somewhat facile': at 40 (footnote omitted). These countervailing articles are also noted in Keeton (ed), above n 247, Supplement Chapter 24, 139.
395 Rabin, above n 61, 1521.
396 See discussion in Part II(C).
397 Keeton (ed), above n 247, 1008.
398 See discussion in the text at above nn 299-308.
399 Helen Anderson, 'Liability trends in the USA and their relevance for Australian auditors' (2001) 13 *Australian Journal of Corporate Law* 19, 23.

recklessness and (unlawful) conduct 'aimed at' or 'directed against' the plaintiff. That negligence may include both 'non-wilful' and 'wilful' conduct has been discussed.[400] On one (perhaps simple) view, the latter two forms of knowledge could merely be considered 'elevated' versions of foresight, thus there would (other things being equal) be no widening of the range of plaintiffs already permitted by the negligence action. However, conceptual difficulties, it is submitted, stand in the way of collapsing negligence and the intentional torts under consideration in this way.

In favour of amalgamation, it is submitted that the operation of '*knowledge*' in negligence for pure economic loss shares some similarity to constructive knowledge in the tort of interference with contractual relations[401] as this factor includes not only actual knowledge but also the concept of the defendant having the 'means of knowledge'.[402] In negligence, where the defendant has the *means* of knowledge, the relevant knowledge will be imputed to the reasonable person in the position of the defendant by whose standard the conduct of the defendant is judged. To similar effect as the operation of constructive knowledge in interference with contractual relations, then, this factor operates to extend the range of potential plaintiffs (but the risk of indeterminate liability in the negligence tort is, again, eliminated by reference to the 'individual' and 'ascertainable class' concepts).[403]

However, in comparing constructive knowledge in these two torts, it appears that the scope for operation of constructive knowledge in the case of *negligent* infliction of economic loss will be limited. It will be recalled that McHugh J in *Perre* expresses caution in the adoption of constructive knowledge in cases of negligent interference with contract. His Honour observes that '[w]hile the defendant might reasonably foresee that the first line victims might have contractual and similar relationships with others', 'second line' or 'ripple effect' victims are unlikely to be within the relevant class.[404] This is illustrated in hypothetical examples below.[405]

In addition, the constructive knowledge concepts in the two torts are clearly not identical. Constructive knowledge in negligence, which may be constituted by a variety of factors or considerations, is essentially the familiar concept of what the reasonable person in the position of the defendant *ought* to have known in the relevant circumstances. It is by the standard of that objective reasonable person that the defendant's conduct is judged. As noted previously, constructive knowledge in the interference with contract tort, by contrast, arises from a 'reckless disregard' or 'wilful blindness' of the means of ascertaining the terms of

400 See the comments of Fitzgerald, above n 384, 51, set out in the text at n 385.
401 See discussion in Part II(D).
402 See discussion in the text and footnotes at above nn 122-6.
403 See discussion in the text and footnotes at above nn 122-6.
404 See discussion in the text at above nn 63-8.
405 See hypothetical situations discussed in the text below under the sub-heading '*Vulnerability and the Contractual Background*'.

a contract.[406] This, however, falls far short of imposing liability for 'negligent' acts in the sense of conduct which *merely* – that is, without more – falls below the relevant objective standard of the reasonable person. Again, as discussed previously, it is clear that '[i]gnorance of the existence of the contract or of its terms born of inadvertence or negligence is not enough' to found liability in the interference tort.[407]

E *Knowledge in Negligence and Intention in the Unlawful Interference Tort*

The requirement in the unlawful interference tort that the unlawful means be *directed against* or *aimed at*[408] the plaintiff operates to limit the operation in that tort of the constructive knowledge or recklessness principle. This is to the extent, given Mitchell's view, that it is at all applicable to the unlawful interference tort. As discussed previously, the learned author notes that, under the unlawful interference tort, 'it would be irrelevant whether or not the defendant had *any* knowledge of the plaintiff's contractual relations'.[409]

As discussed previously, even *actual* knowledge or foresight of '*inevitable* harm' – in the absence of the requisite intent – is insufficient to found liability in the unlawful interference tort.[410] Accordingly, it can be seen that the requisite intention does not include constructive knowledge in the sense of (unlawful) conduct which *merely* – that is, without in any way being directed against or aimed at the plaintiff – falls below the relevant objective standard of the foresight (actual or constructive) of the 'reasonable person' in the tort of negligence.

1 *Hypothetical Example 1*

A consideration of a hypothetical situation involving the facts of *Perre* itself demonstrates this distinction. It will be recalled that the *Fruit and Plant Protection Act 1968* (SA) banned Apand from bringing the diseased seeds into South Australia. Further, Apand's internal memoranda highlighting potential harm to farms inside the 20 kilometre quarantine zone evidenced, in Gleeson CJ's view, 'actual foresight of the likelihood of harm, and knowledge of an ascertainable class of vulnerable persons'.[411]

Though not considering the question for the purposes of the unlawful interference tort, it will also be recalled that Hayne J considered that *intentionally* importing the seeds into South Australia was illegal.[412] Assuming that such a breach of

406 See discussion in Part II(D).
407 *Tszyu v Fightvision* (1999) 47 NSWLR 473, 512 (Sheller, Stein and Giles JJA). See passage quoted in the text at above n 318.
408 See the view of Lord Wedderburn, *Clerk & Lindsell on Torts*, above n 185, 1246, set out in the text at above n 277 and the discussion in Part II(C).
409 Mitchell, above n 185, 450 (emphasis added).
410 See discussion in the text at above nn 299-308.
411 *Perre* (1999) 198 CLR 180, 194-5. See discussion in the text at above n 124.
412 See discussion in the text at above nn 100-3.

legislation would constitute 'unlawful means' for the unlawful interference tort,[413] it is clear that the requisite intention element of that tort would still not be made out. On the facts of *Perre*, it is clear that such an unlawful act was in no way directed against or aimed at any of the Perre interests. It is submitted that the position can be expressed in the terms adopted by Cooke J in *Van Camp Chocolates*[414] – while Apand foresaw the 'incidental interference' to the Perre interests as a result of its conduct, 'the reasons which actuate[d] the defendant to use unlawful means [ie, in this case, unlawfully importing the seeds] are wholly independent of a wish to interfere with the plaintiff's business'.[415] Alternatively, such a result could be justified in the terms adopted by Sales and Stilitz to explain the decision in *Lonhro v Shell* – that breach of the South Australian Act was not aimed at, in this case, the Perre interests and that 'any harm ... was incidental to their primary motivation of improving their own positions'.[416]

In theory, then, and to prevent unduly widening the range of plaintiffs, 'subsuming' the unlawful interference tort into the negligence tort would require some form of limiting mechanism to replace the 'directed at' requirement. This could conceivably only be done in the 'amalgamated' negligence tort by requiring the plaintiff to establish a duty of care (or some sort of akin relationship of closeness or proximity), a requirement which need not be shown for either of the intentional torts under consideration. Judicial support for this may be found in *Hill v Van Erp* where Gaudron J observes in relation to various intentional torts (in particular, interference with contractual relations):

> [T]he policy questions which necessitate that there be a special relationship of proximity in cases of pure economic loss do not arise. No question arises as to the possibility of liability in an indeterminate amount for an indeterminate time to an indeterminate class ... Nor is there any question of liability for actions which, by community standards, are legitimate in the pursuit of personal advantage.[417]

Accordingly, 'collapsing' the torts in the manner theoretically proposed is to seek to combine incongruous principles for attaching liability. Further, this could lead to substantial injustice given the negligence tort's reluctance to extend the duty of care to 'second-line' victims[418] and add complexity (and cost) to the intentional actions as they presently exist.

413 As to whether a breach of legislation would *automatically* constitute unlawful means, see the divergent approaches noted at above nn 258-65.
414 See discussion at above n 290-2.
415 See quotation in the text at above n 291.
416 Sales and Stilitz, above n 2, 427. See also discussion at above n 302-3.
417 *Hill v Van Erp* (1997) 188 CLR 159, 198. A similar observation appears in *Guiseppe Emanuele* [1998] 709 FCA, where, in this respect, Wilcox, Miles and R D Nicholson JJ state that '[t]he pleading does no more than assert a duty of care and breach of that duty, matters immaterial to an intentional tort': at 7.
418 See discussion in the text at above nn 63-6.

F *The Unlawful Means Element and 'Illegitimate' Conduct in Negligence*

As discussed previously,[419] the rationale for the 'unlawful means' requirement in the unlawful interference tort is similar to the policy factor or consideration in negligence of protecting legitimate business conduct. However, 'subsuming' the unlawful interference tort into the negligence tort framework would require removal, or at least some alteration, of the 'unlawful means' requirement to subsume this element within the 'salient features' approach. This could conceivably remove conceptual difficulties surrounding this element such as distinctions between civil and criminal wrongs and the divergent approaches as to whether breach of legislation amounts to unlawful means.[420] Further, it is submitted, the distinction between direct and indirect interference with contract could also therefore be removed as would the necessity to engage in distinctions made by the High Court between acts which are 'unauthorised' and those 'forbidden by law'.[421]

In the case of the negligence tort, the various observations of the members of the High Court discussed earlier indicate that while negligence principles will not generally interfere with *legitimate* business conduct, a duty of care is very likely to be imposed where that conduct is illegal. In this respect, the commission of an unlawful act *directed against* or *aimed at* the plaintiff is the cornerstone of the unlawful interference tort. This comparison is not to suggest that there is any general duty of care to avoid the commission of any illegal or otherwise unlawful act – as McHugh J suggests, clearly there is not.[422] Instead, it is to be observed that the operation (putting aside questions of the requisite intention) of the two torts may 'converge' in such circumstances. This convergence – and the implications for the existence or exclusion of a duty of care – was demonstrated in the approach of Hayne J to the duty of care question in *Perre*.[423]

However, the following hypothetical examples demonstrate the difficulties in reconciling (and therefore amalgamating) conduct or means which is 'unlawful' for the purposes of the intentional torts and that which is *not* 'legitimate' business conduct in the negligence tort.

1 *Hypothetical Example 2*

Suppose a trader (D2) engages in deceptive conduct in relation to the sale or promotion of a product towards a customer (B2) with the intention of harming a trade rival (P2) by taking business away from P2. Such conduct by D2 constitutes misleading and deceptive conduct in breach of s 52 of the TPA.[424]

419 See discussion in Part II(B).
420 See discussion in the text at above nn 258-65.
421 See discussion in the text at above nn 269-70, 275.
422 See discussion in the text at above n 74.
423 See discussion in the text at above nn 100-3.
424 Section 52 provides that '[a] corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive'.

2 *Hypothetical Example 3*

Alternatively, suppose a retailer of goods (D3), with the intention of harming its trade rival (P3), entered into an agreement (or an understanding) with its supplier (B3) pursuant to which D3 agreed to acquire goods from B3 on the condition that B3 did not sell goods to P3.[425] Such conduct by D3 constitutes a breach of s 47 of Part IV of the TPA.

In hypothetical examples 2 and 3, let us *assume* that the breach of the relevant provision would constitute 'unlawful means' for the purposes of the unlawful interference tort.[426] Clearly, in each hypothetical example, the requisite intentional element is satisfied as the unlawful conduct is clearly aimed at P2 and P3.

3 *Hypothetical Example 4*

As a further hypothetical example, let us consider the facts of another well-known case. It is interesting to consider whether the facts in a case such as *Daily Mirror*

425 This example is similar to the facts of *Fairbairn Wright & Co v Levin & Co* (1914) 34 NZLR 1 cited in and discussed by Sales and Stilitz, above n 2, 416.

426 See discussion of the divergent approaches to whether a breach of legislation constitutes 'unlawful means' discussed in the text at above nn 258-65. See also the observations of Berry, above n 185, 547, set out in the text at below n 444, where the author concludes that the unlawful interference tort does not apply where the relevant legislation gives the plaintiff a 'specific remedy'. In the case of the TPA, a breach of s gives rise to civil remedies, including an action for damages under s 82, to any 'person who suffers loss or damage by conduct of another ... in contravention of a provision of Part ... V' (which includes s 52). This would extend to the rival trader (P2) in hypothetical example 2. Where, however, the claim is framed as a breach of s 53 of the Act (which covers various specific false representations extending to, for example, standard, quality, price and place of origin), in addition to damages under s 82, the corporation contravenes a statutory offence under s 75AZC of Part VC of the Act (s 53 is, in effect, reproduced in s 75AZC of Part VC). In addition, under s 79, an offence exists for, among other things, aiding and abetting, being knowingly concerned in or conspiring in such a contravention. Similarly, a contravention of s 47 of Part IV of the Act sounds in damages under s 82 (which would again extend to P3). In addition, under s 76, a person who contravenes a provision of Part IV is liable to pay to the Commonwealth a pecuniary penalty. Accordingly, P2 and P3 have remedies under the Act without resort to the unlawful interference tort. Despite the above, a breach of s 52 was alleged, among other conduct, as constituting unlawful means for the purposes of the tort of *conspiracy by unlawful means* in *Dresna* [2004] FCAFC 169 described in the footnotes at above nn 263, 279, 283. Without specifically discussing the point, the judgments of the Full Court of the Federal Court appear to accept that a breach of s could amount to unlawful means for the conspiracy tort. In this respect, Keifel and Jacobson JJ considered, at [34]-[35], that certain alleged representations made by the vendor of a supermarket business in a submission to the Australian Competition and Consumer Commission were arguably 'in trade or commerce' within the meaning of s 52. Justice Marshall agreed at [66]. In addition, three Justices of the High Court appear to suggest (only in passing it is conceded) that certain practices may attract liability under the intentional torts *and* also constitute breaches of Part IV of the TPA for which, as stated above, there is a remedy of damages under s 82. In *Boral Besser Masonry Ltd (now Boral Masonry Ltd) v Australian Competition and Consumer Commission* (2003) 215 CLR 374, Gaudron, Gummow and Hayne JJ observed in relation to 'predatory pricing': 'However the Act has never contained any specific and comprehensive prohibition of a practice of cutting prices to below cost ... It is true that injury to a trade rival by price-cutting in some circumstances may attract liability in tort, *under one or more of the intentional economic torts* as they are, so far, understood in Australia.. *Further, if contravention of Pt IV by one firm be established, another firm may, for example, recover under s 82* its loss or damage suffered by that conduct': at 429-30 (footnote omitted and emphasis added).

Newspapers[427] could nonetheless give rise to a duty of care to avoid the negligent infliction of economic loss. It will be recalled that, in that case, the relevant retailers' federation (D4) boycotted the plaintiff publisher (P4) for one week by sending 'stop notices' to the relevant newspaper wholesalers (B4). Lord Denning considered the notices to breach the *Restrictive Trade Practices Act 1956* (UK) and, therefore, to be unlawful means.[428] Let us again *assume* that such conduct would, in Australia, also amount to a contravention of Part IV of the TPA.

In terms of the factors identified by the High Court in *Perre* for the imposition of a duty of care, it is clear that economic loss to P2, P3 and the plaintiff publisher P4 would be reasonably – in fact actually – foreseeable and many of the 'salient features' would exist. In all three examples, there would be no indeterminate liability nor would it be necessary to rely on concepts of any 'ascertainable class' as there would be *knowledge* that the plaintiff *individually* would be harmed within the principle in *Caltex Oil*. Further, in the *Daily Mirror Newspapers* example, it could conceivably be argued that D4 could exercise 'control' over P4's 'right to trade' by its ability to send directions to its members and that, consequently, P4 was 'vulnerable' to the federation's conduct because it could not take protective measures (for example, through contractual warranties, there being no contract between the publisher and individual retailers). The 'salient feature' of 'control' is less relevant – or for that matter, applicable – in example 2 although P2, again, is unlikely to be able to protect itself from the effect of the conduct. In example 3, however, D3 could be argued to be able to 'control' P3's 'right to trade' by (unlawfully) agreeing with B3 to cut-off P3's supplies and so, again, P3 may be said to be 'vulnerable' to D3's conduct because it could not take any protective measures. It may also be submitted that imposing a duty of care would not interfere with the *autonomy of the individual* or the *legitimate* or lawful pursuit by D2, D3 or D4 of its activities as the conduct is in contravention of the TPA.

However, in terms of the negligence tort, it is submitted that it is unlikely that the High Court would impose a duty of care in any of the hypothetical situations suggested above on the grounds of the *nature* of the relevant conduct. As McHugh J suggests in *Perre*:

> However, it does not follow that, other indicia of duty being present, a person will always lose the immunity given to protect the autonomy of the individual merely because his or her conduct has been done in breach of law. It would be curious if *breach of s 52, or a provision of Pt IV, of the Trade Practices Act 1974* (Cth) automatically meant that the defendant owed a common law duty of care to all those that he or she knew would be affected by the breach. Between the extremes are acts whose legitimacy will no doubt affect minds differently. They are likely to involve sharp or ruthless conduct. *Perhaps no more can be said in the abstract than that the line of legitimacy will be passed only when the conduct is such that the community cannot tolerate it.*[429]

427 *Daily Mirror Newspapers* [1968] 2 QB 762.
428 Ibid 782-3. See discussion in the text and footnote at above nn 199-200.
429 *Perre* (1999) 198 CLR 180, 225 (emphasis added).

In any event, it is clear that difficulties commensurate with those which arise in the unlawful interference tort in relation to the identification of 'unlawful means' also arise in predicting when a 'breach of law' or otherwise 'illegitimate' conduct will give rise to a duty of care. McHugh J in *Perre* states that:

> Competitive acts not prohibited by law are legitimate unless they fall within the ambit of one of the economic torts to which I referred in *Hill v Van Erp* ... conduct involving deceit, duress or intentional acts prohibited by law could seldom, if ever, be regarded as done in the legitimate protection or pursuit of one's interests.[430]

Given the difficulties in categorising which conduct or means is 'unlawful' for the purposes of the economic torts, it is submitted that it is likely to cause further uncertainty to determine 'legitimate' acts in negligence by reference to those torts. Further, within the negligence tort itself, problems of definition and consistency also exist. In the above passage, for example, McHugh J described illegitimate acts by reference to 'community standards' which, while clearly likely to encompass breaches of the law (to use a neutral term), may also *conceivably* encompass conduct much wider than merely 'unlawful means' (whatever the scope of that expression in the unlawful interference tort).[431]

However, as noted previously, McHugh J also considered that a defendant did not 'automatically' owe a duty of care on the sole ground that its activities were illegal.[432] It would be necessary, to establish the duty, to establish the existence of other 'salient features'. If that is the case, the 'amalgamated' negligence tort would be likely to render tortious some, but not all, 'unlawful means' presently rendered tortious by the unlawful interference tort and again introduce an additional requirement (to show 'salient features') which need not be established for either of the intentional torts under consideration.

G *Statutory 'Pre-emption', Negligence and the Unlawful Interference Tort*

To continue the consideration of the above hypothetical examples, McHugh J in *Perre* does not appear to expand further on the reasons why breach of the relevant provisions, s 52 and Part IV of the TPA, would not give rise to imposition of the relevant duty. On the grounds of policy suggested by McHugh J himself in *Perre* and discussed previously, it may be that imposing a duty in such circumstances would be inconsistent with recognised principles of a different area of law.[433] In such a case, a duty of care is unlikely to be imposed. It will be recalled that McHugh J states in *Perre* that:

430 Ibid 224-5 (emphasis added). See also *Perre* (1999) 198 CLR 180, 290 (Kirby J).

431 See the comments of Gaudron J noted in the text at above n 70 and those of McHugh J noted in the text at above n 429.

432 *Perre* (1999) 198 CLR 180, 224-5.

433 Ibid 226-7 (McHugh J). See also the discussion in the text and footnote at above nn 147-64. On a similar theme in relation to the unlawful interference tort, see Sales and Stilitz, above n 2, 420, 423-4.

> In the twentieth century, many areas of economic activity are extensively regulated by legislation and regulations. The judgment of Brennan CJ in *Pyrenees* shows that the potential for interference with such a body of law is vitally important in determining whether a common law duty of care should be imposed on a defendant.[434]

However, while this policy factor or consideration may be applicable to any relevant recognised 'body of law', statutory provisions also raise questions of statutory 'pre-emption'.[435] More recently in *Graham Barclay Oysters No 2*, Kirby J expressly considered whether the TPA provisions relating to defective goods excluded a duty of care.[436] His Honour assumed without further considering that both could 'exist concurrently' as the question had not been argued.[437] However, in this respect, his Honour observed that it was necessary to ask if:

> a legislature ... has, in effect, completely and exhaustively covered the applicable subject matter of legal regulation, [in which case] it will not be competent for a court to add to the legislative design additional and inconsistent legal duties which the court attributes to general principles of the common law.[438]

As noted above, more recently in *Johnson Tiles No 5*, Gillard J concluded that the Victorian Parliament had 'regulated all aspects of the gas industry from the supply of gas by Esso at the tailgate' and denied a duty of care on this ground.[439]

In *Graham Barclay Oysters No 2*, Gaudron J also considers whether various sections of the TPA excluded a duty of care, with emphasis on ss 52 and 75AD (the latter again relating to defective goods).[440] Her Honour considered that:

> Were the general law of negligence to develop to a point where, in circumstances in which ss 52 and 75AD operate, it imposed more onerous obligations than are imposed by those provisions, it would, in my view, be necessary to consider whether those provisions had supplanted the general law. And the same may well be true of other provisions in the Act. However, as the reasons of Gummow and Hayne JJ demonstrate, the general law of negligence has not yet developed to that point.[441]

434 *Perre* (1999) 198 CLR 180, 226. This passage is cited and applied by Gillard J in *Johnson Tiles No 5* [2003] VSC 27, [1166]. See also *Sullivan v Moody* (2001) 207 CLR 562, 579-80.

435 This term is taken from the judgment of Kirby J in *Graham Barclay Oysters No 2* (2002) 211 CLR 540, 622.

436 Ibid 621-2.

437 Ibid 622. Gummow and Hayne JJ make the same assumption, noting that '[t]he relationship between ... the *Trade Practices Act* and ... negligence ... has not been examined in detail in any decision of this Court': at 591. See also *Carey-Hazell v Getz Bros & Co (Aust) Pty Ltd* [2004] FCA 853, [215] (Kiefel J).

438 *Graham Barclay Oysters No 2* (2002) 211 CLR 540, 621. Gummow and Hayne JJ noted that '[i]t remains to be seen whether some adaptation of the "pre-emption" doctrine may apply in the development of the Australian common law': at 591.

439 *Johnson Tiles No 5* [2003] VSC 27, [1188]-[1189]. See discussion in the text at above nn 176-8.

440 *Graham Barclay Oysters No 2* (2002) 211 CLR 540, 570-1.

441 Ibid 570. For an examination of the relationship between negligence causing pure economic loss and the TPA in the context of 'design professionals', see Stewart Muirhead, 'The Liability of Design Professionals For Economic Loss and the Apportionment of Damages under the Trade Practices Act 1974' (2002) 18 *Building and Construction Law* 180.

However, her Honour suggested that some similarities existed between the enquiries necessary under the TPA and negligence and gave some examples in this respect.[442]

While a detailed consideration of the 'pre-emption' doctrine is beyond the scope of this article, it is submitted for the purposes of the comparison in this article that the doctrine may, if developed, have important ramifications for the question of whether a duty of care will be imposed in cases of pure economic loss where statutory provisions such as the TPA arguably provide comprehensive regimes for the recovery of loss as a result of breaches of the relevant provisions. This is particularly so, it is submitted, given the importance of a breach of the law (to use a neutral term) or otherwise 'illegitimate' act as a 'salient feature' for the imposition of a duty of care. Assuming the development of the 'pre-emption' doctrine, the observations of the High Court and the decision in *Johnson Tiles No 5* suggest that once a court determines that the defendant's conduct involves the breach of a statutory provision, a successful plea of 'pre-emption' will avoid the imposition of a duty of care.

It appears also that the development of such a doctrine would affect the development of the unlawful interference tort and other economic torts in Australia where the relevant 'unlawful means' sought to be relied upon is a contravention of a statutory provision which provides remedies not only for the 'immediate' injured party but also for other parties who suffer harm as a result of the breach. In the case of s 52 and Part IV of the TPA, the relevant provisions provide for remedies for P2, P3 and P4 in the hypothetical examples given above.[443] In this respect, Berry has concluded that:

> in the context of the breach of statutory provisions it appears that if a statute provides specific remedies which may be pursued by individuals for breaches of such statute, it is not possible to commence a distinct and separate innominate tort action asserting that the unlawful act was provided by the breach of the relevant statutory provision.[444]

442 *Graham Barclay Oysters No 2* (2002) 211 CLR 540, 570-1.

443 See the discussion in the footnote at above n 426. Note also the discussion in that footnote of *Dresna* [2004] FCAFC 169 where a breach of s 52 was alleged, among other conduct, as constituting unlawful means for the purposes of the tort of *conspiracy by unlawful means*. As noted above, without specifically discussing the point, the judgments of the Full Court of the Federal Court appear to accept that a breach of s 52 could amount to unlawful means for the *conspiracy* tort.

444 Berry, above n 185, 547. The author there cites *Broadlex Pty Ltd v Computer Co Pty Ltd* (1983) 50 ALR 92, 95; *Aristotite v Gladstone Shopping Centre Pty Ltd* (1983) 5 ATPR 40-370, 44-413. In *Perre* (1999) 198 CLR 180, Gummow J states: 'It remains to be seen whether any such "pre-emption" doctrine, operating beyond s 109 of the Constitution (which deals with conflict between federal and state laws), may apply in the development of the Australian common law respecting the "economic torts". Significantly, some of the anti-competitive practices forbidden by Pt IV of the *Trade Practices Act* (ss 45-51AAA) do not require purposeful abuse of market power and instead fix upon a prescribed anti-competitive effect': at 247 (footnote omitted). In *Terranora Leisure Time Management Ltd (in liq) v Harris* [2002] QSC 424, Moynihan J, by way of *obiter*, considered, at [37], that the *Corporations Law* was an 'exclusive source of remedy for breach of its provisions' so that a breach of s 232 *Corporations Law* (improper use of position by officer or employee of a corporation) could not constitute unlawful means for the tort of *conspiracy by*

H *Vulnerability and the Contractual Background*

The plaintiff's 'vulnerability' to the defendant's conduct is, of course, an important 'salient feature' in establishing the imposition of a duty of care. However, this concept raises some difficulties in the way of 'collapsing' the intentional torts under consideration into the negligence framework.

As noted previously, in the contractual context, the question of vulnerability may be affected by the plaintiff's ability to obtain contractual warranties or to take other protective measures. Where such warranties or measures are available to the plaintiff, it is less likely that a duty of care will be imposed on the defendant.[445]

Consider the following two hypothetical examples 5 and 6. Importantly, the following examples, it is submitted, also demonstrate why a separate unlawful interference tort is required – that is, where the plaintiff would succeed in the unlawful interference tort but not in negligence. In this respect, Cockburn and Thomas consider suggestions made in the appeal hearing in *Tepko* that 'the misfeasance claim was unnecessary ... if the negligence action was successful' and 'if the negligence action failed, then misfeasance could not succeed'.[446] The learned authors disagree with the second proposition on the basis that a court may refrain from recognising a duty of care on policy grounds but that, provided the requisite intention for the misfeasance claim existed, the latter claim could be made out.[447] Similarly, it is submitted that, where the requisite intention for the unlawful interference tort exists, a claim under that tort could again be made out where an action in negligence may not. First, it will be demonstrated that, on the facts as given, the negligence tort will not be made out in either example as the

(footnote 444 cont'd) unlawful means. His Honour relies, at [33]-[34], on the judgment of Drummond J in *Council of the City of Gold Coast v Pioneer Concrete (Qld) Pty Ltd* (1998) 157 ALR 135 and that of Beaumont J in *Transcontinental Mining Pty Ltd v Posgold Investments Pty Ltd* (1994) 121 ALR 405. Of note is that Moynihan J in *Terranora* describes the *Pioneer Concrete* case as excluding a claim for *unlawful means conspiracy* where the relevant breach is s 45 of the TPA, one of the sections referred to by Gummow J in the above quote from *Perre*. The passage by Moynihan J in *Terranora* reads: 'The principle stated there [by Beaumont J in *Transcontinental Mining*] was that where a statute made previously lawful conduct unlawful and provided a specific remedy, only that remedy was available. Justice Drummond [in *Pioneer Concrete*] applied that principle to a statute providing civil remedies for harm caused by conduct which it prescribed. Specifically he applied it to the *Trade Practices Act* (1974) Commonwealth which provided civil remedies for the contravention of s 45': at [34]. In *Cultivaust Pty Ltd v Grain Pool Pty Ltd* [2004] FCA 638, for the reasons discussed in the footnote at above n 223, it was submitted that it is not clear whether Mansfield J is considering the unlawful interference tort or the tort of interference with contractual relations. In any event, the unlawful acts alleged there were breaches of ss 45(2)(a)(ii) (arrangements with the purpose or effect of substantially lessening competition) and 76 (pecuniary penalties for contravention) of the TPA. Justice Mansfield made the following observation in the case where a claim is not pursued under the Act: 'The circumstances in which there may arise a cause of action for unlawful interference with contractual relations may be uncertain ... *However, whether such a cause of action may be maintained by reason of a contravention of the TP Act where no remedy is sought under the TP Act is far from certain*: see eg *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494 at 504, 515. I do not need to determine that question': at [270] (emphasis added).

445 See the comments of McHugh J in *Perre* in the text at above n 146.

446 Cockburn and Thomas, above n 341, 258. The authors there describe the first proposition as a concession from counsel and the second a comment from Gaudron J citing the transcripts of argument 21 and 22 November 2000.

447 Ibid 258-9.

plaintiff is not 'vulnerable' in terms of the 'salient features' and, in addition, the policy factor or consideration of avoiding the 'ripple-effect' operates to deny the imposition of a duty of care. In terms of the unlawful interference tort, it will be demonstrated that this tort is not made out because the requisite intention element is not present. Finally, assuming the requisite intention for the unlawful interference tort is present, it will be suggested that this tort is made out but that, on account of the absence of 'vulnerability' and the operation of the 'ripple-effect', the negligence tort is not available.

1 *Hypothetical Example 5*

In the first example, suppose the members of a trade union (D5) are employed by a car component manufacturer (B5). For the purposes of improving its members' entitlements, D5 directs them to strike. As a result, B5 cannot supply the components to a factory owned by a large car manufacturer (P5). This causes P5 to temporarily close its production line. D5 knows this will be the likely result of its strike action. The contracts of supply between B5 and P5 and between P5 and its customers (car retailers) contain *force majeure* clauses which relieve B5 and P5 from obligations to supply the relevant products in the event of industrial action.

2 *Hypothetical Example 6*[448]

In the next example, suppose D6 and P6 are both subcontractors on a building site. D6 has a contract with the major site builder (B6) to provide electrical services to the site and P6 has a contract with the same builder to install lifts. All subcontractors on the site have clauses in their contracts with the main builder which provide for substantial bonuses for early completion of their particular contractual tasks. There is no contract between D6 and P6. D6 attempts to cut its costs and save time by using unauthorised wiring techniques (in breach of the relevant electrical safety regulations) but this practice unfortunately causes the whole site and surrounding buildings to be without power for several days. This prevents P6 from installing the lift system in sufficient time to obtain the early completion bonus from the builder under the existing contract. D6 knows that all subcontractors on the site were on early completion bonuses.

Similar to the analysis of the 'salient features' set out above, it is clear that economic loss to both P5 and P6 would be reasonably – again, actually – foreseeable. There would be *knowledge* that the plaintiff *individually* would be harmed within the principle in *Caltex Oil*. Further, in hypothetical example 5, it could *conceivably* be argued that D5 could exercise 'control' over P5's 'right to trade' by its ability to halt B5's production of components by calling its members out on strike. Consequently, P5 may be considered 'vulnerable' to the union's conduct because it depends on the components to complete the relevant products.

448 The writer acknowledges with gratitude the concept and wording for this example provided by Mr Keith Akers, Research Assistant, Department of Business Law and Taxation, Monash University.

Similarly, in hypothetical example 6, D6 could be said to 'control' P6's right to derive additional income by its ability to affect the schedule of works. It may also be submitted that imposing a duty of care would not interfere with the *autonomy of the individual* or the *legitimate* or lawful pursuit by D5 of its activities as the strike action constitutes a procuring of a breach of the employment contracts of the relevant workers. In the second case, D6 is acting in breach of the electrical safety regulations and therefore 'illegitimately'.

However, it is submitted that it is unlikely that a duty of care would be imposed in either of these circumstances. The plaintiffs are unlikely to be considered 'vulnerable'. It is likely, given the bargaining power of the car manufacturer (P5), that it could obtain contractual warranties from the component manufacturer (B5) to cover this eventuality or to take other protective measures (such as securing other sources of supply). The presence of *force majeure* clauses in P5's contracts may also, it is submitted, be considered protective measures and commonly cover such actions. In such a case, it would be inconsistent with recognised principles of contract law relating to the supply of goods to impose a duty of care where the parties themselves had included such clauses to deal with the relevant eventualities. In the case of P6, the early completion bonus is contractual and it could be argued that P6 could have negotiated contractual protection to the effect that it was not responsible for delays caused by other contractors on the site which are beyond its control. In addition, it is submitted that both P5 (and, for that matter, the car retailers) and P6 are not 'first-line' victims but merely parties who are harmed because of the 'ripple-effect'. The 'first-line' victims are the component manufacturer (B5) and the main builder (B6).

In terms of the unlawful interference tort, again, despite the presence of unlawful means, the requisite intent is lacking in hypothetical example 5 for the reasons previously discussed in *Barretts & Baird* – there is no 'independent ... desire to injure the plaintiffs' and the damage to P5 is 'an unavoidable by-product of that withdrawal of labour and was a readily foreseeable consequence'.[449] Similarly, in terms of the tort of *indirect* interference with contractual relations (which commentators such as Lord Wedderburn consider to be the unlawful interference tort), the intention requirement for an *indirect* interference is not made out – it is submitted that the union's conduct is *not* 'directed against' the plaintiff whose damage is 'incidental'.[450] In terms of the intention element expressed by Lord Diplock in *Merkur Island Shipping*, there may well be 'knowledge of the existence of the [plaintiff's] contract' with its supplier and customers, but *no* 'intention to interfere with [their] performance'.[451] To similar effect would be the analysis of hypothetical example 6.

If, however, it is assumed that the requisite intention element for the unlawful

449 *Barretts & Baird* [1987] 1 IRLR 3, 10, discussed in the text at above nn 293-6.

450 See the comments of Lord Wedderburn, *Clerk & Lindsell on Torts*, above n 185, 1181 and in the text at above n 310.

451 See the passage by Lord Diplock in *Merkur Island Shipping* [1983] 2 AC 570, 608 set out in the text at above n 312.

interference tort (or for an *indirect* interference with contractual relations) exists, then it is suggested that the plaintiff would succeed under that tort but still fail under the negligence action. Under the negligence action, the analysis would be identical. The absence of 'vulnerability' and the policy factor or consideration of avoiding the 'ripple-effect' would combine, despite the presence of other 'salient features', to deny the imposition of a duty of care. The fact that an 'elevated' form of intention exists would not, it is submitted, alter this position as the negligence action contemplates that the 'careless' act is constituted by 'deliberate' conduct.[452]

By contrast, in the unlawful interference tort, that the plaintiff is harmed because of the 'ripple-effect' is no bar to recovery. This is because, as demonstrated by Sales and Stilitz in their 'paradigm case', the unlawful means is committed in the first place against (what, in negligence terms, would be) the 'first-line victim' but *aimed at* the 'ripple-effect victim' and, as Bagshaw reminds us, 'the "unlawful means" need not in themselves amount to [an actionable] tort to the plaintiff'.[453] Further, that the plaintiff could have taken protective measures to avoid the loss (and therefore, in negligence terms, was *not* 'vulnerable') is not relevant and has been expressly rejected as a ground of denying liability. As discussed previously, in *Stratford v Lindley*, a case of *indirect* interference with contractual relations (again, in effect, the unlawful interference tort), a trade union directed its members not to handle any empty barge of the appellant company. Lord Pearce considered that it was *not* necessary that the appellants 'tried to employ men belonging to other unions' to perform the work and that it was *no* defence that 'the hirers could have somehow avoided the breaches'.[454] This passage was quoted with approval by Wells J in *Woolley v Dunford.*[455] In that case, a trade union sent a letter to a shipping company to 'black ban' the movement of the plaintiff's wool. Justice Wells *rejected* the argument that the plaintiff was required to prove that, 'the two main export routes [having been] closed to him, there were no other means open to him by which he could have had his wool transported to the mainland'.[456]

Similarly, contractual protective measures, such as a '*force majeure* or *exception clause*'[457] will not prevent a claim for interference with contractual relations, Wells J in *Woolley v Dunford* observing that:

452 See discussion in the text at above nn 384-5.

453 See the 'paradigm case' suggested by Sales and Stilitz, above n 2, 412, set out in the text at above n 198 and the observations of Bagshaw set out in the text at above n 257. In this respect, Elias and Ewing, above n 185, observe: 'But the tort comes into its own either if it applies where the unlawful means are not independently actionable ... or where the unlawful means are directed towards a third party in order to harm the plaintiff': at 335.

454 *Stratford v Lindley* [1965] AC 269, 333.

455 *Woolley v Dunford* (1972) 3 SASR 243, 292-3.

456 Ibid. The quoted passage is at 292.

457 *Torquay Hotel* [1969] 2 Ch 106, 137 (emphasis in original) (Lord Denning). See also *Merkur Island Shipping* [1983] 2 AC 570, 609G (Lord Diplock). In *Torquay Hotel*, Winn LJ stated that: 'where a contract between two persons exists which gives one of them an optional extension of time or an optional mode for his performance of it, or of part of it, but, from the normal course of dealing between them, the other person does not anticipate such postponement, or has come to expect a particular mode of performance, a procuring of the exercise of such an option should, in principle, be held actionable': at 147.

Where the defendant has interfered with the contract by procuring an act by one of the parties in circumstances in which it would not, *because of an exemption clause or excuse implied by law*, have been within the power of the plaintiff to insist on performance of the contract, the defendant cannot rely upon the exemption clause or other excuse, if the tort is otherwise proved.[458]

In fact, such conceptual problems in 'collapsing' the intentional torts under consideration into the negligence tort would extend beyond concepts of 'vulnerability'. It is submitted that the foregoing discussion – that it is no defence in the intentional torts that the plaintiff could have taken protective measures to avoid the loss – also poses difficulties in any 'amalgamated' tort for the operation of defences such as contributory negligence and considerations of remoteness of damage.[459]

V CONCLUDING REMARKS

In 2001, Carty undertook an examination of the relationship between negligence and the intentional economic torts.[460] The learned author's analysis of negligently inflicted economic loss traces developments in the principle established by *Hedley Byrne & Co Ltd v Heller & Partners*[461] and concludes that:

> Its development has not been guided expressly by the issue of free competition and the need to map out the limits of permissible behaviour in the market place ... Negligence liability looks to *dependency*; the economic torts look to unlawful acts. Where tort's protection is concerned, neighbours are clearly a different species to competitors ...[462]

While recognising certain 'overlaps' applying to negligence and the intentional torts, Carty concludes that 'such overlaps do not reveal a rationale close to the other economic torts or a willingness to create a general principle of liability for negligently inflicted economic harm.'[463]

Of course, the examination of *Perre* and subsequent cases and developments undertaken in this article suggests that, beyond the paradigm cases of negligent

458 *Woolley v Dunford* (1972) 3 SASR 243, 267 (emphasis added).

459 While a detailed consideration of the concept of remoteness of damage is beyond the scope of this article, it would also appear that the relevant remoteness concepts, too, present difficulties for subsuming the intentional torts under consideration within the negligence framework. In this respect, Sales and Stilitz, above n 2, 413, note that, in the unlawful interference tort, 'the intention of D to harm P ... bridges ... the remoteness of P's loss from D's unlawful actions', the authors there quoting the following statement of Lord Lindley in *Quinn v Leathem* [1901] AC 495: 'The intention to injure the plaintiff negatives all excuses and disposes of any question of remoteness of damage': at 537. In negligence, by contrast, remoteness of damage must be determined according to the well-known principles in *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd (The Wagon Mound No 2)* [1967] 1 AC 617.

460 Carty, *An Analysis of the Economic Torts*, above n 45, 238-60.

461 [1964] AC 465.

462 Carty, *An Analysis of the Economic Torts*, above n 45, 257 (footnote omitted and emphasis added).

463 Ibid 258.

misstatement (and services) examined by Carty, the touchstone of liability in cases of negligently inflicted economic loss in Australia will (at present) be more appropriately described as *vulnerability* rather than *dependency*. However, it is not sought here to draw too fine a distinction. Clearly, there is some overlap between these concepts as McHugh J suggests in *Perre*[464] and even in cases of negligent acts or omissions (quite apart from statements) the terms are sometimes used interchangeably.[465]

Also, this distinction is not to disagree with Carty's conclusion in relation to the 'overlaps' she has identified but to emphasise the basis for the comparison which has been undertaken in this article and the principles of liability which have developed from *Perre*. In particular, liability for negligent acts or omissions in Australia may be affected by various 'salient features' including, most importantly, whether there was actual (or reasonable or means of) *knowledge* that the plaintiff *individually or as a member of an ascertainable class* may suffer financial harm and was *vulnerable* to the defendant's actions.[466] In the case of *vulnerability*, this will include a consideration of the 'contractual background' of the plaintiff's dealings and whether *contractual warranties* or other *protective measures* are available to the plaintiff. Important, too, in assessing the 'contractual background' is the presence of exclusion or limitation clauses in the contractual chain.[467] In this respect, beyond the *Hedley Byrne* and *Caparo* principles, Carty does not examine authorities on negligent interference with contractual relations in detail. While the learned author notes the decisions in *J'Aire*[468] and *Caltex Oil*,[469] she does not appear to consider *Perre*.

This article has highlighted the approach of the members of the High Court in *Perre* (and subsequent cases and developments) to the question of recovery for negligently inflicted economic loss with particular emphasis on highlighting the policy factors or considerations which operate in such cases, the methodology adopted by the various Justices and, as noted above, the 'salient features' which are indicative of a duty of care. Similarities in policy factors or considerations between negligence and the unlawful interference tort have been identified - including the range of plaintiffs and the sphere of *legitimate* business conduct (in negligence, also known as the *autonomy of the individual*) – and the legal principles by which those factors or considerations are effected have been discussed. In particular, the policy factor or consideration to avoid *indeterminate liability* and the operation of an illegal or otherwise 'illegitimate' act in the

464 *Perre* (1999) 198 CLR 180, 228, where his Honour states, '[v]ulnerability will often include, but not be synonymous with, concepts of reliance and assumption of responsibility'.

465 See, eg, the judgment of Merkel J in *Johnson Tiles No 4* [2000] FCA 1837, discussed at above n 141. In *Perre* (1999) 198 CLR 180, Gleeson CJ considered that 'knowledge (actual, or that which a reasonable person would have) of an individual, or an ascertainable class of persons, *who is or are reliant, and therefore vulnerable*, is a significant factor in establishing a duty of care': at 194 (emphasis added).

466 See discussion in the text and footnotes at above nn 122-6, 141.

467 See discussion in the text and footnotes at above nn 141-64.

468 See discussion of this case at above nn 388-99. See Carty, *An Analysis of the Economic Torts*, above n 45, 258.

469 *Caltex Oil* (1976) 136 CLR 529. See Carty, *An Analysis of the Economic Torts*, above n 45, 259.

imposition of a duty of care in cases of negligently inflicted economic loss were highlighted. Distinctions between the operation of various concepts in the negligence tort, the unlawful interference tort and the tort of interference with contractual relations have also been identified, in particular the concept of 'constructive knowledge'.

Importantly, the mental state or element in negligence identified in *Perre* (including constructive knowledge of what the 'reasonable person' ought to know) has been distinguished from the requisite intention element in the unlawful interference tort – that the unlawful means is *directed against* or *aimed at* the plaintiff. In this respect, the discussion has highlighted authorities and views of commentators which suggest that merely 'negligent' or 'inadvertent' acts and even actual knowledge of 'inevitable harm' will not be sufficient – in the absence of conduct directed against or aimed at the plaintiff – to establish liability in the 'genus' tort of interference with trade and business by unlawful means.

Accordingly, if the unlawful interference tort is adopted as law in Australia by the High Court, the diverging trend suggested by the High Court in *Mengel* set out in the introduction to this article – 'that liability in tort depends on *either* the intentional or the negligent infliction of harm' – is likely to continue to separate the development of the relevant torts. In this respect, Part III has demonstrated various overlapping concepts which exist between negligent infliction of economic loss (as developed in *Perre* and subsequent cases), the unlawful interference tort and the tort of interference with contractual relations. In accord with the observations of Carty, this author considers that the conceptual distinctions and practical difficulties demonstrated in Part III continue to require that the intentional torts should remain separate and distinct from the negligence framework.