Case Note

Perre v Apand Pty Ltd – Coherent Negligence Law for the New Millennium?

> Only a measure of reconceptualisation will provide an enduring foundation for the application of legal principles to this and future cases in the place of the present disorder and confusion.[1]

1. Introduction

Perhaps Kirby J spoke with too much pessimism when he discussed the 'disorder and confusion' in the law of negligently inflicted economic loss. However, a form of mild chaos marks the history[2] of this aspect of tort law. The orthodoxy in the common law consistently stated that there should never be any recovery for losses 'not consequential on damage to person or property.'[3] In opposition, there stands a body of law allowing exceptions to this rule or denying its validity entirely. This fundamental tension still rages in courts of the highest authority.

The High Court of Australia has not followed the more conservative precedents. However, it has struggled, in the last twenty-five years, to articulate the appropriate parameters for a duty to avoid purely economic loss. *Perre v Apand Pty Ltd* raises this very issue. This paper sketches the history of this case, before providing a comprehensive analysis of the High Court's decision. It approaches this task with two aims: to elucidate the various approaches to the issue of the duty of care and to crystallise the common themes amongst them. It then turns to an evaluation of the likely significance of this decision in the future.

2. Facts[4]

David Sparnon, Sandra Sparnon and their son Michael ('the Sparnons') owned a farm in South Australia and used this property to grow vegetable crops for commercial sale. Their main customer was Apand Pty Ltd ('Apand'), an Australian company with a large presence in our snack food market. To produce their famous 'Kettle Chips', Apand sourced potatoes from around Australia. The Sparnons supplied potatoes to Apand between September 1989 and February 1992 without encountering any difficulties.

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1 *Perre v Apand Pty Ltd* (1999) 164 ALR 606 at 668 (Kirby J).

2 See, setting up the exclusion, *Cattle v Stockton Waterworks Co* (1875) LR 10 QB 453; *Simpson & Co v Thomson, Burrell* (1877) 3 App Cas 279. But compare *Shiells v Blackburne* (1789) 1 Hy Bl 158; *Wilkinson v Coverdale* (1793) 1 Esp 75.

3 Definition from *Caltex Oil (Australasia) Pty Ltd v The Dredge 'Willemstad'* (1976) 136 CLR 529 (hereinafter *Caltex*) at 555 (Gibbs J), at 569 (Stephen J). See also Benson P, 'The Basis for Excluding Liability for Economic Loss in Tort Law' in Owen DG (ed), *Philosophical Foundations of Tort Law* (1995) at 428.

4 Taken from the judgment at first instance: *Sparnon v Apand Pty Ltd* (Federal Court of Australia, von Doussa J, 20 December 1996): <http://www.austlii.edu.au/au/cases/cth/federal_ct/1996/684.html> (28 September 1999). hereinafter *Sparnon* (first instance).

As Kettle Chips continued their inexorable drive into supermarkets and corner stores, Apand wanted to purchase even more potatoes from their suppliers, including the Sparnons. However, all potatoes commercially grown in Australia share an important trait: they are summer crops. Apand rejected the option of buying more summer potatoes as this would create storage problems and potentially lead to oversupply. Instead, they settled upon the introduction of an 'experimental' winter crop, known as Saturna potatoes.

Apand purchased their Saturna seed from Mr GPJ Tymensen, a Victorian grower. Both the seeds and Mr Tymensen's property *appeared* to be free from disease. However, the evidence showed that seeds from his property had sometimes been associated with small outbreaks of 'bacterial wilt'. This is a devastating disease which not only damages the current potato crop, but also means that infected farms cannot be used to grow potatoes for five years.

On 3 March 1992 the Sparnons planted a small run of Apand's Saturna seed on their property. This crop ultimately failed due to an outbreak of bacterial wilt. In 1994 the Sparnons commenced their action against Apand in the Federal Court. However, by then they were joined by another set of applicants, raising an even more complex set of issues.

Twelve different members of the Perre family ('the Perres') owned farms and other property near the Sparnons' land. The Perres also controlled three companies, Warruga Farms Pty Ltd, Perre's Vineyards Pty Ltd and Rangara Pty Ltd. All the individuals and all the companies were in some way involved with the growing, storage or processing of potatoes.[5] When the Perres heard of the outbreak of bacterial wilt on the Sparnons' farm, they immediately checked their own potatoes, which showed no signs of the disease.

Despite the lack of any physical damage to their potatoes, the presence of the wilt on the Sparnons' farm caused a grave problem for the Perres. The main market for the Perre potatoes was Western Australia, which prohibited the import of potatoes that were held, grown or processed within twenty kilometres of a bacterial wilt outbreak.[6] All of the relevant property of the Perres was within three kilometres of the Sparnons. As such the Perres, or at least some of them, lost the benefit of the contracts that they had already concluded with their Western Australian buyers.

3. *The First Instance Decision*

The Sparnons and the Perres brought actions against Apand in the Federal Court of Australia. The Sparnons argued that they suffered loss as a result of Apand's negligence. They also made a contractual argument about implied conditions of fitness and merchantable quality,[7] as well as pursuing a claim for misleading and deceptive conduct under the *Trade Practices Act* 1974 (Cth).[8] The Perres, who had no contract with Apand, only framed their action in negligence and under the Trade Practices Act. The two sets of claims met vastly different results.

5 Only the High Court differentiated between the competing claims of the fifteen Perre applicants.

6 Regulations under the *Plant Diseases Act* 1914 (WA), Schedule 1, Part B, Item 14(1)(b).

7 *Sale of Goods Act* 1895 (SA) Sections 14 I and 14 II respectively.

8 Section 52 (Misleading and Deceptive Conduct) and Section 82 (Damages).

A. The Sparnons' Claim: Victory

von Doussa J began his analysis by finding that Apand owed the Sparnons a duty of care. He phrased this as a duty to take all reasonable steps to ensure the seeds had not come from a source where there was a real risk of infection by pests or disease.[9] On the evidence of industry 'insiders', His Honour held that Apand either knew or ought to have known about the history and risk of their own Saturna seeds.[10] As such, Apand was in breach of their duty of care. This half of von Doussa J's decision on duty is not controversial and provides a classic example of economic loss consequential upon physical damage. The facts demonstrated clear foreseeability that the acts of the supplier would harm the customer[11] and their relationship satisfied any requirement of proximity that may be required.[12] Other arguments against liability did not arise.[13]

B. The Perres' Claim: Failure

von Doussa J began his analysis of the Perres' negligence claim by describing claims for the diminution of value of the lands and for the lost profits and opportunity for profits as 'purely economic loss'.[14] He was clearly correct in making this finding. In doing so, His Honour avoided the temptation to fit the facts before him into some category of physical or quasi-physical damage. Such a process, which has sporadically found favour in years gone by,[15] is both artificial and illogical.

Having categorised the loss in this way, His Honour proceeded to set out and apply his version of the law in this area. He commenced by stating that, in economic loss cases, foreseeability alone is insufficient to ground a duty of care. He went on, citing *Caltex*[16] and *Bryan v Maloney,*[17] to suggest that a relationship of proximity is a pre-condition to recognition of duty. However, the more significant basis for his judgment was an overt *policy* concern. He held that

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9 *Sparnon* (first instance) at 20.

10 Id at 20–21.

11 As is required by *Donoghue v Stevenson* [1932] AC 562 at 580 (hereinafter *Donoghue*).

12 See, for example, *Jaensch v Coffey* (1984) 155 CLR 549 at 584–585 (hereinafter *Jaensch*); *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 497–498 (hereinafter *Heyman*). I write '*may* be required' as members of the High Court questioned the saliency of this requirement in the *Perre* appeal.

13 For example, Apand could not (and indeed did not) argue that they did not cause the damage to the Sparnons: see *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506; *Medlin v State Government Insurance Commission* (1995) 182 CLR 1. Similarly, the *type* of damage was patently foreseeable, another point conceded by Apand: see *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The 'Wagon Mound' No.1)* [1961] AC 388; *Overseas Tankship (UK) Ltd v Miller Steamship Co Ltd (The 'Wagon Mound' No. 2)* [1967] 1 AC 617.

14 *Sparnon* (first instance) at 37.

15 See, for example, *Caltex*, above n3 at 597 (Jacobs J); See also *Anns v Merton London Borough Council* [1978] AC 728 (hereinafter *Anns*) and some of the reasoning in *D & F Estates Ltd v Church Commissioners for England* [1989] AC 177.

16 Id at 555 (Gibbs CJ).

17 (1995) 182 CLR 609 (hereinafter *Bryan*), at 617–618 (Mason CJ, Deane and Gaudron JJ). *Sparnon* (first instance) at 37–38.

allowing a duty of care to extend to any claimant within a twenty-kilometre radius (as set out in the Western Australian legislation) could lead to indeterminate liability for Apand.[18] On the basis of the unacceptable ambit of liability, His Honour refused to allow the Perres' negligence claim against Apand.

The clearest error in His Honour's reasoning seems to be the *weight* he attached to this indeterminacy argument. Firstly, His Honour purported to discuss the competing policy concerns on the facts before him. However, what he did in practice was to use indeterminacy as an excuse for not examining the merits of the case in detail. A second problem was His Honour's repeated use of an analogy with a recent South Australian decision, the *ETSA* case.[19] This case involved a negligently caused bushfire with far-reaching consequences. The range of plaintiffs was enormous and undefined. As such, there is little logical force in this (extreme) analogy.

In summary, we can make a neat comparison of the results at first instance. The Sparnons, who claimed a paradigmatic type of damage to their property succeeded in their action. The Perres, who brought a more unorthodox action for purely economic loss, failed.

4. *The Full Federal Court Decision*

Both the Sparnon actions and the Perre actions returned to the courts in 1997.[20] Several issues faced O'Loughlin, Branson and Mansfield JJ. Their Honours delivered a relatively brief joint judgment which dismissed all three of Apand's points of appeal against the Sparnons as well as the Perres' appeal against Apand.

A. Sparnon v Apand Pty Ltd: *Three Unsuccessful Arguments*

Apand sought a reversal of von Doussa J's decision on three main grounds. First, they argued that His Honour erred in formulating the content of the duty of care that they owed to the Sparnons. The Court adopted the reasoning in *Burnie Port Authority,*[21] which held that a general duty, such as between supplier and customer, would usually be a duty to avoid reasonably foreseeable injury.[22] Secondly, they argued that the *mode* of damage was remarkably unusual. The Court swiftly negated this contention by citing *Hughes v Lord Advocate,*[23] a case

18 Id at 37, citing Cardozo J's famous dictum in *Ultramares Corporation v Touche* (1931) 174 NE 441 at 444 (hereinafter *Ultramares*): 'liability in an indeterminate amount for an indeterminate time to an indeterminate class'.

19 *Seas Sapfor Forests Pty Ltd v ETSA* (Supreme Court of South Australia, Doyle CJ, 9 August 1996).

20 *Perre v Apand Pty Ltd; Apand Pty Ltd v Sparnon* (1997) 160 ALR 429 (hereinafter *Perre* (1997)).

21 *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 (hereinafter *Burnie*) at 543. See also the analyses in *Wyong Shire Council v Shirt* (1980) 146 CLR 40; *Ryan v ETSA* (No 1) (1987) 47 SASR 220.

22 *Perre* (1997) at 437–438.

23 [1963] AC 837 at 850, 856. See, in Australia, *Chapman v Hearse* (1961) 106 CLR 112 at 115, 120–121; *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383 at 390; *Jambrovic v ACT Health Authority* (1992) 108 FLR 8.

that held that if the general type of loss is reasonably foreseeable, the exact mode of damage does not need to be foreseeable.[24] The Full Federal Court quickly dispensed with Apand's final argument. They did not agree that the Sparnons accepted the risk of total destruction of the crop and of the subsequent immobilisation of their property.[25]

B. Perre v Apand Pty Ltd: *Another Rejection*

The Perre action on appeal rested on two grounds. Firstly, the Perres argued that von Doussa J erred in his statement of the rules for purely economic loss in negligence. Next, they contended that he had misapplied the test.

The Full Court substantially agreed with von Doussa J's explication of purely economic loss in negligence. However, they cited more authorities[26] in reaching the conclusion that 'a relationship of proximity [is] an essential element for the existence of a duty of care'.[27] They split proximity into several potential elements such as reliance by the plaintiff, assumption of responsibility by the defendant and knowledge of the defendant. They also took a different view of policy factors, seeing them as a part of the preliminary analysis, not the concluding analysis.[28] This said, the only policy factor that they outlined in any depth was the indeterminacy argument. Thus, the Perres failed in their attempt to persuade the court to adopt a more relaxed view of the requirements for a duty of care in this situation.

The Perres then challenged von Doussa J's *application* of the test. The Full Federal Court responded to this appeal with a detailed reading of the *Caltex* decision. This paper submits that this is a more appropriate analogy than the *ETSA* case cited by von Doussa J.[29] Here, the Full Federal Court distinguished *Caltex* for two reasons. Firstly, they held that the relationship of proximity was stronger in the *Caltex* case. Secondly (and additionally), they held that the policy factor of potential indeterminate liability existed on the facts of the Perres' claim, but not in *Caltex*.[30] The Court then combined the doubtful proximity with the potential for unascertainable liability to resolve the duty issue against the Perres.

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24 *Perre* (1997) at 441–442.

25 Id at 443–444 citing *Australian Knitting Mills Ltd v Grant* (1933) 50 CLR 387; *Ashington Piggeries Ltd v Christopher Hill Ltd* [1972] AC 441.

26 Id at 447. Their Honours provided a long list of cases. The most significant were *Caltex*, above n3; *Jaensch* above n12; *Heyman*, above n12; *San Sebastian Pty Ltd v Minister Administering The EPA Act 1979* (1986) 162 CLR 240 (hereinafter *San Sebastian*); *Bryan*, above n17; *Hill v Van Erp* (1997) 188 CLR 159 (hereinafter *Hill*).

27 *Perre* (1997) at 447.

28 Id at 449, again relying in particular on dicta from *Bryan*, above n17 at 617–618.

29 In *Caltex*, above n3, the plaintiff recovered damages for purely economic loss when the defendant damaged a pipe owned by a third party. Because Caltex could not use the pipe, they incurred extra expenses in providing alternative modes of transport their oil for refinement. See also dicta in *Candlewood Navigation Corp Ltd v Mitsui OSK Lines Ltd* [1986] 1 AC 1; *Leigh & Sillivan Ltd v Aliakmon Shipping Co Ltd (the 'Aliakmon')* [1986] 2 WLR 902.

30 Id at 449.

In summary, the Federal Court proceedings maintained the status quo. Apand failed against the Sparnons and the Perres failed against Apand. The Court essentially used exactly the same arguments as von Doussa J at first instance. As such, we can make many of the same criticisms. However, the Court at least provided a greater level of analysis of the authorities on some of the key issues.

5. Perre v Apand Pty Ltd in the High Court: *Third Time Lucky*

Early in 1999, this matter came before the High Court of Australia.[31] However, the issues for determination were reduced to just one: an analysis of the proper requirements for a duty of care for negligently inflicted purely economic loss. Apand did not appeal the judgment of the Federal Court in favour of the Sparnons. The Perre appeal, however, gave the High Court the opportunity to investigate the field of pure economic loss in tort. Part A of this section draws together the common elements of the judgments to identify four alternative tests for the existence of a duty. It describes each of these as well as critically evaluating their strengths and weaknesses. Part B turns to the application of the tests, demonstrating that the only divergence between the tests was on the interpretation of the indeterminacy argument.

A. Seven Judgments, Four Tests

(i) 'Salient Features': Gleeson CJ, Gummow J, Hayne J and Callinan J

These four judges delivered separate judgments[32] in the *Perre* appeal, and there are certain points of dissonance between them. For this reason they do not form a 'true' majority. However, on a fundamental level, the judgments share the same approach to the concept of a duty of care. Put simply, this approach does not involve a test at all. Rather, it involves identifying the 'salient features' of the case at hand to see whether the plaintiff should owe a duty to the defendant.[33]

Their Honours all explicitly reject any strict formulation of the approach to finding novel duties of care. By way of example, Gleeson, CJ rejects tests based on 'proximity', on 'fairness' and on 'reliance'.[34] In doing so, he rejects the cogency of the *Caparo*[35] decision, a leading English decision that uses these terms. Gummow J made similar points, and also rejected tests based on an incremental approach to the law and on prima facie exclusions.[36] Hayne and Callinan JJ made similar points, although perhaps less stridently than the other two judges.[37]

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31 *Perre v Apand Pty Ltd* (1999) 164 ALR 606 (hereinafter *Perre* (1999)). Special leave to appeal was granted on 19 June 1998.

32 Although the Chief Justice concurred in the reasons of Justice Gummow.

33 *Perre* (1999) at 660 (Gummow J), 697–698 (Hayne J), 716 (Callinan J).

34 Id at 611.

35 *Caparo Industries plc v Dickman* [1990] 2 AC 605 (hereinafter *Caparo*). For a fuller explanation of this test, see the analysis of Justice Kirby's judgment below.

36 *Perre* (1999) at 652–653, 659. For a more detailed explanation of the incremental approach, see the analysis of Justice McHugh's judgment below.

37 Id at 697–698 (Hayne J), 716 (Callinan J).

Presumably the salient features will differ from case to case. Gummow J pointed to three factors on the facts of this appeal: Apand's *actual* knowledge of the risk to nearby farmers, the inability of the Perres to protect themselves from the harm and the small set of potential plaintiffs.[38] Hayne J referred to similar factors. However, the emphasis in His Honour's judgment was on the knowledge attributable to Apand.[39] Finally, Callinan J reiterated the comments of his colleagues. He also underlined the geographical propinquity between the parties and the fact that imposing a duty on Apand would not unreasonably burden their commercial autonomy.[40]

The judges used a mixture of proximity factors (geographical nearness, knowledge) and policy factors (indeterminacy, autonomy) in formulating the duty of care in this case. However, they deliberately refused to place these factors under any strict conceptual banner. This paper submits that there are two main benefits of this type of reasoning.

Firstly, this approach openly acknowledges the role that social policy has in the enunciation of new duties of care. Despite calls for an 'unmasking,[41] of the true reasons behind judicial opinions on economic loss, policy issues have often been considered as part of the analysis of proximity.[42] This cloaks important aspects of a judgment behind 'proximity', which is a vague term and susceptible of different interpretations. By comparison, the four judgments above made no attempt to hide their evaluation of the competing policy claims in the case. Another attraction of this openness is that it allows future litigants to understand the reasoning of the courts and their chances of success before commencing litigation.

Next, this method of approaching the duty of care is very flexible. Harvey describes the fundamental question in negligence as being 'whether society is prepared to burden members of the community with the responsibility of accounting for the loss of others'.[43] Thus, the law of negligence must respond to community values of what are the appropriate limits of the duty of care. The approach of the four members of the High Court places great emphasis on a thorough investigation of policy in each case, allowing community values to intersect. As these values change, so too will the judgments.

Conversely, it is this very flexibility that can lead to the first major weakness of this approach. The denial of an overarching principle places a high level of discretion in the hands of the court. If judges utilise policy analysis to the *exclusion*

38 Id at 660–664.

39 Id at 700.

40 Id at 719.

41 Stapleton J, 'Duty of Care Factors: A Selection from the Judicial Menus' in Cane P & Stapleton J (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (1998) at 62; Miller G & Miller D, 'A Reformulation of the Concept of Duty of Care and Entitlement to Recovery of Pure Economic Loss in Negligence' (1991) 8 *Aust Bar Rev* 65 at 90.

42 See, for example, *Thomas v Elder Smith Goldsbrough Mort Ltd* (1982) 30 SASR 592; *Bryan*, above n17; *San Sebastian*, above n26.

43 Harvey C, 'Economic Losses and Negligence: The Search for a Just Solution' (1972) 50 *Canadian Bar Rev* 580 at 598. See also *Candler v Crane Christmas & Co* [1951] 2 KB 164 at 192.

of traditional foreseeability and proximity factors, there is the potential for judgments to become unprincipled, even 'arbitrary'.[44] Cases in the past have shown an inclination to rely very heavily on policy.[45] An example from a different context is *Giannarelli v Wraith*.[46] Despite the indisputable proximity between the parties, the court denied the existence of a duty on the basis of policy. If judges do adopt the salient features 'test', they should be vigilant that their judgments are not merely manifestations of their own idiosyncratic views of justice.

A second problem with this approach is that such a flexible approach to the law of negligence could allow the court to vastly increase the scope of recovery of purely economic losses. Of itself, this is not a problem. The law is not a static instrument, and it would be counter-intuitive to suggest that it should be. However, the fusion of policy and proximity allows the court to proceed in massive increments. Hayne and Callinan JJ concede this point.[47] It is probably wrong to say that this approach will usurp the legislative function of the parliament,[48] but one wonders if it is the legislature that should be responsible for the paradigm shifts in our law.

(ii) Categories of Case: Gaudron J

In a striking parallel to the first approach, Gaudron J began her analysis by suggesting that none of the previous 'tests' for establishing a duty were adequate to explain all cases where a duty was found.[49] In making this point, Her Honour rejected the two-stage *Anns*[50] test (foreseeability and negative policy factors), the three-stage *Caparo*[51] test (foreseeability, proximity and policy) and the incremental approach of Brennan J.[52] However, the approach of Gaudron J is unique as she managed to fit the Perres' situation into an existing category of economic loss, rather than approaching it as a novel claim.

Her Honour considered that two areas of the law were settled. The first, liability for negligent misstatements,[53] did not apply to the Perres and is not controversial.[54] However, Gaudron J moved on to describe a second category as

44 Katter NA, *Duty of Care in Australia* (1999) at 59.

45 See for example, *Dorset Yacht Co v Home Office* [1970] AC 1004; *Spartan Steel and Alloys Ltd v Martin & Co (Contractors) Ltd* [1973] 1 QB 27; *Gala v Preston* (1991) 172 CLR 243 (hereinafter *Gala*).

46 (1988) 165 CLR 545. This case involved a claim against a barrister with respect to the conduct of court proceedings.

47 *Perre* (1999) at 698 (Hayne J), 717 (Callinan J).

48 Wallace IND, 'Negligence and Economic Loss: A View of the Future' (1993) 1 *Tort L Rev* 152 at 153. See also *McLoughlin v O'Brian* [1983] 1 AC 410 at 430.

49 *Perre* (1999) at 614.

50 *Anns*, above n15 at 752 (Lord Wilberforce).

51 Above n37.

52 Justice Brennan (as he then was) favoured this test in *Jaensch*, above n12 at 575; *Heyman*, above n12 at 481; *Hawkins v Clayton* (1988) 164 CLR 539 (hereinafter *Hawkins*) at 556.

53 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465. See Murphy J, 'Expectation Losses, Negligent Omissions and the Tortious Duty of Care' (1996) 55 *CLJ* 43.

54 See *Australian Mutual Life & Citizens' Assurance Co Ltd v Evatt* (1968) 122 CLR 556; *White v Jones* [1995] 2 AC 207; *Hercules Management Ltd v Ernst & Young* [1997] 2 SCR 165; *Esanda Finance Corp Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241.

the 'protection of legal rights'.[55] In her opinion, the two key elements of this class were: the ability of the defendant to influence the exercise of a plaintiff's legal right and the plaintiff's corollary dependence on the defendant.[56] By way of example, Gaudron J suggested that the relationship in *Hill*[57] satisfied her twin criteria.

The main advantage of this 'categories' approach over previous tests is that it does not generalise across the whole field of economic loss. A similar approach is popular in the Supreme Court of Canada[58] and draws on the rigorous academic analysis of Feldthusen.[59] The Canadian model further reduces the temptation to essentialise different types of cases, as it provides five categories of economic loss, not two. Either approach avoids the platitudinous nature of doctrines that attempt to cover *every* fact situation involving financial loss. Just as the facts vary, so too should the tests for finding a duty. A related strength of this method is the certainty that it brings to the law. Provided litigants can fit their claims into one of the recognised categories, they will avoid the expense and inconvenience of complex legal arguments as to the appropriateness of a duty of care.

On the other hand, the rigidity of this analysis creates a significant problem. By focusing on the categories of duty, Gaudron J fails to provide a framework for recognising duties in novel situations. In the *Perre* appeal, she drew an analogy between the facts at hand and the 'protection of legal rights' category. In this case, the 'right' was the Perres' opportunity to continue their profit-making in the Western Australian market. Such a simple application of this rule will not always be possible.[60] As Her Honour criticised all the other tests, one can only assume that she will take a flexible approach to new duties in the future. However, at the moment, her analysis is somewhat incomplete.

(iii) Incrementalism: McHugh J

The approach of McHugh J rests on the identification of relevant factors from previous cases and the application of all of these factors to the case at hand. In other words, an *overtly* incremental approach.[61] Before embarking upon this analysis, it must be reasonably foreseeable that the defendant's conduct will impact upon the plaintiff.[62] In his investigation of past cases, His Honour identifies two factors suggestive of a duty and two factors that militate against the imposition of a duty.

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55 *Perre* (1999) at 616.

56 Drawing on *Bennett v Minister of Community Welfare* (1992) 176 CLR 408 and her previous analyses in *Hawkins*, above n52 and in *Hill*, above n26.

57 Above n26, where the defendant-solicitor was in a position to control the plaintiff-beneficiary's legal right to a gift under the testatrix' will *and* the plaintiff depended on the defendant's skill to receive the gift.

58 *Canadian National Railway Co v Norsk Pacific Steamship Co* [1992] 1 SCR 1021.

59 Feldthusen B, 'Liability for Pure Economic Loss: Yes, But Why?' (1999) 28 *UWALR* 84 at 85–86. See also Feldthusen B, 'Pure Economic Loss Consequent upon Physical Damage to a Third Party' (1977) 16 *U Western Ontario LR* 1.

60 Stapleton J 'Duty of Care and Economic Loss: A Wider Agenda' (1991) 107 *LQR* 249 at 295.

61 Contrast the cautious, and arguably *covertly* incremental view of Hayne and Callinan JJ, above n47.

62 *Perre* (1999) at 631.

The first factor that suggests a duty is the vulnerability of the plaintiff.[63] The plaintiff's reliance or their inability to protect themselves may help show this vulnerability. The next factor is the knowledge of the defendant.[64] This can be actual or constructive knowledge. Conversely, the main factor that would lead to a no-duty result is the potential for indeterminate liability.[65] The second reason for denying duty occurs where the imposition would be an unreasonable burden upon the commercial autonomy of the plaintiff.[66]

The main advantage of this approach, once again, is certainty. If the courts are to emphasise precedent in their development of new duties, putative litigants can be relatively sure of the factors that the court will consider. As such, the law will hopefully proceed cautiously and in a principled manner. The strict logic, academic rigour and judicial discipline required to employ this test obviously appeal to McHugh J, as they once appealed to Brennan J.[67]

Unlike some incremental methods,[68] McHugh J has ardently proclaimed that his version can incorporate understandings of policy.[69] This is so, he argues, because a re-reading of past cases to find the important factors will reveal the policies in play in those decisions. Here, His Honour reveals both a strength and a weakness of his approach. The strength is the surprising ability of a deductive model to incorporate amorphous concepts like 'policy'. Conversely, McHugh J demonstrates that he would look for the policy in prior decisions of high authority. As such, any policy that the judge discovers may be out of date. As one author suggests, this has the potential to stultify the development of the law.[70] Perhaps this is too harsh, but progressive judgments are less likely in a system that defines *itself* as retrospective. All law uses precedent but we must be wary of an approach that symbolically ties itself so firmly to the past.

McHugh J's incremental approach has two other drawbacks. Firstly, it does not prescribe a method of creating novel duties of care for economic loss. It is ill-equipped to cope with changing technologies, changing business relationships and the like. So much has been acknowledged from time to time in the cases.[71] Next,

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63 Id at 636.

64 Id at 640.

65 Id at 633.

66 Id at 635. For a good analysis of the New Zealand and Canadian positions, see Kalderimis D, 'Contractual Economic Loss in New Zealand: "Who, Then, Is My Neighbour Really"' (1999) 29 *Victoria University of Wellington LR* 193.

67 See cases cited at n52 above.

68 Several distinct strands of incrementalism are discussed by Stanton KM, 'Incremental Approaches to the Duty of Care' in Mullany NJ (ed), *Torts in the Nineties* (1997) at 34.

69 McHugh MH, 'Neighbourhood, Proximity and Reliance' in Finn PD (ed), *Essays on Torts* (1989) at 39.

70 Rafferty N, 'Torts – Negligent Misstatement – Recovery for Purely Economic Loss' (1991) 70 *Canadian Bar Rev* 381 at 396.

71 See, for example, *Dutton v Bognor Regis UDC* [1972] 1 QB 373; *Invercargill City Council v Hamlin* [1994] 3 NZLR 513; *Murphy v Brentwood District Council* [1991] AC 398. See also Wallace IND, 'No Somersault After Murphy: New Zealand Follows Canada' (1995) 111 *LQR* 285 at 294.

the incremental approach, by relying on factors from previous analyses, never addresses the central question of the *basis* of liability.[72]

(iv) Foreseeability, Proximity and Policy: Kirby J

Kirby J resolved the duty issue in exactly the same way as he did in two previous cases.[73] In essence, he adopted the three-stage test from the English case of *Caparo*.[74] This test finds support in England and occasionally in Canada.[75] The first requirement is foreseeability of harm, in the sense used in *Donoghue v Stevenson*.[76] There must also be sufficient proximity. Kirby J defines this term in the narrow sense from previous cases like *Jaensch v Coffey*.[77] If the plaintiff can prove both foreseeability and proximity, then the court will consider if the imposition of a duty would be 'fair just and reasonable'. This involves an analysis of any policy concerns.

The cogency of Kirby J's judgment comes from the insight he gives us into the decision-making process.[78] By explaining the logical mechanism of the test, he makes it easy for future litigants to plead their cases in pure economic loss situations. His Honour's judgment is forcefully argued and well written. However, the clarity of his articulation does not make up for the problems in the application of the three-stage test.

The largest failing of this test is its reliance on catchphrases such as 'proximity' and 'fair, just and reasonable'. The dangers of using proximity as a universal touchstone were outlined above. Many of the same criticisms apply to the final requirement in the methodology. For example, without more, one might describe it as 'empty' or 'ambiguous'.[79]

Kirby J defends himself by arguing that he has adopted a narrow, technical reading of proximity.[80] However, there are two rejoinders to this assertion. Firstly, placing proximity at the second step of the analysis symbolically locates policy as the 'end' criterion. This constructs policy as an extraneous item to *negative* the existence of a duty, rather than as part of a balanced analysis. Secondly, given the proximity concept's chequered history, it is fair to say that the distinction between

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72 See Mason A, 'The Recovery and Calculation of Economic Loss' in Mullany NJ (ed), *Torts in the Nineties* (1997) at 5.

73 *Pyrenees Shire Council v Day* (1998) 192 CLR 330; *Romeo v Conservation Commission of the Northern Territory* (1998)192 CLR 431.

74 *Perre* (1999) at 676. *Caparo*, above n35.

75 *X v Bedfordshire County Council* [1995] 2 AC 633; *Marc Rich & Co A-G v Bishop Rock Marine Co Ltd* [1995] 3 WLR 227; *Bow Valley Husky (Bermuda) Ltd v St John Shipbuilding Ltd* [1997] 3 SCR 1210.

76 Above n11 at 580 (Lord Atkin).

77 Above n12 at 584–585 (Deane J) (physical, circumstantial or causal proximity).

78 See, for example, Vaggelas KH, 'Proximity, Economic Loss and the High Court of Australia' (1997) 5 *Tort L Rev* 127 at 135–136

79 Cherniak EA & How E, 'Policy and Predictability: Pure Economic Loss in the Supreme Court of Canada' (1999) 31 *Canadian Bus LJ* 209 at 233. Contrast Chambers RS, 'Economic Loss' in Finn PD (ed), *Essays on Torts* (1989).

80 *Perre* (1999) at 687. A view unequivocally endorsed by Katter NA, 'Duty of Care in Australia: Is the Fog Lifting?' (1998) 72 *ALJ* 871 at 873.

the last two limbs of the test is 'strained and artificial'.[81] In an ideal legal world, a syllogistic test like this would prevail. However, in the context of the uncertainty of the proximity concept, this paper submits that lower courts would find this test very difficult to apply.

B. Application of the Tests: Homogeneity and Indeterminacy

The previous section described the tests for finding a duty of care in cases of negligently inflicted economic loss. It provided an analysis of the strengths and weaknesses of each approach. This paper now turns to the result of the application of these tests to the facts of the *Perre* appeal.

Five of the Judges held that Apand owed a duty of care to all the Perres and their family companies (Gleeson CJ, Gaudron, Gummow, Kirby and Callinan JJ).[82] The remaining members (McHugh J and Hayne J) only found a duty in favour of the Perres that owned the growing farm and not the processing or storage facilities.[83] Two things are relevant about the application of the law to the facts. Firstly, several different tests produced the same result. Next, the difference between the majority and minority (on this issue) was only based on one criterion: indeterminacy. Both of these observations deserve further treatment.

(i) Different Tests, Same Result

The five judges who found for *all* the Perres represent three different approaches to duty in economic loss situations. This curious outcome suggests that the tests may be fundamentally very similar. When we strip away the legalistic jargon, we find that there are indeed many resonances across the disparate tests. For example, those within the majority who prefer the 'salient features' approach (Gleeson CJ, Gummow and Callinan JJ) drew on factors like 'knowledge', 'vulnerability' 'geographical closeness' to found the duty. Gaudron J, in purporting to formulate a different test referred to Apand's knowledge and the Perres inability to protect themselves as 'elements' of the test. Kirby J utilised all the same notions as 'policy factors' at the third stage of his methodology.

In other words, these judges used different frameworks but were unanimous regarding the important aspects of the case. This paper suggests that 'salient features', 'elements' and 'policy factors' are almost synonymous in application. Judges and commentators alike share the view that there is often very little to separate the competing tests.[84] The main difference in the *Perre* decision would seem to be when in the analysis these features are considered. The 'salient features' amalgamates all the factors. Gaudron J balances them and Kirby J saves them for the end of his analysis.

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81 Smillie JA, 'The Foundation of the Duty of Care in Negligence' (1989) 15 *Mon ULR* 302 at 321; Mullany NJ, 'Proximity, Policy and Procrastination' (1992) 9 *Aust Bar Rev* 80 at 81.

82 *Perre* (1999) at 618 (Gaudron J), 665 (Gummow J) (with whom Gleeson CJ agreed), 688–689 (Kirby J), 722 (Callinan J).

83 Id at 644 (McHugh J), 703 (Hayne J).

84 See, for example, *Hill*, above n26 at 178 (Dawson J), 190 (Toohey J); Stapleton J, above n41 at 89. Justice McHugh concedes this point in *Perre* (1999) at 624.

One might expect, then, to find a divergent test in the minority. However, neither McHugh J nor Hayne J strayed far from the analysis of the majority. McHugh J's incremental approach identified all the same factors as above, but found them in prior cases. The same can be said of Hayne J's understanding of the 'salient features' test. The *only* reason these two judges provided a different result was because they gave slightly more weight to the indeterminacy argument. As such, the indeterminacy question may be crucial to the future of economic loss claims in negligence and deserves investigation.

(ii) Indeterminacy (and Disproportionality)

Cardozo J's classic dictum, warning of 'liability in an indeterminate amount for an indeterminate time to an indeterminate class',[85] looms in many guises over the law of negligence. In several jurisdictions, the fear of 'indeterminate liability' or 'unascertainable damages' or 'opening the floodgates' has pervaded judicial reasoning.[86] Judges seem to chant these phrases as a mantra for denying liability, but with little real analysis. Thus, before turning to the treatment of the indeterminacy concept in *Perre,* we should note some of the weaknesses of the argument.

Firstly, in many circumstances where the floodgates *could* open, contract and insurance intersect to destroy the salience of the argument. A real life example is *Ball v Consolidated Rutile Ltd.*[87] Here, many of the victims were insured for the losses in question. As such, massive liability was unlikely to result. Similarly, parties often allocate the risks of economic loss through the contractual mechanism. This does not exclude the application of tort law.[88] However, it provides a framework for coherent analysis that does not merely hide behind the indeterminacy argument.

Next, the floodgates argument is usually reserved for cases of economic loss. However, massive *physical* losses can occur as a result of negligence. A leaking nuclear reactor (indeed any mass toxic tort) is an obvious and realistic example. Yet, evidence shows that this argument is very rarely used in physical loss cases.[89] If there is no quantitative distinction between the two types of massive liabilities, this suggests that the indeterminacy concept acts as a shield for an unspoken judicial bias against imposing duty for purely economic loss.[90]

Finally, the indeterminacy argument cloaks a different policy concern in relation to proportionality. In many instances of pure economic loss, the amount

85 Above n18 at 444.

86 *Caltex*, above n3 at 568, 591; *Heyman*, above n12 at 465; *San Sebastian*, above n26 at 353–354, 367; *Bryan*, above n17 at 618; *Hill*, above n26 at 171, 179, 192, 216, 235.

87 [1991] 1 Qd R 524.

88 *Voli v Inglewood Shire Council* (1963) 110 CLR 74; *Henderson v Merrett Syndicates* [1995] 2 AC 145. See Atiyah PS, 'Negligence and Economic Loss' (1967) 83 *LQR* 248 at 270.

89 Markensis BS & Deakin S, 'The Random Element of Their Lordships' Infallible Judgment: An Economic and Comparative Analysis of the Tort of Negligence from *Anns* to *Murphy*' (1992) 55 *MLR* 619 at 640.

90 Interestingly, some suggest this hostility is not apparent in many civil law systems. See Vranken M, 'The Relevance of Civil Law Doctrines in Australian Courts: Some Examples from Contract and Tort' (1999) 22 *UNSWLJ* 1; Deschamps CL, 'La Réparation du Préjudice Economique Pur en Droit Français' in Banakas EK (ed), *Civil Liability for Pure Economic Loss* (1996).

of damages seems wholly out of proportion to the moral blameworthiness of the plaintiff. This issue, while more explicit in the United States,[91] tends to be implicit in the judicial reasoning in other common law countries.[92] These factors suggest that indeterminacy is an important and complex issue. It is an issue that deserved the clarification that it received from the High Court in *Perre*.

Most of the judgments in this decision provided some analysis of the meaning of the indeterminacy concept. In those judgments, we find some principled and open perspectives on this controversial rule. Gaudron and Hayne JJ suggested that there would be no indeterminate liability if the class of plaintiffs could be identified.[93] It did not matter, Gaudron J added, that the members of this class could not be identified with complete accuracy. McHugh J echoed these sentiments when he spoke of indeterminate liability as that which 'cannot be realistically calculated'.[94] Kirby J pointed to the specific foresight of Apand to suggest there would be no unascertainable liability.[95] The final judgment, that of Callinan J, probably provides the most instructive analysis as he exposes the myth of indeterminacy. His Honour describes the test as frequently shrouding the policy concern of disproportionate liability.[96] He noted, as did Hayne J, that indeterminacy did not refer to the extent of the liability; rather, it referred to the ability to ascertain in advance the range of potential (notional) plaintiffs.[97]

6. *The Future: Three Issues*

The *Perre* decision provides a comprehensive review of the state of the law of economic loss in negligence. It sets out several competing tests and shows us the application of these to the facts. What then is the future of the law in this area? This paper suggests that there will be three main consequences of the *Perre* appeal.

A. The Death of Proximity

The proximity concept had its modern genesis in the judgment of Deane J in *Jaensch v Coffey*,[98] a case involving expanding the duty of care in relation to nervous shock. There, His Honour stressed the importance of a further criterion to rein in the rather loose concept of foreseeability. This, he argued, referred to one or more of the following: physical proximity (space and time), circumstantial proximity (based on a relationship) and causal proximity (a link between the events and the damage sustained).[99] In the decade after *Jaensch*, members of the

91 See, for example, *Rickards v Sun Oil Co* 41 A 2d 207 (1945). Compare *Robins Dry Dock v Flint* 275 US 303 (1927). See Atiyah PS, Economic Loss in the United States' (1985) 50 *OJLS* 485.

92 Harvey, above n43 at 617. See generally Hnatt KM, 'Purely Economic Loss: A Standard for Recovery' (1988) 73 *Iowa LR* 1181.

93 *Perre* (1999) at 617–618 (Gaudron J), 699 (Hayne J).

94 Id at 633.

95 Id at 688.

96 Id at 720.

97 Id at 699 (Hayne J), 721 (Callinan J).

98 Above n12.

99 Id at 584–585.

High Court and of lower courts often sought guidance from Deane J's weighty dicta.[100]

However, the proximity concept has not withstood the test of time. Academic commentators generally approached it with a mixture of unease, distaste, even ridicule. This paper provided some examples of these criticisms above. Three of the most common refrains in the literature are that the concept is meaningless,[101] that it lacks coherence across a variety of fact situations[102] and that it is a sham that merely hides idiosyncratic views of policy and society.[103] Perhaps inevitably, the judicial tide began to turn. Lower courts expressed dissatisfaction with requirement, describing it as 'confusing'.[104] Occasionally, courts even refused to utilise 'proximity' in their analyses.[105] Echoing Brennans J's vigorous dissents in the 1980s,[106] these criticisms began to pervade the reasons of the High Court.[107]

The Perre decision is a striking extension of this trend. With the exception of Kirby J, every member of the High Court has denounced proximity as a unifying theme for the law of tort. Some were more ardent in their criticism than others but semantic differences are unimportant. What is significant is the near unanimity on the bench regarding the inappropriateness of this concept. The vituperative stance towards proximity also precludes an Australian move to a duty test that includes this concept. An example is the *Anns* test mentioned earlier.[108] To recapitulate, this test requires an analysis of proximity and then any factors that operate to negative the imposition of a duty. It holds sway in the New Zealand Court of Appeal[109] and with certain members of the Supreme Court of Canada.[110] Such a test is now unlikely to arise in Australia. Similarly, despite Kirby J's adherence to the *Caparo* test, its dependence on proximity makes it equally doomed to failure in the future. Perhaps the time has come to speak of the death of proximity.

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100 See, for example, *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 30 (Mason J); *Cook v Cook* (1986) 162 CLR 376 at 381–382 (Mason, Wilson Deane & Dawson JJ); *San Sebastian*, above n26 at 354–355; *Hawkins*, above n52 at 543, 549; *Gala*, above n45 at 252–253. See also Swanton J & McDonald B, 'The Reach of the Tort of Negligence' (1997) 71 *ALJ* 822.

101 Tilbury M, 'Purely Economic Loss in the Supreme Court of Canada' (1994) 2 *Torts LJ* 1 at 6.

102 Yeo S, 'Rethinking Proximity: A Paper Tiger?' (1997) 5 *Tort L Rev* 174 at 178.

103 Kostal RW, 'Currents in the Counter-Reformation: Illegality and Duty of Care in Canada and Australia' (1995) 3 *Tort L Rev* 100 at 116.

104 See, for example, *Columbia Coffee & Tea Pty Ltd v Churchill (t/as Nelson Parkhill)* (1992) 29 NSWLR 179; *Opat v National Mutual Life Association of Australasia Ltd* [1992] 1 VR 283; *Woollahra Municipal Council v Sved* (1996) 40 NSWLR 101 at 134–136.

105 See, for example, *RG & TJ Anderson Pty Ltd v Chamberlain John Deere Pty Ltd* (1988) 15 NSWLR 363.

106 See cases cited at n52 above.

107 See for example, *Burnie*, above n21 at 543 (Mason CJ, Deane, Dawson and Toohey JJ); *Hill*, above n26 at 176–177 (Dawson J).

108 Above n15. See also *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 AC 520.

109 *First City Corporation Ltd v Downsview Nominees Ltd* [1990] 3 NZLR 265; *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282.

110 *Edgeworth Construction Ltd v ND Lea & Associates Ltd* [1993] 3 SCR 206; *Winnipeg Condominium Corp No. 36 v Byrd Construction Co* [1995] 1 SCR 85.

B. The Birth of a New Approach

If proximity disappears, taking with it the *Anns* and *Caparo* tests, not to mention all the exclusionary rules, then what remains? This will be a fundamental question for litigants in the years to come. This paper suggests that the High Court is likely to continue its dedication to a 'salient features' approach when determining duty questions in the area of pure economic loss.

The 'salient features' test has the explicit approval of two members of the High Court (Gleeson CJ and Gummow J). Arguably, Hayne and Callinan JJ also favour this approach. It is a flexible approach to the law and allows progressive judgments. It also forces judges to disclose the policy choices behind their decisions. This paper suggests that there are two main reasons why the court will continue to use this test, despite its tendency towards a 'judicial discretion'.[111]

Firstly, there has now been an extensive period of Australian jurisprudence on the subject of negligently inflicted economic loss. The above sections have referred to cases from a wide range of contexts. The result of this corpus of authority is that Australian judges can now accurately identify in advance the 'typical' salient features that may arise. The clearest evidence for this proposition is the *Perre* decision itself. Here, seven judges, in seven judgments, pointed to precisely the same significant factors. The *manner* in which they applied them differed, but the substance did not.

Secondly, there seems to be a growing consensus on the High Court regarding the relative strength of the salient factors. Their application will be on a case-by-case basis, but one key factor stands out in favour of a duty, and one against. The most important item suggesting a duty in the *Perre* case was the vulnerability of the Perres with respect to Apand. The judges expressed this in different ways,[112] but all agreed that this was a crucial factor. Conversely, their Honours also concurred that the potential for indeterminacy was the most important factor that could negate the existence of a duty.[113]

At first glance, the multiple judgments in Perre seem scattered and incoherent. However, beneath the surface lies an implicit agreement. The members of the High Court all recognise the important features of an economic loss case and understand their relative force. This paper predicts that the High Court will eventually make explicit their agreement and that, by doing so, the 'salient features' test will prevail in Australian jurisprudence. However, there may be some confusion before this occurs.

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111 Weir goes as far as suggesting an 'overlap' between tort and equity: Weir T, 'The Staggering March of Negligence' in Cane P & Stapleton J (eds), above n41 at 127.

112 'Vulnerability': *Perre* (1999) at 611 (Gleeson CJ), 636 (McHugh J), 688 (Kirby J); 'Inability to protect oneself': Id at 618 (Gaudron J), 664 (Gummow J), 718–719 (Callinan J); 'Knowledge of special position': Id at 700–701 (Hayne J).

113 Id at 615–616 (Gaudron J), 633 (McHugh J), 661 (Gummow J), 688 (Kirby J), 699 (Hayne J), 720 (Callinan J).

C. *Subsequent Treatment: Early Confusion*

At the time of writing, nine cases had considered the High Court's decision in *Perre.*[114] In this paper's opinion, the judgments lie on a spectrum from accurate comprehension of the *Perre* authority to significant misunderstanding of that case.

The Judge who seemed to understand all the nuances of the decision was Wood J in the *Papadopoulos* case.[115] His Honour acknowledged that the seemingly inconsistent judgments cause 'great difficulty' for a trial judge.[116] However, he went on to suggest that *Perre* dictated that he set out the competing factors for and against the imposition of a duty. On the facts, these included the joint venture between the parties, the plaintiff's inexperience and the defendant's effective control. In other words, he identified the 'salient features'. Two other cases echo this detailed understanding of the *Perre* decision. The *Zanca*[117]decision uses the phrase 'salient features' to describe the appropriate test, while the *Beach Petroleum*[118] case outlines the 'factors of special significance'.

The next four cases are similarly correct, but somewhat narrower in their focus. All recognised that competing factors would be important from case to case. However, they each proceeded to rely on one factor rather than a comparison of all significant factors. In *Mahlo,*[119] the court pointed to 'inducement combined with reliance' as the crucial point. In *Bailey,*[120] Santow J referred to the defendant's 'assumption of responsibility' as vital to the imposition of the duty. *Hollis*[121] centred on 'the defendant's knowledge', while *Batten*[122] focused upon 'vulnerability'. None of these decisions is 'wrong', as these four factors were significant to the High Court in *Perre.* However, the analyses are, in a sense, incomplete.

The final two decisions make more serious errors in their approach to *Perre.* In *Tepko,*[123] Mason P suggested that there was 'no consensus' as to the appropriate framework, while Fitzgerald AJA commented that 'the material legal principles are not finally settled'.[124] Their Honours failed to provide any further analysis of *Perre.* This is a rather cursory attitude towards a very significant case, although perhaps understandable considering the lack of *overt* consensus in the High Court. Abadee J also seemed confused in the *Williams*[125] case. There, His Honour read

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114 In addition several cases have cited *Perre* (1999) without providing any analysis. See *Johnson v DOCS* [1999] NSWSC 1156 (2 December 1999); *Lenah Game Meats Pty Ltd v ABC* [1999] TASSC 114 (2 November 1999); *BT v Oei* [1999] NSWSC 1082 (5 November 1999); *Crimmins v Stevedoring Industry Finance Committee* [1999] HCA 59 (10 November 1999).

115 *Papadopoulos v Hristoforidis* [1999] NSWSC 1017 (8 October 1999).

116 Id at 15.

117 *Law Institute of Victoria v Zanca & Tisher Liner* [1999] VSC 464 (24 November 1999).

118 *Beach Petroleum NL v Abbott Tout Russell Kennedy* [1999] NSWCA 408 (5 November 1999).

119 *Mahlo v Westpac Banking Corporation* [1999] NSWCA 358 (1 October 1999).

120 *Bailey v Redebi Pty Ltd* [1999] NSWSC 918 (13 September 1999).

121 *Hollis v Vabu Pty Ltd* [1999] NSWCA 334 (5 November 1999).

122 *Batten v CTMS Ltd* [1999] FCA 1576 (12 November 1999).

123 *Tepko Pty Ltd v Water Board* [1999] NSWCA 40 (29 September 1999).

124 Id at paragraph 69.

125 *Williams v The Minister, Aboriginal Land Rights Act 1983* [1999] NSWSC 843 (26 August 1999).

the *Perre* case as an endorsement of an explicitly incremental approach to the law.[126] He clearly favoured McHugh J opinion. However, this paper has demonstrated that there is not a majority for this perspective. As such, Abadee J erred in his reasoning. This highlights a problem with the *Perre* decision. The superficial disagreement between the judges is very likely to confuse lower courts. Only when the High Court provides clearer joint judgments will the ambiguity disappear.

7. *Conclusion*

The *Perre* decision is at the same time discordant and harmonious. On the surface the High Court provided seven different opinions to instruct us on the proper limits of a duty to avoid negligently inflicted loss. However, this paper has attempted to demonstrate that there is a level of coherence beneath this superficial ambiguity. The form of this latent consensus is a new test for establishing a duty of care that rests on identifying the salient features of each case. The law has come to a point where each of the judges in the High Court identified the same relevant factors in this case. Further, they agreed on their relative strengths.

This paper concludes that the salient features test accurately denotes the Australian jurisprudential maturity in this area. This test replaces the vague rhetoric of proximity and of policy. It avoids the rigidity of incrementalism and the exclusory rule. However, the *Perre* decision does not complete the process of reform. The High Court must not only make its agreement explicit, it must also answer criticisms that this test is another example of judicial legislation.[127] Only *after* these developments occur can we return to the title of this article. Only then will we have a coherent negligence law for the new millennium.

JOSEPH TESVIC *

126 Id at 815.

127 Note the response to other controversial High Court decisions in the last decade such as *Mabo v Queensland (No 2)* (1992) 175 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Wik Peoples v Queensland* (1996) 187 CLR 1. See, for example, Kirby M, 'Judicial Activism' (1997) 27 *UWALR* 1; Doyle J, 'High Court Symposium: Do Judges Make Policy? Should They?' (1998) 57 *AJ Public Administration* 89.

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