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The Common Law in the Twentieth Century

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I. Introduction

Comparing the judicial with the legislative approach to law-making is the stuff of academic debate. I do not propose to enter upon that debate in this short discussion, except to concede that each approach has its strengths, each its weaknesses, and each its separate role. My purpose is, rather, to examine the making of law by the judiciary as it illustrates the inherent capacity of the common law for change and for growth in a dynamic society.

This century has seen several extraordinary developments of the common law in Canada, England, and the United States, the leading example of which is in the area of liability for negligence. By adopting the concept of a duty of care to one's neighbour in *MacPherson v. Buick Motor Co.*,¹ Mr. Justice Cardozo, of the New York Court of Appeals, took a giant step away from the traditional view of negligence causing loss to a third party who is not within the contract relationship. In England, the same issue was dealt with, in 1932, in the landmark decision made by the House of Lords in *Donoghue v. Stevenson*,² wherein Lord Atkin laid down the principle of reasonable foreseeability that underlies the modern law of negligence. When one considers that, a mere three years earlier, as distinguished a legal scholar as Sir Frederick Pollock thought that "it would take a bold man" to induce the House of Lords to reverse the current of English authority,³ the decision in *Donoghue v. Stevenson* was momentous indeed. The preceding fifty years had seen little growth in the English law of negligence, and in recognizing the plaintiff's claim, the Law Lords gave the law a fresh direction. That they well understood the broad implications of their decision is clear from, for example, the judgement of Lord Macmillan, in which he said:

*Justice of the Federal Court of Canada, Ottawa.

1. *MacPherson v. Buick Motor Co.* (1916), 217 N.Y. 382, 11 N.E. 1060.

2. *Donoghue v. Stevenson*, [1932] A.C. 562.

3. Sir Frederick Pollock (1929) 45 L. O. Rev. 421 at 422.

What, then, are the circumstances which give rise to this duty to take care? In the daily contacts of social and business life human beings are thrown into, or place themselves in, an infinite variety of relations with their fellows; and the law can refer only to the standards of the reasonable man in order to determine whether any particular relation gives rise to a duty to take care as between those who stand in that relation to each other. The grounds of action may be as various and manifold as human errancy; and the conception of legal responsibility may develop in adaptation to altering social conditions and standards. The criterion of judgment must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed.⁴

In 1933, as our own law school was about to celebrate its first fifty years, Vincent C. MacDonald, who was soon to become one of its many distinguished deans and, later, an eminent member of the Supreme Court of Nova Scotia, saw the majority decision in *Donoghue v. Stevenson* “in the larger view” as “. . . an extremely apt illustration of the inherent flexibility of the common law, which in the hands of men of judicial valour and statesmanship is periodically given fresh impetus and direction just when the rigid rules of precedent seem to have ‘cribbed, cabined and confined’ it in a blind alley.”⁵

It is not surprising that the law of negligence should have remained static for so long, for the courts have always been mindful of the need for certainty in the law. The legitimacy of the desire to know the “rules of the game” so as to order personal and business affairs is something with which few would quarrel, and the cliché “old cases make good law” is but an expression of that desire. In fact, a high degree of stability is built into the law by our rules of precedent, whereby lesser courts are bound by the previous decisions of higher courts on the same point and intermediate appellate courts are bound by their own previous decisions. In the short run, these rules tend to favour certainty over flexibility. If conditions in society never changed, then that would be unobjectionable, for there would be no need for the law to change. However, conditions in society do change, and the pressure for change in the law is directly related to the pace of change in society. Whenever the law is slow to respond, a gap develops between what the law is and what it should be. Deciding when and how to fill that

4. *Supra*, note 2 at 619.

5. Vincent C. MacDonald (1932) 10 Can. Bar. Rev. 478.

gap is the task faced by the courts in dealing with the new fact situations and relationships within a changing society. While, the courts have, for the most part, discharged that task most admirably, the desire for certainty in the law has often delayed recognition of a need for change. The gap is then perpetuated and enlarged, until the law is either altered by legislation or it comes under the scrutiny of a court of "valour and statesmanship" that is willing and able to set it right.

In the hands of such a court, the common law can be as infinitely adaptable to a dynamic society as life itself. Indeed, the great jurists have regarded our law as much more than simply a collection of rules based in logic and designed for certainty. Rather, Maitland declared that "law is the place where life and logic meet," and Mr. Justice Holmes said that "the life of the law has been experience, not logic." The need for the law to change and adapt with society was also acknowledged by Mr. Justice Cardozo in these poetic words:

The inn that shelters for the night is not
the journey's end. The law, like the traveller,
must be ready for the morrow.⁶

Above all, the development of the law by the courts must be guided by justice. Lord Denning expressed this in his own inimitable fashion in the course of a public interview given a few years before his retirement as Master of the Rolls in the summer of 1982, saying that "some hold that the object of the law is to be certain, but I hold that the object of the law is to be just."

Examples of the law being given "fresh impetus and direction" may be found in the twentieth century, a period of great societal change. I wish to examine three of the more outstanding examples, namely, the dramatic changes made by the courts in the laws regarding injunctive relief, liability for negligent misstatement, and recovery of damages for pure economic loss.

II. *The Mareva Injunction*

The remarkable development of the so-called Mareva injunction aptly illustrates the ability of the common law to change and to march with the times. In England, the traditional view had been that the interlocutory injunction would not be granted to restrain a defendant from disposing of his assets out of, or removing them

6. Benjamin N. Cardozo, *The Growth of Law* (Yale University Press, 1924) at 20.

from, the jurisdiction prior to judgment. The principle was one of long standing, having had its genesis in *Lister & Co. v. Stubbs*, a decision of the Court of Appeal.⁷ In that case, Lord Justice Cotton said that he knew “of no case where, because it was highly probable that if the action were brought to a hearing the plaintiff could establish that a debt was due to him from the defendant, the defendant has been ordered to give security until that has been established by the judgment or decree.”⁸ Lord Justice Lindley was even more emphatic, stating that it would be a “very great mischief if we were to stretch a sound principle” in the manner sought.⁹ And there the law stood for the next eighty years, until the decision of the Court of Appeal in *Nippon Yusen Kaisha v. Karageorgis*.¹⁰ In that case, the defendants, who had chartered several ships, failed to pay the agreed charter hire, and the plaintiff’s attempts at locating them to collect payment were unsuccessful. Somehow, the plaintiff discovered that the defendants had funds in London banks, and fearing that the funds would be removed from the jurisdiction, brought an ex parte application to restrain their disposition or removal, by the defendants, from the jurisdiction. The decision of Mr. Justice Donaldson, in which this application was refused, was reviewed by the Court of Appeal, which, in a bold departure, held that the relief should be granted on the ground that it was “just or convenient” to do so. Confronting the issue head-on, the Master of the Rolls, Lord Denning, stated that:

We are told that an injunction of this kind had never been done before. It has never been the practice of the English courts to seize assets of a defendant in advance of judgment, or to restrain the disposal of them. We were told that Chapman, J. in chambers recently refused such an application. In this case also Donaldson, J. refused. We know, of course, that the practice on the continent of Europe is different.

It seems to me that the time has come when we should revise our practice. There is no reason why the High Court or this court should not make an order such as is asked for here. It is warranted by Section 45 of the Supreme Court of Judicature (Consolidation) Act 1925 which says that the High Court may grant a mandamus or injunction or appoint a receiver by an interlocutory order in all cases in which it appears to the Court to be just or convenient to do so. It seems to me that this is just such a case. There is a strong

7. *Lister & Co. v. Stubbs* (1890) 45 Ch. D. 1.

8. *Id.* at 13.

9. *Id.* at 15.

10. *Nippon Yusen Kaisha v. Karageorgis*, [1975] 3 All E.R. 282.

prima facie case that the hire is owing and unpaid. If an injunction is not granted, these monies may be removed out of the jurisdiction and the shipowners will have the greatest difficulty in recovering anything. Two days ago we granted an injunction ex parte and we should continue it.¹¹

In *Mareva Campania Naviera SA v. International Bulkcarriers SA*,¹² a later case which was also decided in 1975, Mr. Justice Donaldson declined to extend ex parte injunctive relief in an action to collect unpaid charter hire and damages for repudiation of a charter party, or to restrain the foreign defendants from removing or disposing out of the jurisdiction monies standing to their credit at a London bank. But on appeal, the Court of Appeal followed its own decision in the *Karageorgis* case, and granted the relief. However, it was not until *Rasu Maritima SA v. Pertamina*¹³ that the same court heard both sides in such a dispute, after which it gave its final blessing to the Mareva injunction as it is now understood. Later still, in *Third Chandris Shipping Corporation v. Unimarine SA*,¹⁴ Lord Denning, who was concerned that the Mareva injunction "not be stretched too far lest it be endangered,"¹⁵ set forth certain guidelines that are the bases on which it will be granted.

While the earlier English cases that were heard during the 1970s were concerned with the presence in the jurisdiction of the assets of foreign defendants, it was not long before the sweep of judicial reasoning led to the granting of Mareva injunctions in cases where the assets were those of a domestic defendant. Here the lead was taken by Sir Robert Magarry V-C., in *Barclay-Johnson v. Yuill*.¹⁶ In this case, the plaintiff claimed that he was owed the balance on the transfer of leasehold property. In the course of litigation over the claim, the plaintiff subsequently learned that the defendant was abroad or was about to go abroad. Finding also that the premises had been sold, the plaintiff, being fearful that the defendant would remove all of his assets and live outside the country, sought an ex parte injunction to restrain the defendant from removing the net proceeds of the sale from the jurisdiction. There was evidence that

11. *Id.* at 283.

12. *Mareva Compania Naviera SA, v. International Bulkcarriers SA*, [1980] 1 All E.R. 213.

13. *Rasu Maritima SA v. Pertamina*, [1977] 3 All E.R. 324.

14. *Third Chandris Shipping Corporation v. Unimarine SA*, [1979] 2 All E.R. 972.

15. *Id.* at 984.

16. *Barclay-Johnson v. Yuill*, [1980] 3 All E.R. 190.

the defendant had previously experienced financial difficulties and had gone to live in the United States for a period of time. Sir Robert, after taking the view “that the heart and core of the Mareva injunction is the risk of the defendant removing his assets from the jurisdiction and so stultifying any judgment given by the Court in the action,”¹⁷ could see no reason why that injunction “should be confined to ‘foreigners’ in any sense of that term.”¹⁸ Accordingly, he granted the relief, noting in passing the decision of Mr. Justice Robert Joff in *Iraqi Ministry of Defence v. Arcepey Shipping Co. SA*,¹⁹ wherein the defendant was allowed to use the assets that were subject to the restraining order to pay debts as they came due. Finally, in *Prince Abdul Rahman Bin Turki Al Sudairy v. Abu-Taha*,²⁰ Lord Denning arrived at the same conclusion that Sir Robert Magarry had in the *Barclay-Johnson* case.

Once the path had been blazed by the English Court of Appeal, courts in other common law jurisdictions received word of the Mareva injunction with equanimity. It was not long before the courts in our own country began to grant injunctions of the same sort, although some confusion was created in the process. In *Chitel and Anstalt v. Rothbart and Roprop Foundation Inc.*,²¹ a decision of the Ontario Court of Appeal, effort was made to inject some order into the granting, in Ontario, of the Mareva-style injunction. After an exhaustive review of the leading cases, which Associate Chief Justice MacKinnon acknowledged was “not necessary to my decision,” he agreed that “the Mareva injunction is here and here to stay”²² and would function as an exception to the general rule against prejudgment relief only when there was a risk that the defendant’s assets would be removed from the jurisdiction before judgment, and only in narrowly defined circumstances. In his decision, he stated that:

The applicant must persuade the court by his material that the defendant is removing or there is a real risk that he is about to remove his assets from the jurisdiction to avoid the possibility of

17. *Id.* at 194.

18. *Id.*

19. *Iraqi Ministry of Defence v. Arcepey Shipping Co. S.A.*, [1980] 1 All E.R. 480.

20. *Prince Abdul Rahman Bin Turki Al Sudairy v. Abu-Taha*, [1980] 3 All E.R. 409.

21. *Chitel and Anstalt v. Rothbart and Roprop Foundation Inc.*, [1983] 39 O.R. (2d) 513 (C.A.).

22. *Id.* at 534.

a judgment, or that the defendant is otherwise dissipating or disposing of his assets, in a manner clearly distinct from his usual or ordinary course of business or living, so as to render the possibility of future tracing of the assets remote, if not impossible in fact or in law.²³

With this, enough has been said about the Mareva injunction, except to note that after eighty years, during which the law stood virtually unchanged, the English courts once again demonstrated the inner strength and ability of the common law to afford an appropriate remedy in the face of changing circumstances and conditions. As Lord Denning put it in the *Rasu Maritima SA* case, the facts presented to the court “called aloud” for judicial intervention.²⁴ Even more remarkably, the Mareva injunction had, within a mere five years, been extended to prevent removal and disposition of assets of a domestic defendant, as it had been extended to prevent removal of assets of a foreign defendant in circumstances where it is evident that failure to grant relief would end in “stultifying” or “sterilizing” any judgment that the plaintiff may obtain. The remedy has become such standard practice in Canada that it is now being expressly provided for in the rules of practice of our courts, as, for example, in Rule 40.03 (“Injunction for Preservation of Assets (Mareva Injunction)”) of the Supreme Court of New Brunswick’s Rules of Practice.

III. *Negligent Misstatement*

The manner in which the common law of negligence has developed in respect of negligent misstatement over the past thirty years provides another striking example of the inherent adaptability of common law. Although the impetus for change had its seeds in *Donoghue v. Stevenson*, it was not until the celebrated dissent of Lord Justice Denning in *Candler v. Crane, Christmas & Co.*,²⁵ in which the traditional view of the law was challenged, that a new direction was set. Before investing in a corporation, the plaintiff asked to see the accounts which had been prepared by the defendant firm of chartered accountants. In due course, the plaintiff received the accounts and, on the strength of their accuracy, decided to invest. It was clear that the defendants knew that the accounts would

23. *Id.* at 533-34.

24. *Supra*, note 13.

25. *Candler v. Crane, Christmas & Co.*, [1951] 2 K.B. 164.

be passed to the plaintiff. In fact, the accounts contained numerous false statements and presented a misleading picture of the financial state of the corporation, which became defunct within a year and resulted in the plaintiff losing his investment. His action against the firm of chartered accountants was dismissed, both by the trial judge and by the Court of Appeal, on the ground that, while the financial statements were false, they were not fraudulent and, accordingly, the defendants owed no duty to the plaintiff with whom they had no contractual or fiduciary relationship.

This case aptly illustrates the reluctance of some courts to look beyond traditional solutions in existing law, and to examine the merits of those solutions while seeking new ones that would be appropriate in light of contemporary conditions. The old law on which this case was grounded was found in a line of cases that began with *LeLievre and Dennes v. Gould*.²⁶ In that case, a surveyor who did work for a building owner issued certificates which informed the owner of the amounts he had to pay to the builder. The owner showed the certificates to his mortgagees, who advanced money, relying upon these certificates rather than upon the certificate of their own surveyor. The certificates, it turned out, had been negligently prepared, and led the mortgagees to seek redress of their loss from the surveyor. The case was dismissed both by the lower court and by the Court of Appeal, where the prevailing view of the law was set forth by the Master of the Rolls, Lord Esher, as follows:

No doubt the defendant did give untrue certificates; it was negligent on his part to do so, and it may even be called gross negligence. But can the plaintiffs rely upon negligence in the absence of fraud? The question of liability for negligence cannot arise at all until it is established that the man who has been negligent owed some duty to the person who seeks to make him liable for his negligence. What duty is there when there is no relation between the parties by contract? A man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them.²⁷

In *Candler v. Crane, Christmas & Co.*, the majority view of the Court of Appeal was that a distinction existed between negligent misstatement, on the one hand, and negligent circulation or repair of chattels, on the other, and that this distinction had not been

26. *LeLievre and Dennes v. Gould*, [1893] 1 Q.B. 491.

27. *Id.* at 497.

abolished by the decision of the House of Lords in *Donoghue v. Stevenson*. Lord Justice Denning, dissenting, took a decidedly different view, invoking statements of principle “made by some of the great names in the law,”²⁸ from Lord Eldon to Lord Atkin, and then pointing to the divided opinions in “the great cases which have been milestones of progress in our law,”²⁹ adding that:

On the one side there were the timorous souls who were fearful of allowing a new cause of action. On the other side there were the bold spirits who were ready to allow it if justice so required. It was fortunate for the common law that the progressive view prevailed. Whenever this argument of novelty is put forward I call to mind the emphatic answer given by Pratt, C.J., nearly two hundred years ago in *Chapman v. Pickersgill* when he said: “I wish never to hear this objection again. This action is for a tort: torts are infinitely various; not limited or confined, for there is nothing in nature but may be an instrument of mischief.” The same answer was given by Lord Macmillan in *Donoghue v. Stevenson* when he said: “The criterion of judgment must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed.” I beg leave to quote those cases and those passages against those who would emphasize the paramount importance of certainty at the expense of justice. It needs only a little imagination to see how much the common law would have suffered if those decisions had gone the other way.³⁰

He then proceeded to hold that the chartered accountants owed a duty to use care in their work not only to their own clients, with whom they had contracted, but to any third party to whom they showed their accounts and reports or to whom they knew that their clients were going to show them, when the accountants knew that the person would consider their accounts and reports with a view to investing or taking other action to his gain or detriment. Lord Asquith, reflecting the majority view, saw his duty as that of simply recording “the existing state of the law,” and added that if this view rendered him “to the company of ‘timorous souls,’” then “I must face that consequence with such fortitude as I can command.”³¹

And so the law stood, as it had for almost sixty years, until the House of Lords reviewed the principle fourteen years later in *Hedley*

28. See, *supra*, note 25 at 176.

29. *Id.* at 178.

30. *Id.*

31. *Id.* at 195.

*Byrne & Co. Ltd. v. Heller & Partners Ltd.*³² In that case, the plaintiff asked its bankers to inquire into the financial stability of a company on whose behalf they were about to incur a contractual debt. These bankers, in turn, made inquiries of the company's own bankers, who gave favourable references but stipulated that they were "without responsibility". In relying upon these references, the plaintiff incurred a debt, resulting in a loss for which it sued the company's bankers. The defence succeeded on the narrow ground that the "without responsibility" disclaimer protected the defendants. Throughout their speeches, the Law Lords stressed the importance of *Donoghue v. Stevenson* in the development of the law of negligence. Lord Devlin, in particular, saw the law rather as a living organism. He commented upon that case and Lord Atkin's speech in the following terms:

What Lord Atkin did was to use his general conception to open a category of cases giving rise to a special duty. It was already clear that the law recognized the existence of such a duty in the category of articles that were dangerous in themselves. What *Donoghue v. Stevenson* did may be described either as widening of an old category or as the creation of a new and similar one. The general conception can be used to produce other categories in the same way. An existing category grows as instances of its application multiply until the time comes when the cell divides . . . As always, in English law, the first step . . . is to see how far the authorities have gone, for new categories in the law do not spring into existence overnight.³³

On the main issue of whether a cause of action lay in favour of the plaintiff for the loss he suffered as a result of the defendants' misstatement of the company's financial stability, a majority of the House of Lords was under no doubt. They overruled *Candler v. Crane, Christmas & Co.* and laid down a new principle of law, which stated that a negligent, though honest, misrepresentation, whether spoken or written, may give rise to a cause of action in damages for financial loss that was caused by it apart from any contract or fiduciary relationship. The basis for this principle was that the law will imply a duty of care when a party who seeks information from a party who is possessed of special skill trusts him to exercise due care, and when that party knew or ought to have known that reliance would be placed on his skill and judgment. In

32. *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*, [1964] A. C. 465.

33. *Id.* at 524-25.

other words, where the issuer of a negligent misstatement should have reasonably foreseen that a person in the position of the plaintiff would rely upon it to his detriment, he will be held liable for that person's damages. The *Hedley Byrne* principle, as it has come to be known, has been adopted by our courts, including the Supreme Court of Canada, which applied it in *Wellbridge Holdings Ltd. v. The Metropolitan Corporation of Greater Winnipeg and Walter Machinery & Equipment Ltd.*,³⁴ *Rivtow Marine Ltd. v. Washington Iron Works*,³⁵ and *Haig v. Bamford*.³⁶ In this last case, which involved a claim made against some chartered accountants by a third party plaintiff, the Supreme Court also took account of the "increasing growth and changing role of corporations in modern society" and the "new perception of the societal role of the profession of accounting."³⁷

More recently, in *Anns v. Merton London Borough Council*,³⁸ the existence of a duty of care in a particular situation was once again canvassed by the House of Lords, in light of *Donoghue v. Stevenson* and subsequent cases. Lord Wilberforce summarized the governing principles as follows:

Through the trilogy of cases in this House — *Donoghue v. Stevenson* . . . , *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* . . . , and *Dorest Yacht Co. Ltd. v. Home Office* . . . , the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damages, there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter — in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit, the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise.³⁹

34. *Wellbridge Holdings Ltd. v. The Metropolitan Corporation of Greater Winnipeg and Walter Machinery & Equipment Ltd.*, [1971] S.C.R. 957.

35. *Rivtow Marine Ltd. v. Washington Iron Works*, [1974] S.C.R. 1189.

36. *Haig v. Bamford*, [1977] 1 S.C.R. 466.

37. *Id.* at 475.

38. *Anns v. Merton London Borough Council*, [1978] A.C. 728.

39. *Id.* at 751-52.

In the second principle expressed here, the House of Lords might appear to be indicating a desire to draw back from the broad principles that were laid down and to accomplish this by allowing the courts, in particular cases, to deny recovery, despite the existence of a *prima facie* duty of care, but when, for policy reasons not fully articulated, recovery should be denied. Some assurance that the House was not intending to abridge the great principle of *Donoghue v. Stevenson* may be found in its most recent decision in *Junior Books Ltd. v. Veitchi Co. Ltd.*,⁴⁰ where Lord Roskill repudiated the merest suggestion that the law, as it stood before 1932, should be resurrected. He stated that:

It was powerfully urged on behalf of the appellants that were your Lordships to so extend the law, a pursuer in the position of the pursuer in *Donoghue v. Stevenson* . . . could, in addition to recovering for any personal injury suffered, have also recovered for the diminished value of the offending bottle of ginger beer. Any remedy of that kind, it was argued, must lie in contract and not in delict or tort. My Lords, I seem to detect in that able argument reflections of the previous judicial approach to comparable problems before *Donoghue v. Stevenson* was decided. That approach usually resulted in the conclusion that in principle the proper remedy lay in contract and not outside it. But that approach and its concomitant philosophy ended in 1932 and for my part I should be reluctant to countenance its re-emergence some 50 years later in the instant case.⁴¹

The law had come a long way indeed from the days of *Winterbottom v. Wright*.⁴² In that case, Chief Baron Abinger regarded as quite “absurd and outrageous” a suggestion that a mail coach driver, who was injured while employed by the Postmaster-General as a result of the coach upsetting due to a construction defect, should be entitled to recover damages against its supplier. “If the plaintiff can sue,” he said, then “every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action.” Lord Buckmaster had that case, and particularly the view of Baron Alderson,⁴³ very much in mind in preparing his dissenting speech in *Donoghue v. Stevenson* when he asked “If one step why not fifty?”⁴⁴

40. *Junior Books Ltd. v. Veitchi Co. Ltd.*, [1982] 3 W.L.R. 477.

41. *Id.* at 493.

42. *Winterbottom v. Wright* (1842) 10 M & W 109.

43. *Id.* at 115.

44. *Supra*, note 2 at 577.

The *Junior Books* case was principally concerned with the recoverability of damages for pure economic loss, and the developments in that branch of the law in this century are a subject to which I now turn. Again they illustrate the ability of the common law to adapt and to grow with experience as its guide, and so to meet the needs of an ever-changing society.

IV. *Damages for Economic Loss*

The progress of the common law in the difficult area of the recoverability of damages for pure economic loss has been hesitating and, at times, even tortured. But the point has now been reached where it can be confidently stated as a general proposition that damages for direct economic loss, whether or not they are coupled with damages for physical loss, are recoverable under English common law. That important principle aside, the development of the law on this point owes a good deal to Canadian judges and to Canadian courts, and illustrates a willingness on their part to strike out on their own when the common law is found to be in need of new direction.

In order to appreciate the true significance of the change wrought on the law in this area, it is once again desirable, in keeping with Holdsworth's admonition that those wishing to understand the law have "the patience to read its history", to examine the law that preceded the change. Again, we find that it extended back well into the nineteenth century, which was also the period of the great Industrial Revolution in England. A good example of the view that prevailed is to be found in *Cattle v. Stockton Waterworks Co.*,⁴⁵ where Mr. Justice Blackburn thought that wages that were lost by a group of miners upon the negligent flooding of a mine should not be recoverable in an action founded upon that negligence. That view held for many years, until, in Canada in 1959, it began to break down under the scrutiny of a judge who was not prepared to apply it in a particular case. That case was *Seaway Hotels Ltd. v. Consumer's Gas Co.*⁴⁶ There, an electric cable was accidentally severed, due to the negligence of the defendant's employee and in the course of his employment. As a result, the plaintiff hotel owners lost rental revenue from guest rooms and from the operation of the hotel's bar and eating facilities. As it was summertime, another

45. *Cattle v. Stockton Waterworks Co.*, [1875] L.R. 10 Q.B. 453 at 457.

46. *Seaway Hotels Ltd. v. Consumer's Gas Co.*, [1959] O.R. 177.

consequence of the negligence was the spoiling of food in the plaintiff's electrically operated refrigerator. If the old law had been applied, the results would have been predictable: there could be no recovery of the lost revenues. But Mr. Justice McLennan, clearly uncomfortable with that prospect, fell upon the simple fact of the physical loss of the spoiled food and proceeded to allow it as well as the economic loss that was represented by the lost revenues. The device was both clever and convenient. It had the effect of inching the law forward, within very narrow limits, and opening the gate ever so slightly but not so much as to invite a flood. In addition, the Court of Appeal agreed.⁴⁷

When the same point came up for decision in England in *Weller & Co. v. Foot and Mouth Disease Research Institute*,⁴⁸ a case in which no physical loss was suffered, recovery was denied. It was again denied in similar circumstances in *Electrohome Ltd. v. Welsh Plastics Ltd.*⁴⁹ There was fear that to extend the principle to cover the recovery of pure economic loss that was not coupled with some physical loss would be to "throw open the floodgates", and judges were not prepared to take that step, meritorious though a particular claim might appear from the standpoint of justice. This fear lay at the base of the English Court of Appeal's decision in *S.C.M. (United Kingdom) Ltd. v. W. J. Whittal and Son Limited*,⁵⁰ where Lord Denning, given the circumstances of that particular case, could not bring himself to allow the claim, preferring instead to apply the exclusionary rule enunciated in the *Seaway Hotels* case. He rested his decision upon public policy, saying that the "risk should be borne by the whole community who suffer the losses rather than rest upon one pair of shoulders," even while admitting that "there is not much logic in this, but still it is the law."⁵¹ Three years later, when the point again came before him in *Spartan Steel & Alloys Ltd. v. Martin & Co. (Contractors) Ltd.*,⁵² Lord Denning held fast to this view, but seemed troubled, for he added that "the more I think about these cases, the more difficult I find it to put each into its own

47. [1959] O.R. 581.

48. *Weller & Co. v. Foot and Mouth Disease Research Institute*, [1966] 1 Q.B. 569.

49. *Electrohome Ltd. v. Welsh Plastic Ltd.*, [1968] 2 All E.R. 205.

50. *S.C.M. (United Kingdom) Ltd. v. W. J. Whittal and Son Limited*, [1971] 1 Q.B. 337.

51. *Id.* at 344.

52. *Spartan Steel & Alloys Ltd. v. Martin & Co. (Contractors) Ltd.*, [1973] 1 Q.B. 27.

proper pigeon-hole. Sometimes I say: 'There was no duty.' In others I say: 'The damage was too remote.' So much so that I think the time has come to discard those tests which have proved so elusive. It seems to me better to consider the particular relationship in hand, and see whether or not, as a matter of policy, economic loss should be recoverable."⁵³ Lord Justice Edmund Davies, dissenting, would have allowed the claim for economic loss, "provided that it was a reasonably foreseeable and direct consequence of failure in a duty of care."⁵⁴ Yet the capacity of the common law to respond, even in the hands of a judge with the breadth of vision of the Master of the Rolls, seemed here to fail. There was work yet to be done.

The question was next taken up by the Supreme Court of Canada in *Rivtow Marine Ltd. v. Washington Iron Works and Walkem Machinery & Equipment Ltd.*⁵⁵ While using a crane on its chartered log barge, the plaintiff noticed that it was defective and removed it from operation in order to repair it. Both the distributor and the designer and manufacturer of the crane were joined as defendants, for both were well aware of the type of defect, since it had been found in other cranes of the same design and manufacture. Yet both had failed to warn the plaintiff, who sued not just for the cost of repairs but also for the revenues that were lost due to the barge being immobilized during the period of repair. A majority of the Supreme Court allowed the claim for economic loss, but only on the basis that it was "the direct and demonstrably foreseeable result of the breach of that duty"⁵⁶ to warn of the defect in the crane of which the defendants were aware after it was put into circulation. Mr. Justice Laskin also allowed the claim but was not content with the basis of "independent tort" upon which the majority rested its decision. His logic is unassailable. He asked why the plaintiff should have been entitled to recover if his economic loss had been accompanied by physical injury, yet be denied recovery when his economic loss was incurred by an action that was taken by him to avoid threatened physical injury. He stated this, in his reasons for judgment, as follows:

53. *Id.* at 37.

54. *Id.* at 45.

55. *Rivtow Marine Ltd. v. Washington Iron Works and Walkem Machinery & Equipment Ltd.*, [1974] S.C.R. 1189.

56. *Id.* at 1215.

It is foreseeable injury to person or to property which supports recovery for economic loss suffered by a consumer or user who is fortunate enough to avert such injury. If recovery for economic loss is allowed when such injury is suffered, I see no reason to deny it when the threatened injury is forestalled. Washington can be no better off in the latter case than in the former. On the admitted facts, a crane or other person's barge, of similar design to that installed on the appellant's barge, had collapsed killing its operator. It was when this fact came to its notice that the appellant took its crane out of service. Its crane had the same cracks in it that were found in the collapsed crane, and they were due to the same faulty design in both cases. Here then was a piece of equipment whose use was fraught with danger to person and property because of negligence in its design and manufacture; one death had already resulted from the use of a similar piece of equipment that had been marketed by Washington. I see nothing untoward in holding Washington liable in such circumstances for economic loss resulting from the downtime necessary to effect repairs to the crane. The case is not one where a manufactured product proves to be merely defective (in short, where it has not met promised expectations) but rather one where by reason of the defect there is a foreseeable risk of physical harm from its use and where the alert avoidance of such harm gives rise to economic loss. Prevention of threatened harm resulting directly in economic loss should not be treated differently from post-injury cure.⁵⁷

He also regarded the cost of repairs to be recoverable as economic loss.

However, in his view of the proper basis upon which to rest recoverability of economic loss, Mr. Justice Laskin stood virtually alone (only Mr. Justice Hall concurred). Two years later, in *Agnew-Surpass Shoe Stores Limited v. Cummer-Yonge Investments Ltd.*,⁵⁸ Mr. Justice Pigeon took the view that the *Rivtow* decision stood for the broad proposition "that recovery of economic loss caused by negligence is allowable without any recovery for property damage."⁵⁹ Some confusion followed. For example, in *Gypsum Carrier Inc. v. The Queen et al.*,⁶⁰ Mr. Justice Collier of the Federal Court of Canada accepted the broad proposition, while in *Bethlehem*

57. *Id.* at 1222.

58. *Agnew-Surpass Shoe Stores Limited v. Cummer-Yonge Investments Ltd.*, [1976] 2 S.C.R. 221.

59. *Id.* at 252.

60. *Gypsum Carrier Inc. v. The Queen et al.*, [1978] 1 F.C. 147.

Steel v. St. Lawrence Seaway Authority,⁶¹ his brother, Mr. Justice Addy, applied the exclusionary rule that pure economic loss is not recoverable, even if foreseeable, where it is not accompanied by actual or threatened physical damage to person or property. More recently, in *Attorney-General for Ontario v. Fatehi*⁶² (which is now pending appeal to the Supreme Court of Canada), Madame Justice Wilson of the Ontario Court of Appeal, for herself, summed up the present state of Canadian law in the following observations:

I have concluded from a review of the leading English and Canadian authorities that, while Canadian courts have made greater inroads into the exclusionary rule than the English courts, there has been no dramatic movement away from it despite the observations of Mr. Justice Pigeon in the *Agnew-Surpass* case, *supra*. I say this because the majority in *Rivtow*, *supra*, found it necessary to base recovery on the existence of an independent tort, breach of the duty to warn arising from the special relationship between the parties, and Laskin J. required a threat of physical damage to person or property. None of the Court seems to have been prepared to go as far as Lord Justice Edmund Davies in his dissenting judgment in the *Spartan Steel* case, *supra*, and permit recovery of the economic loss as a direct and reasonably foreseeable consequence of the defect in the design or manufacture of the crane. In cases where there are no independent tort and no threat of physical damage the exclusionary rule would seem to be still very much alive in Canada.⁶³

The scene of the developments in this area of common law then shifted back to England and to the decision of the House of Lords in the *Junior Books* case.⁶⁴ The plaintiff, who had had a factory built for their business in Grangemouth, Scotland, claimed against a sub-contractor for damages arising from the need to relay the concrete floor, which turned out to be defective when cracks appeared in it shortly after it was laid. In addition to the cost of relaying the floor, the plaintiff also claimed for the cost of storing books off of the premises, for the cost of moving machinery, for lost profit due to temporary closure of the business, for wages to be paid to employees who could not do their jobs, for overhead, and for the costs of its investigation into the defective work. The Scottish courts allowed the claims in economic loss. In agreeing, the House of

61. *Bethlehem Steel v. St. Lawrence Seaway Authority*, [1978] 1 F.C. 464.

62. *Attorney-General for Ontario v. Fatehi* (1981) 34 O.R. (2d) 129.

63. *Id.* at 140.

64. *Supra*, note 40.

Lords carefully reviewed the entire question against the background of the law of negligence as developed by the courts in England and the Commonwealth, from *Donoghue v. Stevenson* onward. Their review included *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*,⁶⁵ where a majority of the House of Lords seemed willing to allow a claim for economic loss even in the absence of physical injury. Against the plaintiff's claim were marshalled the views of eminent jurists, beginning with Chief Justice Cardozo's oft repeated dictum in *Ultramares Corporation v. Touche*,⁶⁶ fearing exposure to "liability in an indeterminate amount for an indeterminate time to an indeterminate class",⁶⁷ and which Lord Fraser characterized as the "floodgates argument".⁶⁸ Lord Roskill wrote the leading judgment, in which he carefully examined the relevant cases in both England and the Commonwealth, including the decision of the Supreme Court in the *Rivtow* case. In his judgment, he preferred the "powerful dissenting judgment" of Mr. Justice Laskin to the judgment of the majority. After noting that "in the instant case there was no physical damage to the flooring in the sense in which that phrase was used"⁶⁹ in some of the earlier cases, Lord Roskill proceeded to dismiss the appeal and to uphold the judgment in favour of the plaintiff for its claim in pure economic loss, taking as his guide the principles of recoverability of damages in negligence, laid down by Lord Wilberforce in the *Anns* case. He said that:

I think today the proper control lies not in asking whether the proper remedy should lie in contract or instead in delict or tort, not in somewhat capricious judicial determination whether a particular case falls on one side of the line or the other, not in somewhat artificial distinctions between physical and economic or financial loss when the two sometimes go together and sometimes do not — it is sometimes overlooked that virtually all damage including physical damage is in one sense financial or economic for it is compensated by an award of damages — but in the first instance in establishing the relevant principles and then in deciding whether the particular case falls within or without those principles. To state this is to do no more than to restate what Lord Reid said in *Dorset Yacht Co. Ltd. v. Home Office* and Lord Wilberforce in *Anns v. Merton London Borough Council*.

65. *Supra*, note 32.

66. *Ultramares Corporation v. Touche* (1931) 174 N.E. 441.

67. *Id.* at 444.

68. *Supra*, note 40 at 482.

69. *Id.*

Lord Wilberforce . . . enunciated the two tests which have to be satisfied. The first is "sufficient relationship of proximity", the second any consideration negating, reducing or limiting the scope of the duty or the class of person to whom it is owed or the damages to which a breach of the duty may give rise. My Lords, it is I think in the application of those two principles that the ability to control the extent of liability in delict or negligence lies. The history of the development of the law in the last 50 years shows that fears aroused by the floodgates argument had been unfounded.⁷⁰

And he added that:

During the argument it was asked what the position would be in a case where there was a relevant exclusion clause in the main contract. My Lords, that question does not arise for decision in that instant appeal, but in principle I would venture the view that such a clause according to the manner in which it was worded might in some circumstances limit the duty of care just as in the *Hedley Byrne* case the plaintiffs were ultimately defeated by the defendant's disclaimer of responsibility. But in the present case the only suggested reason for limiting the damage (ex hypothesi economic or financial only) recoverable for the breach of the duty of care just enunciated is that hitherto the law has not allowed such recovery and therefore ought not in the future to do so. My Lords, with all respect to those who find this a sufficient answer, I do not. I think this is the next logical step forward in the development of this branch of the law. I see no reason why what was called during the argument "damage to the pocket" simpliciter should be disallowed when "damage to the pocket" coupled with physical damage has hitherto always been allowed. I do not think that this development, if development it be, will lead to untoward consequences.⁷¹

It will be noted that the particular case was concerned with direct economic loss, rather than with indirect economic loss to third parties, as was pointed out by Lord Roskill when he described the relationship between the parties as being "as close as it could be short of actual privity of contract."⁷² Nevertheless, while the case may be seen by some as revolutionary in its scope, the concept itself was, in fact, not new to the law. The Supreme Court of New Jersey had accepted it almost two decades earlier in *Santor v. A & M Karagheusian, Inc.*⁷³ (Compare, also, *Seely v. White Motor Co.*)⁷⁴

70. *Id.* at 493-94.

71. *Id.* at 494-95.

72. *Id.* at 494.

73. *Santor v. A & M. Karagheusian, Inc.* (1965) 44 N.J. 52.

74. *Seely v. White Motor Co.* (1965) 45 Cal. Rptr. 17.

And so, in the *Junior Books* case, as in earlier English and Canadian cases, we find yet another example of the ability of the courts to reform the common law, unaided by the legislature. We see also the way in which that is accomplished. Change came slowly, but the courts brought it about by following a step-by-step process. Mr. Justice Vincent MacDonald would, I am confident, approve, for his great faith in the “inherent flexibility” of the common law was once again borne out. One might chance to speculate that Lord Denning, now in retirement, might also nod in agreement, even though he was unable to reject the exclusionary rule against recovery of damages for pure economic loss in his own decisions as Master of the Rolls.

V. Summary

What I have endeavoured to illustrate here is the capacity of the common law to be adapted to new conditions, thereby providing new and better answers either in the place of old ones or where answers (and even the questions themselves) had not existed before. This is the genius of the common law. Whether the process be labelled “administering justice according to law”, as it is in the words of Viscount Simonds,⁷⁵ or simply “doing justice”, as it is viewed by Lord Denning,⁷⁶ is not so important as the process itself. Lord Atkin, in *Donoghue v. Stevenson*, considered that the law of negligence should accord “with sound common sense”,⁷⁷ and Lord Macmillan was of the view that it should be consonant “with justice and common sense”.⁷⁸ Almost one hundred years earlier, Lord Esher wrote, in *Emmens v. Pottle*, that “any proposition the result of which would be to shew that the Common Law of England is wholly unreasonable and unjust, cannot be part of the Common Law of England.”⁷⁹

The common law is far from being a perfect instrument of reform, and those who know it well know its limitations as well as its possibilities. On the whole, it serves society reasonably well, sometimes tilting against reform and thereby inviting legislative intervention, and at other times changing profoundly and with

75. *Midland Silicones Ltd. v. Scruttons Ltd.*, [1962] A.C. 446 at 468.

76. See, for example, Denning, *The Discipline of Law* (Butterworth, 1979) Part Seven.

77. *Supra*, note 2 at 599.

78. *Id.* at 621.

79. *Emmens v. Pottle* (1885) 16 O.B.D. 354 at 357-8.

unexpected swiftness. As an example of the latter, we need only to look at the remarkable development of the Mareva injunction. Not to be overlooked are the practical limitations on those who administer, as well as those who seek, justice. On a day-to-day basis, the courts must be primarily concerned with settling disputes, rather than with matters of high principle. And it is the litigants who must bear the expense.

I have given but a few examples to illustrate the point of this discussion, but these could easily have been multiplied. The dramatic changes in the common law in our own century speak well of its capacity, and of the capacity of the courts, to carry out this creative process. It would be unfortunate if the law stood still, or even if it were to be too slow to change, for as was so eloquently pointed out by Lord Denning, one of the great reform-minded judges of our time:

What is the argument on the other side? Only this: that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before, we shall never get anywhere. The law will stand still whilst the rest of the world goes on — and that will be bad for both.⁸⁰

Certainly the courts of our own century have not left the law to stand still in a changing world, but have changed and developed it. And that has been good for both.

80. *Packer v. Packer*, [1954] p. 15 at 22.