
CANADA / JUDGMENT

Rivtow Marine Ltd. v. Washington Iron Works

[1974] SCR 1189

COURT

Supreme Court of Canada

DECIDED

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Rivtow Marine Ltd. v. Washington Iron Works

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Report

[1974] SCR 1189

Judges

Fauteux, Joseph Honoré Gérard; Abbott, Douglas Charles; Martland, Ronald; Judson, Wilfred; Ritchie, Roland Almon; Hall, Emmett Matthew; Spence, Wishart Flett; Pigeon, Louis-Philippe; Laskin, Bora

On appeal from

British Columbia

Subjects

Torts

Decision Content

Supreme Court of Canada

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

Date: 1973-08-27

Rivtow Marine Ltd. (Plaintiff) Appellant; and

Washington Iron Works and Walkem Machinery & Equipment Ltd. (Defendants) Respondents.

1972: November 23, 24, 27; 1973: August 27.

Present: Fauteux C.J. and Abbott, Martland, Judson, Ritchie, Hall, Spence, Pigeon and Laskin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Negligence—Logging crane found to be defective—Faulty design and fabrication—Withdrawal of crane to effect repairs—Failure of manufacturer and distributor to warn user of potential danger and necessity of repair—Economic loss resulting from non-use during busy period—Damages.

The appellant was the charterer of a log barge the "Rivtow Carrier", fitted with two pintle-type cranes designed and manufactured by the first respondent, for which the second respondent was the sole representative and distributor in British Columbia. During the period of coastal operations, one of the busiest seasons of the year for the logging business in British Columbia, the "Rivtow Carrier" had been sent to Kitimat for the purpose of loading logs when it was ordered back to Vancouver because a crane, virtually identical to its own and which had also been designed, manufactured and installed by the first respondent on a similar barge called the "Straits Log-ger", had collapsed, killing its operator. After inspection the appellant found cracks in the mountings of both cranes on the "Rivtow Carrier", and upon closer inspection very serious structural defects were found in these cranes similar to those which were later found to have been the cause of the death of the operator when the crane collapsed on the "Straits Logger".

Although both respondents had been aware for some time that the pintle-type cranes were subject to cracking due to negligence in design, neither company warned the appellant of the potential danger and accompanying necessity for repair and the appellant

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was first alerted to the seriousness of the situation after the collapse of the "Straits Logger" crane.

The appellant sued for the cost of repairs to the cranes on the "Rivtow Carrier" and for loss of use of the barge during the repair period. The trial judge disallowed the claim for repairing the cranes, but he found the respondents liable for such loss as was suffered by the appellant through the inactivity of the barge during the period of coastal operations. The appellant appealed to the Court of Appeal claiming that it should be awarded the cost of repairs and the loss of use consequent thereon. The respondents cross-appealed on the ground that the appellant was not entitled to recover anything. The Court of Appeal dismissed the appeal and allowed both cross-appeals. The appellant then appealed to this Court.

Held (Hall and Laskin JJ. dissenting in part): The appeal should be allowed and the judgment at trial restored.

Per Fauteux C.J. and Abbott, Martland, Judson, Ritchie, Spence and Pigeon JJ.: The trial judge was right in disallowing the appellant's claim for repairs and for such economic loss as it would, in any event, have sustained even if the proper warning had been given. Liability for the cost of

repairing damage to a defective article itself and for the economic loss flowing directly from the manufacturer's negligence is akin to liability under the terms of an express or implied warranty of fitness and as it is contractual in origin cannot be enforced against the manufacturer by a stranger to the contract. But while the above finding excluded recovery for damage to the article and economic loss directly flowing from the first respondent's negligence and faulty design, it did not exclude the additional damage occasioned by breach of the duty to warn of the danger.

The first respondent as manufacturer and the second respondent as its representative knew that the appellant relied on them for advice concerning the operation of the cranes and a clear duty lay upon them to warn the appellant of the necessity for repairs as soon as they had become aware of the defects and the potential danger attendant thereon.

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The breach of the duty to warn constituted negligence on the part of both respondents. The economic loss solely attributable to the interruption of the appellant's business during "coastal operations" was the immediate consequence of that breach and such damage was recoverable in an action for negligence.

Per Hall and Laskin JJ., dissenting in part: The award of damages as determined by the trial judge should be enlarged to include as well the cost of repairs. The liability of the respondents should not be rested on the one basis of a failure to warn of the probability of injury by reason of the defective design of the crane. The failure to warn was, of course, the only basis upon which, on the facts, liability could be imposed upon the second respondent. However, the first respondent, as the designer and manufacturer of the crane, was under an anterior duty to prevent injury which foreseeably would result from its negligence in the design and manufacture of this piece of equipment. If physical harm had resulted, whether personal injury or damage to property (other than to the crane itself), the first respondent's liability to the person affected, under its anterior duty as a designer and manufacturer of a negligently produced crane, would not be open to question. Neither should it be any less liable for the direct economic loss to the appellant resulting from the faulty crane merely because the likelihood of physical harm, either by way of personal injury to a third person or property damage to the appellant, was averted by the withdrawal of the crane so that it could be repaired.

If recovery for economic loss is allowed when physical injury is suffered, there was no reason to deny it when the threatened injury is forestalled. The cost of repairs was part of the economic loss for which the manufacturer was liable.

[M'Alister (Donoghue) v. Stevenson, [1932] A. C. 562, applied; George v. Skivington (1869), L.R. 5 Ex. 1; Ross v. Dunstall (1921), 62 S.C.R. 393; Trans World Airlines Inc. v. Curtiss-Wright Corp. (1955), 148 N.Y.S. 2d 284; Hodge & Sons v. Anglo-American Oil Co. (1922), 12 L.L. Rep. 183; Lambert v. Lastoplex Chemicals Co., [1972] S.C.R. 569; Cattle v. Stockton Waterworks Co. (1875), L.R. 10 Q.B. 453; Hedley Byrne & Co. v. Heller & Partners Ltd., [1964] A.C. 465; Candler v. Crane, Christmas & Co., [1951] 2 K.B. 164;

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J. Nunes Diamonds Ltd. v. Dominion Electric Protection Co., [1972] S.C.R. 769; SCM (United Kingdom) Ltd. v. W. J. Whittal & Son Ltd., [1970] 3 All E.R. 245; Spartan Steel & Alloys Ltd. v. Martin & Co. (Contractors) Ltd., [1972] 3 W.L.R. 502; Ministry of Housing and Local Government v. Sharp, [1970] 2 Q.B. 223, referred to.]

APPEAL from a judgment of the Court of Appeal for British Columbia[1], dismissing an appeal and allowing a cross-appeal from a judgment of Rattan J. Appeal allowed and judgment at trial restored, with costs, Hall and Laskin JJ. dissenting in part.

C. C. Locke, Q.C., and Peter Johnson, for the plaintiff, appellant.

H. J. Grey, Q.C., for the defendant, respondent, Washington Iron Works.

D. T. Braidwood, Q.C., and C. J. Hopkins, for the defendant, respondent, Walkem Machinery & Equipment Ltd.

The judgment of Fauteux C.J. and Abbott, Martland, Judson, Ritchie, Spence and Pigeon JJ. was delivered by

RITCHIE J.—This is an appeal from a judgment of the Court of Appeal for British Columbia dismissing an appeal and allowing a cross-appeal from the judgment rendered at trial by Ruttan J.

The appellant was the charterer by demise of a self-loading and unloading log barge the "Riv-tow Carrier", fitted with two pintle-type cranes designed and manufactured by the respondent, Washington Ironworks, a company having its head office and chief place of business in the United States of America, (which is hereinafter referred to as "Washington") for which the respondent, Walkem Machinery & Equipment Limited (hereinafter referred to as "Walkem") was at all material times the sole representative and distributor in the Province of British Columbia.

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During the month of September 1966, the logging business in which Rivtow Marine Limited (hereinafter referred to as "Rivtow") was engaged was passing through the period of coastal operations which was recognized by all concerned as being one of the busiest seasons of the year, and the "Rivtow Carrier" had been sent to Kitimat for the purpose of loading logs when it was ordered back to Vancouver because a crane, virtually identical to its own and which had also been designed, manufactured and installed by the respondent Washington on a similar barge called the "Straits Logger", had collapsed, killing its operator. After inspection in Vancouver the appellant found cracks in the mountings of both cranes on the "Rivtow Carrier" and shortly thereafter, on September 20, the Workmen's Compensation Board of British Columbia issued the following order addressed to Rivtow:

In view of the recent failure in the mounting of a Pintle type crane, barge mounted, we request that you submit to this office, without delay, a report over the signature of a qualified professional engineer certifying that the lifting and hoisting equipment on your self-loading log barge is structurally sound, is in the same working condition and all competent parts are properly assembled and installed.

Upon closer inspection very serious structural defects were found in the Rivtow cranes similar to those which were later found to have been the cause of the death of the crane operator when the crane collapsed on the "Straits Log-ger". These cranes, which had been designed by Washington engineers, had been attached to these barges by Washington Ironworks for Yar-rows Limited which had built the barges, and it was agreed by counsel that similar cranes had been installed on three other barges, all of which had "suffered cracking in the legs of the pintle masts". In the case of two of these barges Washington had become aware of the development of identical cracks in the cranes as early as November 1965, and in January 1966 an employee of Walkem discovered cracks in the pintle masts of the "Rivtow Carrier" cranes

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which were the same as those observed in the cranes supplied to the other four barges.

The task of analyzing the facts giving rise to this litigation is much simplified by the admissions made on behalf of the two respondents which are recited in the judgment of the learned trial judge as follows:

The following admissions were made by Walkem:

1. That the cranes referred to in paragraph 6 of the Statement of Claim herein were at all material times defective in that they were of such design, construction and material that under stresses or operation they developed cracks by reason of which it was necessary to undertake substantial repairs, but not that such defects were known to this Defendant at any material time.
2. That on the 20th day of September, 1966, there were cracks in the pintles of the said cranes, but not that such cracks appeared for the first time on September 20th, 1966.
3. That the said cracks were due to over-stresses caused by inadequate design and fabrication of the said cranes, but not that such cranes were designed or fabricated by this Defendant.
4. That the said cranes were of the same design, construction and materials as those manufactured by the Defendant Washington Iron Works and installed in the barge "Straits Logger".
5. That prior to the 16th day of September, 1966, the Defendant Walkem Machinery & Equipment Ltd. was aware that cracks had existed in the pintles of the crane in Haida Carrier, Island Yarder, Straits Logger and Rivtow Carrier, but not that such knowledge on the part of this Defendant was exclusive to this Defendant in any way.
6. That all the said cracks were in approximately the same location in all the said cranes.

7. That on the 16th day of September, 1966, one of the cranes in "Straits Logger" collapsed due to defective design.

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8. That by reason of the defects in the said cranes in "Rivtow Carrier" the Plaintiff took the said barge out of service on the 20th day of September, 1966, to carry out engineering tests and investigation, modification and repairs.

The following admissions of fact were made by Washington:

1. that the cranes in "Rivtow Carrier" were designed and manufactured by the Defendant Washington Iron Works and such design and manufacture are for all material purposes identical to those in "Straits Logger".
2. that the cracks in the pintle masts of "Rivtow Carrier" discovered by Brodie of Walkem on January 11, 1966, were caused by the same defects of design found in the Reasons for Judgment in the Straits Case.
3. that 30 days is a reasonable period for the carrying out of the modifications which were effected on the pintles of "Rivtow Carrier".

In the course of his reasons for judgment in the Court of Appeal, Mr. Justice Tysoe added that:

On the hearing of this appeal Washington admitted that the cracking in the "Rivtow Carrier" cranes was due to inadequacies in the design of the pintle cranes and that Washington, through its responsible engineers, had knowledge there was a problem with regard to cracking developing in the legs of the pintle cranes during operation by not later than February, 1966. Washington also admitted that there was carelessness in design; but it denied any liability to Rivtow.

It also emerges from the evidence and from the findings of the Courts below that although Washington and Walkem had both been aware for some time that the pintle-type cranes were subject to cracking due to negligence in design, neither of these companies warned the appellant of the potential danger and accompanying necessity for repair and the appellant was first alerted to the seriousness of the situation after the collapse of the "Straits Logger" crane in September 1966.

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The nature of the appellant's claim is well described in the reasons for judgment of the learned trial judge which are reproduced in the judgment of the Court of Appeal and are in the following terms:

"The plaintiff's action is for special damages for the cost of repairs to cranes on the "Rivtow Carrier", a self-loading log barge, and for loss of use of the barge during the repair period.

"The claim against the defendant Washington Iron Works as manufacturer of the cranes, is based on negligent design, failure to warn the plaintiff as operator of the dangerous situation created by the serious error in design which was known, or should have been known to Washington, and for making negligent statements in writing, intending them to be relied upon by the plaintiff."

As against the defendant Walkem, who are distributors and sole representatives of the defendant Washington in the province of British Columbia, the claim is for failure to warn the plaintiff when Walkem became aware of the serious error in design and in making negligent statements orally and in writing to the plaintiff intending that such statements be relied upon.

"The action has been discontinued as against Yarrows Ltd."

I think it important to stress the fact that the cranes in question were designed for the express purpose of loading and unloading heavy logs, that the site of the logging operation i.e., the coastal areas of British Columbia, was well known to both respondents who were in fact aware of the exact task to be required of the cranes by Rivtow. This is not a case of a negligent manufacturer whose defective or dangerous goods have caused damage to some unknown member of the general public into whose hands they have found their way. These respondents knew that the cranes were going to be used by the appellant and the exact use to which they were to be put.

In the course of his reasons for judgment at trial, which are reported in 74 W.W.R. 110, the learned trial judge summarized the relative position of the parties in the following terms:

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From the history of the development of the pintle-type crane and the close association by both defendants with that development and knowledge which the defendants must have had of the dangerous condition inherent in all the cranes on all the barges, coupled with their knowledge that the plaintiff looked to them for advice, inspection and repair when necessary for this machinery, it is inevitable to conclude that both defendants had assumed a duty which they owed to the plaintiff, at least to warn it of the existing danger and to advise immediate remedial repairs. The proximity of relationship existed not only from their knowledge of the development of the cranes on the plaintiff's carrier as well as on the other carriers, but because they knew the plaintiff was the operator of the carrier and the company, from the nature of its operations, could suffer either directly, as did the operators of the "Straits Logger", or economically, by a sudden breakdown which removed the carrier from its service at an inconvenient time. The duty of repair, of course, rested with the plaintiff, and whenever it was necessary to remove the carrier for that purpose there would be a loss of use and therefore economic loss for which they themselves must accept responsibility. But the defendants knew the complex nature of the operation of the "Rivtow Carrier" in the coastal logging trade as they knew the operation of such carriers in other companies.

(The italics are my own.)

And the learned trial judge went to say:

The carrier and its pintle cranes had been designed by the defendants bearing in mind the very nature of the log-carrying trade which was involved. They knew or should have known that if the plaintiff could not choose its time when to lay up its carrier for survey and repair it could well suffer much heavier damages than usual. Such happened in the present case, and it is for the excess damages suffered by reason of having to withdraw its carrier and its tug from service at a most profitable time of operations, that the plaintiff is entitled to recovery.

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After quoting the last-cited passage, Mr. Justice Tysoe, whose reasons for judgment rendered on behalf of the Court of Appeal are reported in [1972] 3 W.W.R. 735, went on to say:

Leaving aside the question of remoteness of such damage, with deference and having regard to the fact that the learned judge held Walkem and Washington not liable for the cost of repairs, I cannot see much logic in this, nor have I found any authority to support it. In my respectful opinion, it must be wrong if, as I think is the case, the law is that personal injury or damage to property caused by the use of a dangerous or potentially dangerous article is the very gist of any action in tort against the negligent manufacturer or purveyor of such article.

I take it from this that the members of the Court of Appeal were accepting the facts as found by the learned trial judge and that their conclusion is founded on an acceptance of the proposition that "the law is that personal injury or damage to property caused by the use of a dangerous or potentially dangerous article is the very gist of any action in tort against the negligent manufacturer or purveyor of such article". It is clear, as will hereafter appear, from the reasons for judgment of Mr. Justice Tysoe, that the members of the Court of Appeal treated this proposition as having the effect of excluding damage to the dangerous article itself and all or any economic loss resulting from the defects therein and it was for this reason that they dismissed the appellant's claim.

The learned trial judge would also have disallowed the appellant's claim for repairing the crane, but he found the respondents liable for such loss as was suffered by the appellant through the inactivity of the barge and tug during the period of coastal operations and in so doing he expressed himself as follows:

I find the unit method of calculation the most accurate one and have already stated that losses should be based on coastal operations. Therefore I accept the figure of \$89,879 arrived at by Mr. Phillips to fairly represent the gross damages for the down

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period required for repairs to the pintle crane, and square it off at \$90,000.

From this figure, however, must be deducted earnings which would have been lost in any event for the 30-day period required by the plaintiff to make repairs had it been properly warned by the defendants.

Ruttan J. then proceeded to explain the calculation by which he arrived at the figure of \$30,000 as being an average monthly earning for the equipment in question and concluded:

Deducting the figure of \$30,000 I arrive at a net figure of \$60,000 and this will be the amount of damages to be recovered for loss of use by the plaintiff ...

It will be apparent that the award of the trial judge related exclusively to the failure of both respondents to warn the appellant of the potential danger.

In its appeal to this Court the appellant asked for judgment for the cost of repairs to the cranes and for loss of use of the barge and for its actual losses due to the barge's inactivity based on "coastal operations", in accordance with the claim advanced in the statement of claim.

It appears to me to follow from the trial judge's analysis of the evidence and from the admissions made by the respondents, that both Washington and Walkem knew of the potential danger involved in the continued use, without extensive repairs and alterations, of the pintle-type cranes which Washington had designed and installed on the "Rivtow Carrier" and that both respondents were seized with this knowledge in ample time to have notified the appellant and given it an opportunity to have the repairs effected at a slack period in its activities rather than having to remove its barge and tug from service at one of the most profitable periods of the year thus incurring substantial damage to which it need not have been exposed if it had known of the inherent dangers resulting from faults in the design of the cranes at the time when the respondents first became aware that

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these were a common feature of cranes of this type.

In my opinion the knowledge of the danger involved in the continued use of these cranes for the purpose for which they were designed carried with it a duty to warn those to whom the cranes had been supplied and this duty arose at the moment when the respondents or either of them became seized with the knowledge.

In the present case, the respondents not only knew the purpose for which the cranes were to be used, but they had become aware of their inadequacy for that purpose without modification and repair and although there was no contractual relationship between the manufacturer and the appellant, the respondents both knew the appellant as one who was using the cranes for their intended purpose in reliance on their advice, and having regard to their knowledge of the business in which the "Rivtow Carrier" was engaged, they must have known approximately the dates when it would be at the peak of its activities and that by withholding their knowledge of the risk, they were exposing the appellant to the direct consequence of losing the services of the barge for at least a month during one of its busiest seasons.

The learned trial judge posed the question lying at the heart of this appeal in the following terms:

I turn to consider the claim for economic loss for non-use of the carrier which is sought under the headings of "negligence in design" and "failure to warn".

While there is no right of recovery per se for negligent design, in the absence of contract, such carelessness is a significant item in the creation of a legal duty to the ultimate consumer. It is the first indication of knowledge, knowledge of the danger, knowledge that the condition would not reasonably be observed by intermediate examination. Add to this the curious reluctance to warn anybody of the known danger, and the proximity to those most likely to suffer from defects, and we have the factors for a classic case of liability within the doctrine of *M'Alister (Donoghue) v. Stevenson*, [1932] A.C. 562. The problem here is that recovery is sought not for physical

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or property loss suffered directly by the purchaser of the chattel, but for economic loss suffered to a third person who is user of that chattel.

In the Court of Appeal Mr. Justice Tysoe stated the question even more succinctly in [1972] 3 W.W.R. at p. 743, where he said:

The question is, assuming Walkem and Washington come within the proximity of relationship and the rule of liability contemplated in *M'Alister (Donoghue) v. Stevenson*, is Rivtow entitled to recover for the character of harm suffered by it?

In view of the fact that many of the leading authorities bearing on this issue have been cited and discussed in the careful judgments both at trial and on appeal and that both these judgments have now been reported, I do not find that I need to embark on a lengthy review and analysis of these authorities which might otherwise have been necessary, but I think it desirable to formulate a general outline of the development of the law as I see it governing the liability for breach of the duty to warn resting upon those who are instrumental in furnishing, to third parties with whom they have no contractual relationship, a machine which to their knowledge is dangerous and likely to cause damage when being used for the purpose for which it was designed and intended.

It is no novelty to state that prior to the case of *George v. Skivington*[2], it was generally accepted in the law of England that the breach of a contract requiring the use of skill and care in the manufacture of an article did not of itself give any cause of action to a stranger to that contract who was injured by reason of the article proving to be defective. Even from the earliest times articles dangerous in themselves as well as articles which were made dangerous by reason of some defect known to the manufacturer were excepted from this general rule,

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but the ground for excepting the latter class of articles was first based on the fact that the vendor of the article who knew it to be defective was guilty of fraud or deceit and for this reason liable to anyone who suffered as a result of an injury. See *Langridge v. Levy*[3].

The case of *George v. Skivington*, however, placed the matter on a rather wider base. The situation there was that a chemist had personally manufactured a hair wash, the ingredients of which were known only to him, and sold a bottle of this mixture to a customer for the use of his wife who suffered injury to her health as a result of the use of it. The wife brought an action for negligence not relying on any contractual obligation which might have been incurred. In the course of his reasons for judgment in that case, Kelly C.B. said:

There is, therefore, no question of warranty to be considered, but whether the defendant, a chemist, compounding the article sold for a particular purpose, and knowing of the purpose for which it was bought, is liable in an action on the case for unskilfulness and negligence in the manufacture of it whereby the person who used it was injured. And I think that, quite apart from any question of warranty, express or implied, there was a duty on the defendant, the vendor, to use ordinary care in compounding this wash for the hair. Unquestionably there was such a duty towards the purchaser, and it extends, in my judgment, to the person for whose use the vendor knew the compound was purchased.

Cleasby B., in a concurring judgment, concluded:

The two things concur here; negligence and injury flowing therefrom. There was, therefore, a good cause of action in the person injured ...

The judgment in *George v. Skivington*, though never expressly overruled, underwent severe

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criticism in the English Courts and its authority was still in doubt in that country when the case of *Ross v. Dunstall*[4] was decided in this Court. In the *Ross* case the appellant was a manufacturer of sporting rifles with a bolt action which could be fired with the bolt unlocked though appearing to be locked and two people were injured by the bolt from one of these rifles being driven back through the breach when it was used for the first time after its purchase. It was found that there was a latent defect and source of danger in the rifle and that the failure of the manufacturer to take any reasonable steps to warn purchasers against the latent danger was equivalent to "fault", "negligence" and "imprudence" within the purview of art. 1053 of the Civil Code of Quebec.

Although the action was governed by the law of Quebec, both Mr. Justice Duff and Mr. Justice Anglin took the view that the same considerations would apply in the English Courts. In the course of his reasons for judgment, Duff J. said:

I cannot understand why a delictual responsibility towards those with whom the negligent manufacturer has no contractual relation may not co-exist with contractual responsibility towards those with whom he has.

This is said to be inconsistent with the decisions of the English courts. But it is not, I think, inconsistent with *George v. Skivington*, which appears to be sufficient to support the proposition that a manufacturer is responsible if he negligently manufactures and puts into circulation a mischievous thing which is or may be a trap to people using it. *George v. Skivington* has no doubt been adversely [sic] commented upon but it has not been considered by any court competent to over-rule it and it has been applied widely in the American courts.

The provisions of art. 1053 of the Civil Code read then, as they do now, as follows:

Art. 1053. Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill.

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Mr. Justice Anglin, in the course of his reasons for judgment, and with obvious reference to this article, said:

The failure of the appellant to take any reasonable steps to insure that warning of the latent danger of the misplaced bolt—whether it did or did not amount to a defect in design—should be given to purchasers in the ordinary course of the sporting rifles which he put on the market in my opinion renders him liable to the plaintiffs in these actions. His omission to do so was a failure to take a precaution which human prudence should have dictated and which it was his duty to have taken and as such constituted a fault which, when injury resulted from it to a person of a class who the manufacturer must have contemplated should become users of the rifle, gave rise to a cause of action against him.

I therefore prefer to rest my opinion in favour of the plaintiffs on Art. 1053 C.C. (S.1879.1.374). The defendant's failure to take steps to warn purchasers of his rifles of the hidden danger peculiar to them, that they would fire when the bolt appeared to be locked but was in fact unlocked, I regard as an imprudence or neglect within the purview of that article and therefore actionable.

Like Mr. Justice Duff, Mr. Justice Anglin expressed the view that the same considerations would have applied under the law of England, saying:

While English law is not applicable to these cases I incline to think that under it the defendant would likewise be liable—at all events if he knew of the latent danger of his rifle—and probably if he did not.

and in so expressing himself the learned judge gave his approval to the case of *George v. Skivington* and to the passage in the judgment of Brett M. R. in *Heaven v. Pender*[5], at p. 509, where it was said:

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... whenever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.

Any doubts as to the state of the law in England in this regard were laid at rest by the decision of the House of Lords in *M'Alister (Donoghue) v. Stevenson*[6], where Lord Atkin, relying on the cases of *George v. Skivington* and *MacPherson v. Buick Motor Co.*[7], and also on the dicta of Brett M. R. in *Heaven v. Pender*, defined the scope of the duty of care lying upon a manufacturer in the oft-quoted language where he said:

... a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.

It is a proposition which I venture to say no one in Scotland or England who was not a lawyer would for one moment doubt. It will be an advantage to make it clear that the law in this matter, as in most others, is in accordance with sound common sense.

I find it unnecessary to recite the familiar facts of *M'Alister (Donoghue) v. Stevenson* and its companion case, *Grant v. Australian Knitting Mills*[8], because Mr. Justice Tysoe has analyzed them extensively in the course of his reasons for judgment at pp. 744 to 747, and they are in any event well known to all lawyers.

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I think, however, it is well to quote the further language used by Lord Atkin at p. 580 in the former case where he said of the duty of care:

You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

As I have indicated, the judgment of the Court of Appeal in this case appears to me to proceed on the assumption that Walkem and Washington owed a duty of care to the appellant as being a person "... so closely and directly affected" by the faulty design of the cranes that they ought reasonably to have had it in contemplation as being so affected in directing their mind to the known defects which are here called in question.

Proceeding on this assumption, I take it that the Court of Appeal would have treated the respondents as being liable for damages attributable to personal injury or damage to property resulting from defects in the cranes, but Mr. Justice Tysoe, in concluding his reasons for judgment at p. 759 said:

In my opinion the law of British Columbia as it exists today is that neither a manufacturer of a potentially dangerous or defective article nor other person who is within the proximity of relationship contemplated in *M'Alister (Donoghue) v. Stevenson*, is liable in tort, as distinct from contract, to an ultimate consumer or user for damage arising in the article itself, or for economic loss resulting from the defect in the article, but only for personal injury and damage to other property caused by the article or its use. It is my view that to give effect to the claims of Rivotow it would be necessary to extend the rule of liability laid down in the *Donoghue* case beyond what it now is. I do not feel that this Court would be justified in extending it so that it covers the character of damage suffered by Rivotow. I think that, if that is to be done, it must be left to a higher court to do it.

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Mr. Justice Tysoe's conclusion was based in large measure on a series of American cases, and particularly *Trans World Airlines Inc. v. Curtiss-Wright Corp* [9], where it is pointed out that the liability for the cost of repairing damage to the defective article itself and for the economic loss flowing directly from the negligence, is akin to liability under the terms of an express or implied warranty of fitness and as it is contractual in origin cannot be enforced against the manufacturer by a stranger to the contract. It was, I think, on this basis that the learned trial judge disallowed the appellant's claim for repairs and for such economic loss as it would, in any event, have sustained even if the proper warning had been given. I agree with this conclusion for the same reasons; but while this finding excludes recovery for damage to the article and economic loss directly flowing from Washington's negligence and faulty design, it does not exclude the additional damage occasioned by breach of the duty to warn of the danger.

In the present case, both Washington as manufacturer and Walkem as its representative, knew that the appellant relied on them for advice concerning the operation of the pintle cranes and in my opinion a clear duty lay upon them both to warn the appellant of the necessity for repairs as soon as they had become aware of the defects and the potential danger attendant thereon.

As in the case of *Ross v. Dunstall*, *supra*, the duty to warn in the present case was born of the respondent's knowledge of all the circumstances and the additional damage sustained through the barge's inactivity during the period of "coastal operations" was solely attributable to the negligent breach of this duty.

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That liability for this damage does not flow from negligence in design and manufacture is illustrated by the fact that Walkem, which was not a party to such negligence, is equally liable with Washington for failing to warn the appellant. The difference between the two types of liability and consequent damage is that one may arise without the manufacturer having any knowledge of the defect, whereas the other stems from his awareness of the danger to which the defect gives rise.

The Donoghue case recognized the right of an ultimate consumer, apart from contract or warranty, to recover for damage sustained to his person or property by reason of the negligence of a manufacturer in marketing a defective article. The liability of the manufacturer in that case was based on a breach of the neighbourly duty which Lord Atkin described, but the liability founded on knowledge of the danger which gave rise to the award made by the learned trial judge in this case is a different matter entirely as will be seen from the following excerpts taken from the reasons for judgment in the Donoghue case itself. At p. 602 Lord Thankerton observed:

We are not dealing here with a case of what is called an article per se dangerous, or one which was known by the defendant to be dangerous, in which cases a special duty of protection or adequate warning is placed upon the person who uses or distributes it. The present case is that of a manufacturer and a consumer, with whom he has no contractual relation, of an article which the manufacturer did not know to be dangerous ...

(The italics are my own.)

On the other hand, in referring to the elements required to establish liability for negligence in the manufacture of the article, Lord Macmillan said, at p. 616:

I would observe that, in a true case of negligence, knowledge of the existence of the defect causing damage is not an essential element at all.

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The circumstances of the present case give rise to a duty to warn resting upon both respondents just as surely as such a duty arises in the case of the producer of a thing which is dangerous in itself. In this regard, I refer to the observations of Scrutton L.J. in *Hodge & Sons v. Anglo-American Oil Co.*[10], at p. 187, which were adopted by Lord Atkin in the Donoghue case at p. 595, where the learned judge had said:

Personally, I do not understand the difference between a thing dangerous in itself, as poison, and a thing not dangerous as a class, but by negligent construction dangerous as a particular thing. The latter, if anything, seems the more dangerous of the two; it is a wolf in sheep's clothing instead of an obvious wolf.

In the recent case of *Lambert v. Lastoplex Chemicals Co. Ltd.*[11], the male plaintiff had sustained personal injury and damage to his property as a result of the explosion resulting from his use of an inflammable lacquer sealer produced by the defendant manufacturer, and in the course of his reasons for judgment Mr. Justice Laskin explained the matter thus at p. 574:

The appellants founded their action against the respondent on negligence, including in the specifications thereof failure to give adequate warning of the volatility of the product, and it was argued throughout on that basis and on the defence, inter alia, that the male appellant was the author of his own misfortune. The hazard of fire was known to the manufacturer, and there is hence no need here to consider whether any other basis of liability would be justified if the manufacturer was unaware or could not reasonably be expected to know (if that be conceivable) of particular dangers which its product in fact had for the public at large or for a particular class of users.

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Manufacturers owe a duty to consumers of their products to see that there are no defects in manufacture which are likely to give rise to injury in the ordinary course of use. Their duty does not, however, end if the product, although suitable for the purpose for which it is manufactured and marketed, is at the same time dangerous to use; and if they are aware of its dangerous character they cannot, without more, pass the risk of injury to the consumer.

The applicable principle of law according to which the positions of the parties in this case should be assessed may be stated as follows. Where manufactured products are put on the market for ultimate purchase and use by the general public and carry danger (in this case, by reason of high inflammability), although put to the use for which they are intended, the manufacturer, knowing of their hazardous nature, has a duty to specify the attendant dangers, which it must be taken to appreciate in a detail not known to the ordinary consumer or user. A general warning, as for example, that the product is inflammable, will not suffice where the likelihood of fire may be increased according to the surroundings in which it may reasonably be expected that the product will be used. The required explicitness of the warning will, of course, vary with the danger likely to be encountered in the ordinary use of the product.

Finding as I do that there was in this case a breach of a duty to warn which constituted negligence on the part of both respondents, and that the economic loss solely attributable to the interruption of the appellant's business during "coastal operations" was the immediate consequence of that breach, I come to consider the question of whether such damage is recoverable in an action for negligence.

Neither the case of *M'Alister (Donoghue) v. Stevenson* nor that of *Grant v. Australian Knitting Mills* contains any suggestion that the plaintiffs in those actions would have been precluded from recovery for economic loss if such had been claimed, but, as I have indicated, I agree with the learned trial judge that those cases are not authority for holding the manufacturer liable for damage to the defective cranes or for the

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loss which the appellant would have sustained if it had been properly warned.

The cases of *Cattle v. Stockton Waterworks Co.*[12] and *La Société Anonyme de Remorquage à Hélice v. Bennetts*[13], which have been referred to in the reasons for judgment of the learned trial judge at pp. 120 and 121 [74 W.W.R.], were at one time considered as limiting the range of liability for negligence so as to exclude economic loss altogether, but in my view the judgment of Blackburn J., in the former case, indicates that redress for the proximate and direct consequences of negligent acts was not excluded. In that case the plaintiff was a builder who had contracted for a lump sum to construct a tunnel under a road but owing to the negligence of the defendants a water-pipe owned by them sprung a leak thus allowing water to run off into the tunnel excavation and obstructing the works. In consequence the plaintiff could only complete his contract at much greater expense and Blackburn J. held that the plaintiff had no right of action for pecuniary loss, saying:

It may be said that it is just that all such persons should have compensation for such loss, and that, if the law does not give them redress, it is imperfect. Perhaps it may be so. But, as pointed out by Coleridge J. in *Lumley v. Gye*, 2 E. & B. at p. 252, Courts of justice should not "allow themselves, in the pursuit of perfectly complete remedies for all wrongful acts, to transgress the bounds, which our law, in a wise consciousness as I conceive of its limited powers, has imposed on itself, of redressing only the proximate and direct consequences of wrongful acts."

Mr. Justice Blackburn's thinking in this instance appears to me to be controlled by the then current notions as to proximity and remoteness of damage and I think that his approach requires

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reassessment in light of the judgment in *M'Alister (Donoghue) v. Stevenson*, and in my opinion it has no relevance in a case where liability flows from the manufacturer acquiescing in the continued use of an article which he knows to have become dangerous when used for the purpose for which it was intended, without giving warning to a known user of the article who is a stranger to the contract of sale.

The question of whether damages can be recovered, in an action for negligence for economic loss occasioned otherwise than by reason of personal injury or damage to property of the plaintiff, was the subject of extensive review in the House of Lords in the case of *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*[14] That was a case in which the plaintiffs asked their bankers for a credit report in respect of one of their customers. These bankers then made inquiries from the defendant, the customer's own banker, who gave favourable references to which they attached the caution that they were given "without responsibility". In reliance on these references, the plaintiffs entered into dealings with the customer in question, as a result of which they suffered a loss of £17,000 for which they brought action. In the course of their extended reasons for judgment, the members of the House of Lords were unanimous in approving the dissenting opinion of Lord Denning in *Candler v. Crane, Christmas & Co.*[15] In that case the view of the majority of the Court of Appeal was that a false statement carelessly made by one person to another though acted upon by that other to his detriment was not actionable in the absence of any contractual or fiduciary relationship between the parties and that this principle had not been

affected by the case of *M'Alister (Donoghue) v. Stevenson*. In the course of his dissenting reasons for judgment, however, Lord Denning said, at pp. 178 and 179:

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The second submission of Mr. Foster was that a duty to take care only arose where the result of a failure to take care will cause physical damage to persons or property ... I must say, however, that I cannot accept this as a valid distinction. I can understand that in some cases of financial loss there may not be a sufficiently proximate relationship to give rise to a duty of care; but, if once that duty exists, I cannot think that liability depends on the nature of the damage.

The *Hedley Byrne* case has been widely discussed both academically and judicially and it has been said that the judgment is no more than obiter dicta in that the ultimate decision was against liability, but in my view Mr. Justice Tysoe placed a very narrow interpretation on the case when he said:

All that case decided was that, in view of the express disclaimer of responsibility by the defendant, a special type of care and liability to the plaintiff for negligence were absent and so the latter would not recover.

On the other hand, I am of opinion that the case of *Hedley Byrne* represents the considered opinion of five members of the House of Lords to the effect that a negligent misrepresentation may give rise to an action for damages for economic loss occasioned thereby without any physical injury to person or property and apart from any contract or fiduciary relationship, and that under the circumstances of that case the plaintiff would have been entitled to recover its economic loss had it not been for the warning which was implicit in the defendant's express denial of responsibility.

In the present case there is no suggestion that liability should be based on negligent misrepresentation and to this extent the *Hedley Byrne* case is of no relevance. I refer to it for the sole purpose of indicating the view of the House of Lords that where liability is based on negligence the recovery is not limited to physical damage but extends also to economic loss. The case was recently distinguished in this Court in *J. Nunes Diamonds Ltd. v. Dominion Electric Protection Co.* [16],

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where Pigeon J., speaking for the majority of the Court, said at p. 777:

Furthermore, the basis of tort liability considered in *Hedley Byrne* is inapplicable to any case where the relationship between the parties is governed by a contract, unless the negligence relied on can properly be considered as "an independent tort" unconnected with the performance of that contract ... This is specially important in the present case on account of the provisions of the contract with respect to the nature of the obligations assumed and the practical exclusion of responsibility for failure to perform them.

In the present case, however, I am of opinion that the failure to warn was "an independent tort" unconnected with the performance of any contract either express or implied.

In the course of the exhaustive argument which he presented on behalf of the appellant, Mr. Locke referred to a number of recent decisions in the Court of Appeal of England to illustrate the development of the thinking in that Court on the question of recovery for pure economic loss in an action for negligence where no physical damage has been sustained by the plaintiff.

In one such case, *SCM (United Kingdom) Ltd. v. W. J. Whittal & Son Ltd.*[17], the Court held that economic loss flowing directly from physical harm was recoverable but Lord Denning indicated that he would deny recovery for other economic loss except in exceptional circumstances. His reasoning appears to rest on the basis that the damage was too remote although he observed, in the course of his judgment:

I must not be taken, however, as saying that economic loss is always too remote.

A further lengthy discussion of the same subject is contained in the reasons for judgment of the [Page 1215]

same learned judge in *Spartan Steel & Alloys Ltd. v. Martin & Co. (Contractors) Ltd.*[18], where he appears to treat the question of remoteness of damage as one to be determined "as a matter of policy" and after referring to the cases of *Cattle v. Stockton Waterworks Co.* and *Société Anonyme de Remorquage à Hélice v. Bennetts*, he said:

On the other hand, in the cases where economic loss by itself has been held to be recoverable, it is plain that there was a duty to the plaintiff and the loss was not too remote.

In the case of *Ministry of Housing and Local Government v. Sharp*[19], at p. 278, Salmon L.J. appears to me to have dealt with the question both accurately and succinctly when he said:

So far, however, as the law of negligence relating to civil actions is concerned, the existence of a duty to take reasonable care no longer depends on whether it is physical injury or financial loss which can reasonably be foreseen as a result of a failure to take such care.

I am conscious of the fact that I have not referred to all relevant authorities relating to recovery for economic loss under such circumstances, but I am satisfied that in the present case there was a proximity of relationship giving rise to a duty to warn and that the damages awarded by the learned trial judge were recoverable as compensation for the direct and demonstrably foreseeable result of the breach of that duty. This being the case, I do not find it necessary to follow the sometimes winding paths leading to the formulation of a "policy decision".

It will be seen that I prefer the reasoning and conclusion of the trial judge to those of the Court of Appeal, and for the reasons which I have indicated, I reject the suggestion of Tysoe L.A. that this conclusion involves an extension

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of the rule in *M'Alister (Donoghue) v. Stevenson* where the liability was based on a different ground.

For all these reasons I would set aside the judgment of the Court of Appeal and restore the judgment rendered at trial by Mr. Justice Ruttan.

The appellant will have its costs in this Court and the costs of the respondents' cross-appeal in the Court of Appeal.

The judgment of Hall and Laskin JJ. was delivered by

LASKIN J. (dissenting in part)—This is the first occasion upon which this Court has been called upon to determine whether recovery may be had in a negligence action for economic loss which stands alone and is not consequent upon physical injury. The trial judge awarded damages for loss of earnings suffered by the appellant for a certain down period required for repairs to the pintle crane, but he denied recovery for the cost of repairs to make the faultily-designed and manufactured crane fit for service. In this view he is sustained in the reasons of my brother Ritchie which I have had an opportunity to read. I agree with the award of damages so far as it goes, but I would enlarge it to include as well the cost of repairs.

I would do this because I do not agree that the liability of the respondents should be rested on the one basis of a failure to warn of the probability of injury by reason of the defective design of the crane. The failure to warn is, of course, the only basis upon which, on the facts herein, liability could be imposed upon Walkem. However, Washington, as the designer and manufacturer of the crane, was under an anterior duty to prevent injury which foreseeably would result from its negligence in the design and manufacture of this piece of equipment. If physical harm had resulted, whether personal injury or damage to property (other than to the crane itself), Washington's liability to the person

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affected, under its anterior duty as a designer and manufacturer of a negligently produced crane, would not be open to question. Should it then be any less liable for the direct economic loss to the appellant resulting from the faulty crane merely because the likelihood of physical harm, either by way of personal injury to a third person or property damage to the appellant, was averted by the withdrawal of the crane from service so that it could be repaired?

Two new points are involved in this question. The first is whether Washington's liability for negligence should embrace economic loss when there has been no physical harm in fact, and the second is whether the appellant is a proper plaintiff to recover for economic loss and as well the cost of repairing the defective crane.

A manufacturer's liability in negligence for physical harm extends to ensuing economic loss by the person who has suffered the physical harm: see *British Celanese Ltd. v. A.H. Hunt (Capacitors), Ltd.*[20]; *S.C.M. (United Kingdom) Ltd. v. W.J. Whittall & Son Ltd.*[21] There is no doubt that the appellant in the present case was within the ambit of risk of physical harm

through the collapse of the defectively designed and manufactured crane; damage to the barge which it had under charter was a foreseeable consequence of Washington's negligence. It is said, however, that a manufacturer's liability for negligence does not extend to economic loss where no physical harm results, even in a case where physical harm is threatened. It is true that economic interests, ordinarily protected in contract as promised advantages, were for long protected in tort in only limited classes of cases, as for example, cases of intentional torts, such as deceit and interference with contract relations, per quod actions by a master for injury to

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his servant by a defendant's negligence and statutory fatal accidents actions by dependants of a person whose death was caused by negligence of another. To these classes a new member has been admitted; the doctrine of *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*[22], which has been considered in this Court and has been applied in other Courts in Canada, shows that economic or pecuniary loss is not outside the scope of liability for negligence.

The present case is not of the *Hedley Byrne* type, as the reasons of my brother Ritchie show, but recovery for economic loss alone is none the less supported under negligence doctrine. It seems to me that the rationale of manufacturers' liability for negligence should equally support such recovery in the case where, as here, there is a threat of physical harm and the plaintiff is in the class of those who are foreseeably so threatened: see Fleming, *Law of Torts*, 4th ed., 1971, pp. 164-5, 444-5.

Support for such recovery in the present case will not lead to "liability in an indeterminate amount for an indeterminate time to an indeterminate class", to borrow an often-quoted statement of the late Judge Cardozo in *Ultramares Corp. v. Touche*[23], at p. 179. The pragmatic considerations which underlay *Cattle v. Stockton Waterworks Co.*[24] will not be eroded by the imposition of liability upon Washington as a negligent designer and manufacturer: cf. Fleming James, "Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal", (1972), 12 *Jo.S.P.T.L.* 105.

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Liability here will not mean that it must also be imposed in the case of any negligent conduct where there is foreseeable economic loss; a typical instance would be claims by employees for lost wages where their employer's factory has been damaged and is shut down by reason of another's negligence. The present case is concerned with direct economic loss by a person whose use of the defendant Washington's product was a contemplated one, and not with indirect economic loss by third parties, for example, persons whose logs could not be loaded on the appellant's barge because of the withdrawal of the defective crane from service to undergo repairs. It is concerned (and here I repeat myself) with economic loss resulting directly from avoidance of threatened physical harm to property of the appellant if not also personal injury to persons in its employ.

In advancing its claim for the cost of repairs as well as for loss of earnings, the appellant relied, inter alia, upon a passage in the reasons for judgment of Lord Denning M.R. in *Dutton v. Bognor Regis United Building Co. Ltd.*[25], at p. 474, which is as follows:

The damage done here was not solely economic loss. It was physical damage to the house. If counsel's submission were right, it would mean that, if the inspector negligently passes the house as properly built and it collapses and injures a person, the council are liable; but, if the owner discovers the defect in time to repair it—and he does repair it—the council are not liable. That is an impossible distinction. They are liable in either case. I would say the same about the manufacturer of an article. If he makes it negligently, with a latent defect (so that it breaks to pieces and injures someone), he is undoubtedly liable. Suppose

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that the defect is discovered in time to prevent the injury. Surely he is liable for the cost of repair.

The Bognor Regis case involved a claim against a builder and against a municipality for the cost of repairs and depreciation in the value of a house which developed serious defects within a year after it was completed and when it came into the hands of the plaintiff as its second owner. A building inspector of the municipality had given a certificate of approval of the foundation when in fact the house was built over a thinly buried rubbish heap which a careful inspection would have revealed. The action was settled against the builder and succeeded against the municipality which failed as well on appeal.

The position of the building inspector and the municipality in the Bognor Regis case qua the claim for the cost of repairs and diminution in value of the house is different from that of a manufacturer of a defective product from whom it is sought to recover the cost of repairing it or its diminution in value in a tort action. It represents a Hedley Byrne type of liability, although the reliance on the certificate of approval was immediately that of the builder and not of the purchaser of the house. There would be a parallel with the position of the manufacturer if the builder had been sued, and the question would then be, in the case of the builder as in the case of the manufacturer, whether the breach of duty not to put a negligently built product (house or chattel) on the market can be vindicated by charging the builder or manufacturer with the economic loss suffered by the purchaser.

In brief, given the case of a manufacturer who is under a duty not to expose consumers or users of its products to an unreasonable risk of harm (and I would place builders of houses

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under the same duty) what are the limits on the kind or range of harm for which liability will be imposed if there is a breach of duty? One type of answer has been to invoke the notion of remoteness which may relate to physical harm no less than to economic loss: cf. *Seaway Hotels Ltd. v. Gragg (Canada) Ltd. and Consumers Gas Co.*[26] and *Spartan Steel & Alloys Ltd. v. Martin & Co. (Contractors) Ltd.*[27]. Another, and more usual answer since *MacPherson v. Buick Motor Co.*[28] and *McAlister (Donoghue) v. Stevenson*[29], has been to deny manufacturers' liability, unless

physical harm has resulted from the breach of duty. Put another way, liability has been denied on the ground that there is no duty to a consumer or user in respect of economic loss alone. It seems to me that this restriction on liability has in it more of a concern to avoid limitless claims for economic loss from any kind of negligence than a concern for the particular basis upon which manufacturers' liability for negligence rests. That liability rests upon a conviction that manufacturers should bear the risk of injury to consumers or users of their products when such products are carelessly manufactured because the manufacturers create the risk in the carrying on of their enterprises, and they will be more likely to safeguard the members of the public to whom their products are marketed if they must stand behind them as safe products to consume or to use. They are better able to insure against such risks, and the cost of insurance, as a business expense, can be spread with less pain among the buying public than would be the case if an injured consumer or user was saddled with the entire loss that befalls him.

This rationale embraces, in my opinion, threatened physical harm from a negligently designed and manufactured product resulting in

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economic loss. I need not decide whether it extends to claims for economic loss where there is no threat of physical harm or to claims for damage, without more, to the defective product.

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 on another 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 down time 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.

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Liability of Washington to make good the appellant's loss of profits being established, it remains to consider its liability for the cost of repairs. It is unnecessary in this case to see this cost as necessarily a foreseeable consequence of the breach of anterior duty resting upon Washington. It

can stand on another footing. A plaintiff injured by another's negligence is required to act reasonably to mitigate his damages. If his damages are economic damages only, mitigation may involve him in repairing the defect which brought them about. It may not be open to him to do that because the tortfeasor is in control of the matter that invites repair or correction, as in the Gragg and Spartan Steel cases already cited. But where the defective product which threatened injury has been in use by the plaintiff, it may be reasonable for him, upon learning of the threat of likely injury from its continued use, to expend money for its repair to make it fit for service. Such an expenditure then becomes part of the economic loss for which Washington must respond. No question was raised in this case about the reasonableness of the appellant's conduct in suspending use of the crane nor about the reasonableness of having it repaired nor of the reasonableness of the cost of repair.

I would, accordingly, allow the appeal, set aside the judgment of the British Columbia Court of Appeal and restore the judgment of Ruttan J. but would vary it to add the cost of repair of the crane to the amount of economic loss for which he found Washington liable. I agree with the disposition as to costs made by my brother Ritchie.

Appeal allowed and judgment at trial restored, with costs, HALL and LASKIN B. dissenting in part.

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[1] [1972] 3 W.W.R. 735, 26 D.L.R. (3d) 559.

[2] (1869), L.R. 5 Ex. 1.

[3] (1837), 2 M. & W. 519, 150 E.R. 863.

[4] (1921), 62 S.C.R. 393.

[5] (1883), 11 Q.B.D. 503.

[6] [1932] A.C. 562.

[7] (1916), 217 N.Y. 382.

[8] [1935] A.C. 85.

[9] (1955), 148 N.Y.S. 2d 284.

[10] (1922), 12 Ll L.. Rep. 183.

[11] [1972] S.C.R. 569.

[12] (1875), L.R. 10 Q.B. 453.

[13] [1911] 1 K.B. 243.

[14] [1964] A.C. 465.

[15] [1951] 2 K.B. 164.

[16] [1972] S.C.R. 769.

[17] [1970] 3 All E.R. 245.

[18] [1972] 3 W.L.R. 502.

[19] [1970] 2 Q.B. 223.

[20] [1969] 1 W.L.R. 961.

[21] [1970] 3 All E.R. 245.

[22] [1964] A.C. 465.

[23] (1931), 255 N.Y. 170.

[24] (1875), 10 Q.B. 453.

[25] [1972] 1 All E.R. 462.

[26] [1959] O.R. 581.

[27] [1972] 3 W.L.R. 502.

[28] (1916), 217 N.Y. 382.

[29] [1932] A.C. 562.

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