HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

MALLONLAND PTY LTD & ANOR — APPELLANTS

AND

ADVANTA SEEDS PTY LTD — RESPONDENT

Mallonland Pty Ltd v Advanta Seeds Pty Ltd
[2024] HCA 25
Date of Hearing: 6 March 2024
Date of Judgment: 7 August 2024
B60/2023

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of Queensland

Representation

W A D Edwards KC with B A Hall and T A Rawlinson for the appellants (instructed by Creevey Horrell Lawyers)

P J Dunning KC with E J Goodwin KC and M Y Barnes for the respondent (instructed by Herbert Smith Freehills)

CATCHWORDS

Mallonland Pty Ltd v Advanta Seeds Pty Ltd

Negligence – Duty of care – Where the appellants ("the growers") purchased contaminated grain sorghum seed from a distributor authorised by the respondent ("the producer") – Where the growers consequently suffered pure economic loss in the form of reduced income and increased expenditure – Whether the producer owed the growers a duty to take reasonable care in its production process of the seed to avoid the risk that the growers would sustain pure economic loss by reason of a hidden defect in the seed – Whether the producer had assumed a responsibility towards the growers to take reasonable care to avoid causing them pure economic loss – Whether the salient features of the relationship between the producer and the growers established a duty of care to avoid causing pure economic loss.

Words and phrases – "assumption of responsibility", "control", "disclaimer of responsibility", "duty of care", "indeterminacy", "intention", "knowledge", "proximity", "pure economic loss", "reasonable foreseeability", "salient features", "vulnerability".

GAGELER CJ, GORDON, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ.

Introduction

1 This case concerns whether a producer of commercial hybrid grain sorghum seed, sold in bags contaminated with the seed of another plant known as shattercane, is liable in negligence to commercial farmers who planted the seed and were subsequently required to take costly action to eliminate the contaminant. Shattercane is a plant genetically related to grain sorghum, but not itself useable for grain crops. Its seed-head shatters, spreading seed widely and growing vigorously to the detriment of grain sorghum cultivation.

2 The sole issue in this Court is whether the respondent ("the producer") owed the appellants ("the growers") a duty to take reasonable care in its production process to avoid the risk that the growers would sustain purely economic losses by reason of a hidden defect in the bags of seed (namely, the presence of shattercane seed).

3 For the following reasons, the producer did not owe the growers the alleged duty of care. Accordingly, the appeal should be dismissed.

Facts

4 The growers were farmers who conducted businesses involving the cultivation and sale of grain sorghum, which is a crop farmed for animal feed and biofuel. They commenced a class action in the Supreme Court of Queensland, in which they alleged that they purchased contaminated grain sorghum seed (labelled "MR43 Elite") from a distributor authorised by the producer and consequently suffered pure economic loss in the form of reduced income and increased expenditure.[1] The growers did not allege that the shattercane caused them property damage, or that their economic loss was consequential on property damage.

5 Each of the growers purchased bags of the contaminated seed for planting in the summer of 2010/2011. Some months after they planted the seed, the growers became aware of the contamination.

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1 *Mallonland Pty Ltd v Advanta Seeds Pty Ltd* (2021) 7 QR 234 at 247 [9] ("*Mallonland*").

6 The growers had no way of detecting the contamination prior to planting. To prevent the shattercane from disrupting their grain sorghum growing businesses, the growers were required to stop growing sorghum and remediate the affected fields. The growers' consequential losses comprised the costs of roguing the affected fields (that is, removing inferior or defective plants or seedlings; in this case, shattercane plants or seedlings), applying insecticides and herbicides, and leaving the affected fields to lie fallow for several seasons or planting less remunerative crops in those fields.

7 The producer was one of two producers of grain sorghum seed for distribution and sale to Australian growers. The producer did not sell the contaminated seed directly to growers. Rather, the producer supplied the seed to distributors in labelled 20kg bags. These supplies were made by sale or on consignment. In turn, the distributors supplied the seed to growers in the labelled bags. At the time that the seed was supplied to the market, and later, when it was planted, the producer did not know that the seed was contaminated with shattercane.

8 The bags bore prominent labels on the front and the back ("the packaging"). The label on the front of the bags that contained the contaminated seed was branded "Pacific Seeds", the former business name of the producer. The front of the bag highlighted the type of seed and the net weight of the bag, and set out the following data:

"Minimum Germination:	85%
Minimum Purity:	99%
Maximum Other Seeds:	0.1%
Minimum Inert Matter:	0.5%"

Any suggestion that the contaminated seed did not conform to these specifications was rejected by the primary judge.

9 Reflecting the producer's awareness of the possibility of defective or impure seed, the rear of the bag was printed with what the primary judge described as a "disclaimer". The disclaimer comprised the word "WARNING", next to the headings "ATTENTION" and "CONDITIONS OF SALE AND USE", which were prominently displayed in large bold type and in a font much larger than the conditions themselves. The rear of the bag relevantly included:

"ATTENTION

CONDITIONS OF SALE AND USE

Upon purchasing this product and opening the bag, the purchaser ('you') agrees to be bound by the conditions set out below. Do not open this bag until you have read and agreed with all the terms on this bag. If, before opening the bag, these conditions are not acceptable to you, the product should be returned in its original condition to the place of purchase immediately, together with proof of purchase, for a refund. The product contained in this bag is as described on the bag, within recognised tolerances.

CONDITIONS

You agree that:

– You acknowledge that, except to the extent of any representations made by [the producer's] labelling of the product in this bag or made in [the producer's] official current ... literature, it remains your responsibility to satisfy yourself that the product in the bag is fit for its intended use;

– If the product in this bag does not comply with its description, within recognised tolerances, the liability of [the producer] will be limited, at [the producer's] option, solely to the cost of replacement of the product or the supply of equivalent goods or the payment of the cost of replacing the goods or of acquiring equivalent goods;

– [The producer] will not be liable to you or any other person for any injury, loss or damage caused or contributed to by [the producer] (or its servants or agents), directly or indirectly arising out of or related to the use of the product in this bag, whether as a result of their negligence or otherwise;

..."

10 It was found that the packaging referred to simple concepts in "plain words" to convey "several clear propositions", including that the risk of using the product lay with the buyer and that the producer was not accepting any responsibility for damage or loss caused by negligence on its part. The text included clear statements that the bag must only be opened if the buyer had read and agreed with the

conditions on the bag and that the buyer should return the bag for a refund if the conditions were not acceptable.

The producer's knowledge about the risks of damage and loss from contaminated seed

11 In this Court, the producer acknowledged that, prior to the contamination, "off-types" (that is, plants that deviate from the characteristics of another type in certain respects) were common in its production of grain sorghum seed but were easily controlled and did not have a significant impact upon commercial grain sorghum production.

12 Furthermore, in the courts below the producer admitted that before supplying the contaminated seed to the market, it knew of facts that gave rise to risks of economic loss to growers posed by contaminated grain sorghum seed, including that: (1) contamination of the seed by an off-type sorghum with shattering characteristics may cause damage to the growers or to the owners of land upon which the seed was planted; (2) the production of grain sorghum seed required processes to: (a) minimise the risk of contamination of the seed by reason of "outcross" occurring, that is, by the creation of off-type seeds; (b) identify off-type contamination by reasonable testing; and (c) as far as reasonably practicable, prevent the supply of contaminated seed; (3) in 2009 sorghum off-types had been identified in three varieties of commercial grain sorghum that the producer had produced and sold, including MR43; (4) a sorghum off-type with a shattering characteristic would be more difficult to control or eradicate if such a plant germinated, matured and dropped seed; and (5) a grower was likely to have greater difficulty in controlling a sorghum off-type with a shattering characteristic in a sorghum crop.

13 The producer also admitted that it knew or ought to have known that, if it did not take reasonable care in its production process including by roguing during that process, this would give rise to a risk of harm to growers who purchased and planted the producer's grain sorghum seed because that seed might be contaminated with shattercane seed. The producer further admitted that it was reasonably foreseeable that the eradication of shattercane would mean that the land on which it was located could not be used to its full commercial potential during the eradication period.

14 Ultimately, it was accepted by the producer that the growers' losses were reasonably foreseeable in the absence of due care by the producer in the production of the seed.

The producer's usual production processes

15 The production of commercial hybrid grain sorghum seed of the kind in issue involved a four-year process. The desired characteristics could not be maintained simply by planting a percentage of the commercial hybrid seed, as there would be a reversion to other genetic characteristics and a loss of type. Accordingly, the producer's production processes included controls to minimise the occurrence of contamination of the kind that eventuated.

16 In particular, the MR43 product was grown by commercial seed producers in areas considered to be free of wild sorghums and sub-weeds. Growing plants were inspected repeatedly to check for the presence of undesirable plants. Undesirable plants found inside the production area were rogued. Undesirable plants found outside the production area but inside "isolation zones" (areas that the commercial seed producers were contractually required to keep free from contaminating seed) were also rogued. Furthermore, prior and subsequent to the period in which the contaminated seed was produced, the producer's processes included "grow-outs" (that is, growing a sample of seed from a production batch to assess its qualities, including whether the batch was contaminated with an off-type or weed seed). Even so, it was well known throughout the industry that it is impossible to guarantee that off-types will not exist within commercially produced grain sorghum seed; thus, it would appear that no amount of strict adherence to protocols will guarantee the absence of off-types, including shattering off-types, within any grain sorghum crop.

The producer's failure to follow its usual production processes

17 The primary judge found, and it is no longer in dispute between the parties, that the shattercane contamination originated in a single production block. It was found that the contamination arose because there was a failure by the producer to exercise a reasonable standard of care in roguing the early-2010 seed production crop.[2] The primary judge found that the producer also failed to meet the standard of care that a reasonable producer would have exercised in the circumstances by failing to conduct a grow-out of the contaminated seed in the winter of 2010.[3]

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2 *Mallonland* (2021) 7 QR 234 at 304-305 [353], 325 [480].

3 *Mallonland* (2021) 7 QR 234 at 306-307 [367].

18 It is also no longer in dispute that the producer's failure to act with reasonable care in the production of the contaminated seed caused the claimed economic losses to the growers.

The terms of sale of the contaminated seed

19 There was no evidence about the terms of the contracts of sale of the contaminated seed from the producer to the distributors, except where the seed was supplied on consignment. In such cases, the producer and the distributor made a "stockist agreement". That agreement contained terms that purported to exclude or limit the producer's liability, including a purported exclusion for liability arising out of the use of the MR43 "including as a result of [the producer's] negligence".[4] Another term purported to require the distributor's standard conditions of purchase to contain an agreement by the customer to release the producer from "all liability and costs (including negligence) directly or indirectly arising out of or related to the delivery or use of the goods".[5] It is unclear whether the distributors who took stock on consignment complied with this obligation.

20 There was also no evidence about the terms of the contracts of sale of the seed from the distributors to the growers. Despite the words "Conditions of sale and use" and "Conditions", the producer acknowledged that the words printed on the rear of the bags were not contractual terms of the growers' purchase of the contaminated seed.

The growers' capacity to protect themselves from the risk of economic loss arising from the contaminated seed

21 Although the primary judge did not make an explicit finding that the contamination of the seed by shattercane was a hidden defect, which gave rise to a risk of loss to which the growers were exposed once they planted the seed, this fact does not seem to be in dispute. Accordingly, the growers' capacity to protect themselves from the risk of loss from the contaminated seed comprised: (1) the option not to purchase the seed, noting that there was one other supplier of grain sorghum seed in Australia; and (2) the option not to sow the seed once purchased. The primary judge doubted the likelihood that a consumer in the growers' position

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4 *Mallonland* (2021) 7 QR 234 at 265 [123].

5 *Mallonland* (2021) 7 QR 234 at 264 [121].

might extract a warranty from the seller against a defect in the seed that would protect the consumer from suffering consequential economic loss.

The reasons of the courts below on the duty of care issue

22 Both the primary judge[6] and the Court of Appeal of the Supreme Court of Queensland[7] found that the producer was not liable to the growers in negligence because the producer did not owe them a duty of care.

23 The primary judge noted that the growers had not alleged the existence of a duty of care in the statement of claim, although they alleged breaches of a duty of care.[8] The primary judge identified as a relevant question whether the producer "owed a duty of care in negligence to any of the plaintiffs and group members to avoid the risk of economic loss of the kind claimed by the plaintiffs and group members in relation to the supply of the contaminated MR43 seed".[9] The primary judge concluded that the terms stated on the seed bags operated as a "disclaimer of an assumption of responsibility" that the MR43 seed supplied would be free of contamination by shattercane or grassy off-types to "negate" the existence of a duty of care to avoid causing economic loss.[10] In effect, the primary judge's reasoning depended upon a conclusion that the producer had positively denied any assumption of responsibility for the supply of uncontaminated seed. The primary judge did not make findings about any assumption of responsibility by the producer that arose in the absence of the "disclaimer".

24 In the Court of Appeal, Morrison JA (with whom Williams J agreed) noted that the duty of care identified by the growers in the Court of Appeal was stricter than the duty identified by the primary judge: it was that "a manufacturer of a mass-produced product, owes, in favour of end users who use the product as intended in the course of their business, a duty to take reasonable care in the production process to ensure that the product is free of hidden defects, which, if they later emerge, are

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6 *Mallonland* (2021) 7 QR 234.

7 *Mallonland Pty Ltd v Advanta Seeds Pty Ltd* (2023) 13 QR 492 ("*Mallonland*").

8 *Mallonland* (2021) 7 QR 234 at 261 [106].

9 *Mallonland* (2021) 7 QR 234 at 262 [109].

10 *Mallonland* (2021) 7 QR 234 at 284 [205].

likely to cause a particular kind of financial loss, or relevant financial loss to the business interest of the end user".[11]

25 The growers advanced five reasons in support of the existence of that duty of care.[12] First, the alleged duty "falls within the established category of duty of care of a manufacturer to an end user or arises by close analogy with it".[13] Secondly, the duty of care would not impose indeterminate liability on the producer. Thirdly, the economic losses suffered by the growers were reasonably foreseeable. Fourthly, the growers were vulnerable to a lack of care by the producer in at least four ways: (1) the producer had the means to prevent contaminated seed "getting to market"; (2) it was unrealistic to expect the growers to negotiate for or obtain a warranty or indemnity from the producer or a distributor; (3) if the seed was contaminated it would likely damage the "fundamental income producing asset upon which the [growers'] business depended"; and (4) by the time any contamination is discovered, it is too late for the growers to "readily or cheaply" reverse its effects on the productive capacity of the land.[14] Fifthly, the producer was the person "with control of the risk coming home to the ... [growers]; there was known reliance and there was [an] assumption of responsibility".[15]

26 Morrison JA rejected the growers' contentions on each point. As to the first reason, his Honour did not accept that *Dovuro Pty Ltd v Wilkins*[16] offered any real support for the existence of a duty of care in this case, concluding that, at best, that decision suggests that a seed manufacturer might owe a duty of care to end users, in respect of economic loss, in a different factual scenario.[17] As to the second, third and fourth reasons, his Honour found that those features of the relationship did not

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11 *Mallonland* (2023) 13 QR 492 at 509 [38].

12 *Mallonland* (2023) 13 QR 492 at 510 [44].

13 *Mallonland* (2023) 13 QR 492 at 510 [44(a)].

14 *Mallonland* (2023) 13 QR 492 at 510 [44(d)].

15 *Mallonland* (2023) 13 QR 492 at 510 [44(e)].

16 (2003) 215 CLR 317.

17 *Mallonland* (2023) 13 QR 492 at 539 [173].

outweigh the effect of the disclaimer on the bags, which negated the duty of care.[18] As to the fifth reason, Morrison JA found that known reliance was not pleaded and the growers should not be permitted to change their case to introduce that issue.[19] He accepted that the growers had brought a case based on assumption of responsibility arising from the producer's "thorough processes to guard against contaminants in the seed",[20] but reiterated that this assumption was negated by the so-called disclaimer.[21] Ultimately, Morrison JA considered that the lengths to which the producer went to make the disclaimer made the case "distinctly inapt as one where [the Court of Appeal] might expand the categories where a duty of care has been held to exist where the loss is pure economic loss".[22]

27 Concerning assumption of responsibility, Morrison JA considered that a party's assumption of responsibility is a fact found from evidence relating to the relationship between the parties, their conduct, and the reliance of the other party.[23] Equally, his Honour noted, whether conduct has the effect of negating the assumption of responsibility is a question of fact based on evidence. Morrison JA concluded that the words on the seed bags delivered the following "clear message" to the consumer: "You should be aware this product may contain contaminants which could cause losses to the business, and you must be aware that if losses emerged, they're at your risk, not ours. And if you buy our product, you must take on the risk [that] it may be so contaminated".[24]

28 Bond JA wrote separate reasons, with which Morrison JA and Williams J also agreed. Bond JA posed the question as whether the tort of negligence should provide the growers a remedy by enabling them to "leapfrog up the contractual

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18 *Mallonland* (2023) 13 QR 492 at 552 [227].

19 *Mallonland* (2023) 13 QR 492 at 550 [217].

20 *Mallonland* (2023) 13 QR 492 at 551 [222].

21 *Mallonland* (2023) 13 QR 492 at 551 [223].

22 *Mallonland* (2023) 13 QR 492 at 552 [227].

23 *Mallonland* (2023) 13 QR 492 at 527 [118].

24 *Mallonland* (2023) 13 QR 492 at 530 [143].

chain" to look to the producer for compensation rather than the distributor.[25] His Honour also asked whether the scope of statutory protections in the *Australian Consumer Law* concerning the supply of defective goods, which did not cover the growers, affected the scope of the tort of negligence. Bond JA identified five reasons for concluding that the circumstances of the case did not justify departure from the general rule denying liability in negligence for pure economic loss.[26] These were: (1) in the light of the "specific disclaimer of responsibility" on the seed bags, the producer "most assuredly had not assumed" responsibility to the growers; (2) this conclusion was supported by the terms of the contracts for supply of stock on consignment; (3) the limited scope of relevant remedies under the *Australian Consumer Law* indicated that the legislature had decided to protect only persons who met the statutory definition of "consumer"; (4) the fact that the proposed liability was not indeterminate was not a "conceptual determinant" for the recognition of a duty of care; and (5) the growers had not proved facts which would justify their claim of vulnerability.[27] Further, his Honour stated that in any analysis of whether the growers were vulnerable, it was necessary to take into account the producer's prominent disclaimer of liability for loss arising out of, or related to, the use of the seed, whether as a result of the producer's negligence or otherwise.[28]

Principles governing the existence of a duty of care to avoid causing pure economic loss

29 An essential element of the tort of negligence is that the defendant owes the plaintiff a duty to take reasonable care when engaging in an activity to avoid causing the plaintiff a particular type of damage or loss that is reasonably

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25 *Mallonland* (2023) 13 QR 492 at 569-570 [299].

26 *Mallonland* (2023) 13 QR 492 at 576-577 [318]-[323].

27 *Mallonland* (2023) 13 QR 492 at 577 [319]-[323].

28 *Mallonland* (2023) 13 QR 492 at 578 [327].

foreseeable.[29] "A man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them."[30]

30 As a general rule, damages are not recoverable in negligence for pure economic loss, that is, for loss that is not consequential upon injury to person or property.[31] Ordinarily, a person does not owe a duty to take reasonable care to avoid causing reasonably foreseeable pure economic loss to another.[32]

31 This general rule reflects the well-established position at common law that the infliction of economic loss does not, by itself, infringe any right or legally protected interest of the plaintiff.[33] The general rule is also said to reflect policy concerns about the potentially excessive scope of liability for financial loss, referred to by Cardozo CJ as liability "in an indeterminate amount for an indeterminate time to an indeterminate class".[34] Another policy reason said to

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29 *Sullivan v Moody* (2001) 207 CLR 562 at 576 [42]; *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 254 CLR 185 at 199 [19], 240 [169] ("*Brookfield*").

30 *Le Lievre v Gould* [1893] 1 QB 491 at 497; *Vairy v Wyong Shire Council* (2005) 223 CLR 422 at 431 [23].

31 *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529 at 555, 558-559, 592, 598 ("*Caltex*"); *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 192 [4], 198 [27], 219 [101], 267 [242] ("*Perre v Apand*"); *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at 530 [22] ("*Woolcock*"); *Brookfield* (2014) 254 CLR 185 at 228 [127].

32 *Caltex* (1976) 136 CLR 529 at 544-545, 552, 555, 558-559, 572-573, 590, 592-593, 598; *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241 at 249 ("*Esanda*"); *Perre v Apand* (1999) 198 CLR 180 at 192 [4], 219 [101], 222-223 [112], 281 [275], 316 [387].

33 *Allen v Flood* [1898] AC 1; *Brisbane Shipwrights' Provident Union v Heggie* (1906) 3 CLR 686 at 698, 700; *Sanders v Snell* (1998) 196 CLR 329 at 341-342 [31]-[32]; *Brookfield* (2014) 254 CLR 185 at 226 [122].

34 *Caltex* (1976) 136 CLR 529 at 568, 591, quoting *Ultramares Corporation v Touche* (1931) 174 NE 441 at 444. See also *Bryan v Maloney* (1995) 182 CLR 609 at 618, 632; *Hill v Van Erp* (1997) 188 CLR 159 at 192; *Perre v Apand* (1999) 198 CLR 180 at 220-221 [106].

justify the general rule is a concern to avoid infringing upon the legitimate pursuit of personal advantage.[35]

32 A consequence of the general rule is that damages for pure economic loss are not recoverable if all that is shown is that the defendant's negligence was a cause of the loss and the loss was reasonably foreseeable.[36] That is, reasonable foreseeability is a necessary but not sufficient criterion for the existence of a duty of care to avoid causing pure economic loss.[37] Furthermore, indeterminacy of liability, in the sense that the defendant's liability cannot be realistically calculated, will ordinarily deny the existence of such a duty of care.[38]

33 Where a defendant has assumed a responsibility towards the plaintiff to take reasonable care to avoid economic loss to the plaintiff, a duty of care may well be established. The term "assumption of responsibility" has been criticised as "imprecise and beguiling but deceptively simple".[39] An assumption of responsibility is best understood as an undertaking (whether express or implied) by a person to take on a task or job for another person or class of persons, from which it can be inferred that the first person accepted that he or she would take reasonable care when engaging in that task or job.[40]

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35 *Caltex* (1976) 136 CLR 529 at 552, 572; *Bryan v Maloney* (1995) 182 CLR 609 at 618; *Hill v Van Erp* (1997) 188 CLR 159 at 180, 236. See also *Jaensch v Coffey* (1984) 155 CLR 549 at 578; *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 503.

36 *Esanda* (1997) 188 CLR 241 at 249; *Woolcock* (2004) 216 CLR 515 at 529-530 [21]; *Brookfield* (2014) 254 CLR 185 at 214 [68].

37 eg *Perre v Apand* (1999) 198 CLR 180 at 192 [5], 198 [27], 207 [66], 213 [83], 222 [111], 231 [132], 241 [168], 248-249 [186], 282 [278], 283 [279], 287 [291], 299-300 [329], 303 [335].

38 *Woolcock* (2004) 216 CLR 515 at 548 [77]; *Brookfield* (2014) 254 CLR 185 at 214 [68].

39 *Hill v Van Erp* (1997) 188 CLR 159 at 229.

40 See *Mutual Life & Citizens' Assurance Co Ltd v Evatt* (1968) 122 CLR 556 at 570, 584, 617 ("*MLC*"); *Shaddock & Associates Pty Ltd v Parramatta City Council*

34 Where a duty to take reasonable care to avoid causing pure economic loss is said to arise out of an assumption of responsibility by a defendant to a particular person or class of persons, the defendant can negate or limit that assumption and thus the duty by words or conduct directed to that person or class. That is because such a negation or limitation amounts to a denial of an assumption of responsibility on the part of the defendant which the person or class cannot ignore or reject. For example, no duty to avoid causing pure economic loss will arise in connection with the provision of advice or information if the defendant "had effectually disclaimed any responsibility for it".[41]

35 In the primary judge's reasons in this case, there was some ambiguity about the finding that the producer had disclaimed an assumption of responsibility because his Honour did not identify facts that would have constituted an assumption of responsibility. It is unclear whether he found an assumption of responsibility that the producer disclaimed or that the producer had positively not assumed any relevant responsibility. If the former, the primary judge was in error in the absence of any basis for finding an assumption of responsibility in the sense identified in the Australian case law.

36 In *Sullivan v Moody*, the Court observed that "[d]ifferent classes of case give rise to different problems in determining the existence and nature or scope, of a duty of care ... The relevant problem will then become the focus of attention in a judicial evaluation of the factors which tend for or against a conclusion, to be arrived at as a matter of principle."[42] Since *Sullivan v Moody*, other than in cases

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[No 1] (1981) 150 CLR 225 at 235, 243, 248-250 ("*Shaddock*"); *San Sebastian Pty Ltd v Minister Administering the Environmental Planning and Assessment Act 1979* (1986) 162 CLR 340 at 357; *Bryan v Maloney* (1995) 182 CLR 609 at 627; *Esanda* (1997) 188 CLR 241 at 257-258, 275; *Hill v Van Erp* (1997) 188 CLR 159 at 170, 210-211, 230-231; *Brookfield* (2014) 254 CLR 185 at 202 [27], 226 [122], 233 [143], 235 [150], 243 [180]; *Swick Nominees Pty Ltd v LeRoi International Inc [No 2]* (2015) 48 WAR 376 at 449-450 [389]-[391] ("*Swick*"). See also Nolan, "Assumption of Responsibility: Four Questions" (2019) 72 *Current Legal Problems* 123 at 128-140.

41 *Shaddock* (1981) 150 CLR 225 at 231. See also *MLC* (1968) 122 CLR 556 at 585, 587, 614-615, 617.

42 (2001) 207 CLR 562 at 579-580 [50]. See also *Brookfield* (2014) 254 CLR 185 at 208 [48], 240 [169], 241 [174].

involving an assumption of responsibility, determining whether the relationship between the parties gives rise to a duty of care to avoid causing pure economic loss has been understood in Australia to involve such an evaluation. This "salient features" approach, as it is now known, has attracted significant academic[43] and judicial[44] criticism. However, neither the growers nor the producer argued that there should be a departure from the approach in this case.

37 Their Honours' reference in *Sullivan v Moody* to "factors ... for or against" recognition of a duty of care in a novel case should not be understood as inviting any form of "instinctive synthesis" of competing considerations "without a chain of reasoning linking these factors with the ultimate conclusion".[45] This is why an incremental and analogical approach,[46] paying close attention to relevant precedents and any risk of incoherence in the principles they establish, is necessary.[47]

38 On this approach, actual knowledge of the risk to a person or class of persons of the particular type of economic loss that eventuated, and of the magnitude of the economic loss that risk entails, strengthens a case for finding a

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43 Witting, "The Three-Stage Test Abandoned in Australia—Or Not?" (2002) 118 *Law Quarterly Review* 214 at 217-218; Barker, "Negligent Misstatement in Australia—Resolving the Uncertain Legacy of *Esanda*", in Barker, Grantham and Swain (eds), *The Law of Misstatements: 50 Years on from Hedley Byrne v Heller* (2015) 319 at 342; Robertson, "Proximity: Divergence and Unity", in Robertson and Tilbury (eds), *Divergences in Private Law* (2016) 9 at 33-34; Plunkett, *The Duty of Care in Negligence* (2018) at 69; Davies, Malkin and Voon, *Torts*, 10th ed (2024) at 329-330.

44 See, for example, *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 13 [3], 33-34 [77]; *Howard Smith & Patrick Travel Pty Ltd v Comcare* [2014] NSWCA 215 at [36]; *Swick* (2015) 48 WAR 376 at 448-449 [385]-[386].

45 *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 33-34 [77].

46 *Brookfield* (2014) 254 CLR 185 at 230 [134].

47 *Sullivan v Moody* (2001) 207 CLR 562 at 579-580 [50]; *Brookfield* (2014) 254 CLR 185 at 201-202 [25], 214 [69].

duty of care.[48] In *Perre v Apand Pty Ltd*, McHugh J observed that "[t]he cases have recognised that knowledge, actual or constructive, of the defendant that its act will harm the plaintiff is virtually a prerequisite of a duty of care in cases of pure economic loss".[49] For McHugh J, this recognition reflected the simple propositions that "[n]egligence at common law is still a fault based system ... [and it] would offend current community standards to impose liability on a defendant for acts or omissions which he or she could not apprehend would damage the interests of another".[50] Because negligence is fault-based, recklessness or gross carelessness in a defendant's actions resulting in economic loss may be relevant to the existence of any novel duty of care enabling recovery for such loss.[51]

39 Another matter that adherence to the required incremental and analogical approach has identified as relevant to the existence of a duty of care to avoid causing pure economic loss is a plaintiff's "vulnerability" to the particular type of economic loss that eventuated.[52] The relevant vulnerability is the plaintiff's inability to protect him or herself from the economic loss that eventuated as a consequence of a defendant's carelessness, either entirely or in a way that would cast the consequence of loss on the defendant (for example, by contractual stipulations).[53] A mere likelihood of suffering economic loss if reasonable care is not taken will not amount to vulnerability.[54] As McHugh J explained it in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*, a plaintiff may be unable to protect him or herself from the risk of economic loss by reason of "ignorance or social, political or economic constraints".[55] Conversely, the capacity of a person to protect him or

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48 *Woolcock* (2004) 216 CLR 515 at 530 [22], 550 [87]; *Barclay v Penberthy* (2012) 246 CLR 258 at 284 [42].

49 (1999) 198 CLR 180 at 230 [131].

50 *Perre v Apand* (1999) 198 CLR 180 at 230 [131].

51 *Perre v Apand* (1999) 198 CLR 180 at 230-231 [132].

52 *Woolcock* (2004) 216 CLR 515 at 530 [23], 549 [80]; *Barclay v Penberthy* (2012) 246 CLR 258 at 284 [42].

53 *Woolcock* (2004) 216 CLR 515 at 530 [23].

54 *Woolcock* (2004) 216 CLR 515 at 530 [23].

55 (2004) 216 CLR 515 at 548-549 [80].

herself from economic loss by contractual agreement (or, by analogy, by any other reasonable means) is a reason, and often a decisive one, for rejecting the existence of a duty of care.[56]

40 No duty of care was found in *Woolcock*, as it was reasoned that the facts failed to disclose relevant vulnerability.[57] The Court held that an engineering company, which had designed inadequate foundations for a warehouse and office complex resulting in subsequent structural damage, did not owe a duty of care in respect of economic loss suffered by a subsequent purchaser of the complex. This followed from the lack of any factual basis showing that the purchaser could not have obtained the benefit of terms in the contract for the purchase of the complex that would have cast upon the engineering company the burden of the economic consequences of any carelessness on its part.[58] Furthermore, it was not alleged or agreed that the relevant defects could not have been discovered.[59]

41 In *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288*,[60] the Court held that a builder did not owe an owners corporation of a building a duty of care to avoid pure economic loss resulting from latent defects in the common property. The judgments identified a lack of vulnerability as determinative of the absence of a duty of care in the circumstances of the case.[61] French CJ concluded that the case was analogous to *Woolcock*.[62] Hayne and Kiefel JJ found that the terms of the contracts made by the developer and the original purchasers, which conferred rights for the remedying of defects in the common property, denied the vulnerability of the owners corporation to any lack of care by the builder in the

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56 *Woolcock* (2004) 216 CLR 515 at 552 [94].

57 (2004) 216 CLR 515 at 533 [31]-[33], 548-550 [80]-[86].

58 *Woolcock* (2004) 216 CLR 515 at 533 [31].

59 *Woolcock* (2004) 216 CLR 515 at 533 [32].

60 (2014) 254 CLR 185.

61 *Brookfield* (2014) 254 CLR 185 at 201 [23], 204-205 [34]-[35], 209 [51], 210-211 [58], 231-232 [140].

62 *Brookfield* (2014) 254 CLR 185 at 204-205 [34]-[35].

performance of its contractual obligations.[63] Crennan, Bell and Keane JJ characterised the case as one of disappointed expectations under a contract which allocated economic risks, including risks which a purchaser could avoid by not entering into the contract.[64]

Resolution of the appeal

42 In this Court, the growers ultimately argued that the following matters supported the existence of the alleged duty of care: (1) the reasonable foreseeability of the relevant risk of economic loss if reasonable care was not taken in seed production; (2) the producer's knowledge of the risks of economic loss to which the growers were exposed if reasonable care was not taken in seed production; (3) the producer's capacity to control those risks by careful production; (4) the growers' vulnerability, in the sense that they could not protect themselves from the consequences of a want of reasonable care in the production of the seed in such a way that would cast the consequences on the producer; (5) as the intended consumers of the product, the growers were not in an indeterminate class of victims of the producer's want of care; and (6) the recognition of the alleged duty of care would not give rise to legal incoherence.

43 The growers also argued that the packaging in which the contaminated seed was sold did not operate to affect the duty of care that was alleged to have arisen at the time of the production of the contaminated seed (that is, before the disclaimer had been given to growers on receipt of the bags of seed). Specifically, the growers submitted that the disclaimer did not "intersect" with the producer's knowledge because, according to the growers, the disclaimer did not warn of a risk of which the producer was aware. Furthermore, it was said that the disclaimer did not attenuate the growers' vulnerability and could not have affected whether the producer assumed responsibility for the task of producing the seed.

44 The growers' arguments fail. The facts fall far short of identifying a relationship between the producer and the growers that would lead to the existence of a duty to take reasonable care when producing the grain sorghum seed to avoid causing the growers pure economic loss of the type claimed.

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63 *Brookfield* (2014) 254 CLR 185 at 210-211 [58].

64 *Brookfield* (2014) 254 CLR 185 at 231-232 [140].

45 Dealing first with the growers' argument based on the packaging, while it is true that the producer could not impose a contract on end users by its packaging, the terms on the packaging (including the information and warnings it contained) communicated to the class of potential future purchasers that the producer was positively not assuming the responsibility which is at the core of the alleged duty of care. The significance of the packaging is not that it merely disclaims legal liability. It is that, by the packaging, the producer legitimately and clearly delimited the nature of the product that it made available to the market. The product was one which had a minimum purity of 99% (but not 100%), and, by the terms of the packaging, it was a product which the growers were told to open only after reading and agreeing with the conditions stated on the bag. Those conditions also made it clear that the minimum purity of 99% was within "recognised tolerances". Those "recognised tolerances" included that the product was not 100% the identified seed (as it could contain up to 1% of other plant matter) and that it could contain 0.1% "maximum other seeds". Moreover, the evidence established that the growers would have readily understood the concept of "tolerances" of impure matter in the seed in this context. Far from assuming responsibility for production of the nature and type of the seed beyond the specifications on the packaging, the producer warned the growers that it was not assuming any such responsibility to them.

46 The extent to which, if at all, the producer assumed any responsibility to the growers in relation to any economic loss arising from their use of the seed depends on an assessment of the entirety of the relationship, including the circumstances in which the growers obtained the seed. The producer arranged for production of the seed, intending that it would be produced in accordance with certain processes, but without any undertaking to any potential purchaser concerning those processes beyond the information and warnings on the packaging. Furthermore, the growers did not agree to purchase the seed in advance of its supply to distributors for sale. At most, the growers were potential end users of the producer's seed, if and when it was supplied to distributors for sale, in the packaging selected by the producer. Until the growers purchased the contaminated seed from the distributors in the labelled bags and took possession of it, an important aspect of the relationship between the producer and the growers was that the growers were unidentified members of a class of potential users of the producer's product (that product being not merely the seed, but the seed as packaged).

47 In these circumstances, the growers' argument of a temporal disjunct between the time when the growers had an opportunity to read the warnings on the packaging after purchase and the asserted emergence of the duty of care followed by its breach (by the failure to rogue and grow out the relevant seed crop), with the

consequence that the disclaimer could not "intersect" with or negate the duty of care, is misconceived.

48 Although the primary judge and the Court of Appeal referred to the disclaimer "negating" a duty of care,[65] they should not be understood to have meant that a duty of care arose, was breached, and was subsequently negatived by the opportunity that the growers had to read the packaging. The process of production included the producer placing the seed into the packaging on the basis that the packaging would provide the future purchaser with clear information in "plain words" about the nature of, and scope for impurities in, the seed product. The producer intended that, by the packaging, the future purchaser would be able to make an informed choice, in its own interests, to plant or not to plant the seed. In these circumstances, there is no temporal disjunct of the kind advanced for the growers. No duty of care could arise (and therefore there could be no breach of any such duty of care) because an integral part of the process of producing seed of a particular type with a particular potential for impurities (including other seeds) included the warnings on the packaging about the very matter, the potential for impurities (including other seeds), that eventuated and caused the economic loss. Contrary to the submissions for the growers, this was not a case of the producer merely attempting to disclaim its legal liability by agreement. The circumstances described are all critical aspects of the objective features of the relationship between the producer and the growers.

49 Otherwise, the six matters upon which the growers relied do not afford a principled basis upon which to recognise the alleged duty of care.

50 First, that it was reasonably foreseeable that the growers would suffer economic loss if reasonable care was not taken in the production process of the grain sorghum seed supported the existence of the duty of care, but only as a necessary and not as a sufficient condition.[66]

51 Secondly, as to the producer's knowledge, the critical fact is that the producer did not know that the seed it placed into the market for sale was

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65 eg *Mallonland* (2021) 7 QR 234 at 282 [197], 283 [200], 284 [205]; *Mallonland* (2023) 13 QR 492 at 513 [56], 514 [59], [60], 525-527 [107]-[118].

66 eg *Perre v Apand* (1999) 198 CLR 180 at 192 [5], 198 [27], 207 [66], 213 [83], 222 [111], 231 [132], 241 [168], 248-249 [186], 282 [278], 283 [279], 287 [291], 299-300 [329], 303 [335].

contaminated. The producer knew that if it did not take reasonable care in its production processes, there was a risk that an ascertainable class of persons, being persons who would purchase and plant MR43 seed, would suffer economic loss if the seed contained an off-type seed with a shattering characteristic. However, that was not knowledge of the risk of economic loss to the appellant growers specifically, because the producer did not know that those growers would purchase and plant the contaminated seed. Furthermore, the producer did not have knowledge that want of care in the production of the contaminated seed would or could cause economic loss of the magnitude that was suffered by the growers. The producer's admissions of knowledge were carefully confined in their terms. The producer did not admit that it knew there was a material risk that the relevant seed was contaminated by a sorghum off-type with a shattering characteristic, let alone that it was so contaminated. The producer did not admit that it knew that a sorghum off-type with a shattering characteristic (as opposed to a sorghum off-type more generally) had contaminated previous commercial consignments of its seed products. The most that can be said is that, when the contaminated seed was produced, the producer knew that future purchasers would have more difficulty controlling or eradicating a sorghum off-type with a shattering characteristic if it was present amongst the seed, and that if it was planted and it germinated, matured and dropped seed, such purchasers would probably have more difficulty controlling a sorghum off-type with a shattering characteristic in a sorghum crop than an off-type without that characteristic. That kind of knowledge is far distant from the kind that has been identified in other cases as supporting the case for finding a duty of care to avoid economic loss.

52 Thirdly, the producer's capacity to control the risks of seed contamination by careful production was not absolute, as communicated by the packaging of the seed. Relatedly, there was no finding of conduct or words on the part of the producer that might have conveyed that the contaminated seed was uncontaminated, or different from its description on the labelled bags.

53 Fourthly, the growers' contention that they were unable to protect themselves from the risk of shattercane in their crops and the economic loss that would result if that risk materialised fails. In truth, the growers were able to protect themselves. The packaging enabled potential future purchasers, including the growers, to inform themselves that the seed might not be free from contamination and to decide whether or not to plant the seed on that basis. On receipt of the seed in the packaging, the growers were able to make an informed choice to plant or not to plant seed that might not be free from contamination.

54 The growers may not have been able to insist on a warranty from either the producer or the distributor which guaranteed that the producer had complied with reasonable production processes to avoid seed contamination, or an indemnity for economic losses resulting from sowing seed contaminated as a result of a failure of compliance. However, when the growers obtained possession of the seed in the packaging they had a choice to return the seed if they did not want to accept the risk of impurity identified by the packaging, and a choice not to plant the seed in the face of the clear message on the bags, as found by Morrison JA,[67] of the risk that the seed was contaminated. The growers' argument in this Court that, having purchased the seed from an intermediary and not the producer, the option of returning the seed unopened for a refund was unrealistic, was unsupported by evidence. It was for the growers, as the parties bearing the onus of proof, to establish that they could not return bags of unopened seed to the distributors in exchange for a refund from the producer. The growers did not do so.

55 Fifthly, and in response to the growers' argument with respect to indeterminacy, the fact that the growers fall within an ascertainable class of persons likely to be affected by the producer's careless production of contaminated seed does not improve the case for finding a duty of care but rather excludes the spectre of indeterminate liability that would generally deny the existence of a duty.

56 Sixthly, any lack of legal coherence does not improve the growers' case. Properly analysed, the growers' case would involve the imposition of a duty of care on the producer to take reasonable care to avoid causing economic loss to the growers primarily because the risk of such loss was reasonably foreseeable, contrary to the principles identified earlier.

Conclusion

57 The producer owed no relevant duty of care to the growers. It follows that the producer's notice of contention does not arise for consideration. The appeal should be dismissed with costs.

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67 *Mallonland* (2023) 13 QR 492 at 530 [143].

EDELMAN J.

Introduction

58 We should not attempt to breed from a mule.[68] This appeal arises from attempts to propagate from the decision of this Court in *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"*.[69] Prior to the decision in *Caltex* a duty of care could be owed to a plaintiff if the duty was (i) based upon an (objective) assumption of responsibility, by an express or implied undertaking by the defendant to the plaintiff or a class of persons of which the plaintiff is a member, or (ii) imposed by law. A duty of care that was imposed by law upon a defendant corresponded with a plaintiff's right to person or property. *Caltex* purported to recognise a new species of duty of care, one which imposed an abstract duty to take care not to expose a person to loss, independently of a right to person or property, in circumstances involving undefined "salient features".

59 As the joint reasons of the other members of this Court explain, the "salient features" approach has been strongly criticised.[70] But the respondent producer did not challenge *Caltex* or its progeny. I therefore agree with the application of the salient features approach by the other members of the Court and with their conclusion that the appeal must be dismissed. These additional reasons further address two matters: (i) the absence of any assumption of responsibility by the respondent producer; and (ii) how the recognition of a duty of care to avoid exposing another to "pure" economic loss in circumstances of "salient features" has given rise to the highly unsatisfactory state of the present law with the effect that until *Caltex* and its progeny are challenged or rationalised, a duty of care based upon "salient features" must be confined as narrowly as possible.[71]

Duty of care arising from an assumption of responsibility

The nature of a claim based on assumption of responsibility

60 Category confusion is dangerous. When Dutch explorers landed on Wadjemup they mistakenly identified the friendly quokka marsupial as a rodent and described the island as "Rotte-nest". Without a proper classification of the

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68 Danby, *The Mishnah* (1933) at 29 (Zeraim, Kilaim 1:6).

69 (1976) 136 CLR 529.

70 Joint reasons at [36].

71 See also the similar suggestion in *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 254 CLR 185 at 245 [185], regarding the approach to be taken to *Bryan v Maloney* (1995) 182 CLR 609 and "[a]bsent any application that *Bryan v Maloney* should be overruled".

legal rule by which a duty of care arises from an assumption of responsibility, there was, and remains, a danger that legal genetic engineering could transform that genial rule into a species of legal rat.

61 The concept of "assumption of responsibility predated categorisation into contract and tort",[72] although an assumption of responsibility shares its foundations with what has now become the law of contract.[73] Like a contractual duty, an assumption of responsibility has long been recognised as arising from an expressed undertaking or an undertaking implied from conduct or office.[74] But, unlike modern contractual duties, an assumption of responsibility can arise without any consideration. For instance, in actions against gratuitous bailees (and not merely contractual bailees) for a failure to return goods, the courts recognised an assumed duty of the bailee which, "like the action against the surgeon or the carpenter", was based "on an undertaking (an *assumpsit*)"[75] and was, in effect, an action "for failure to perform a promise to return".[76] The assumed duty or undertaking was also recognised as arising by implication from an office or calling without requiring consideration. Hence, a common carrier or innkeeper was held to have assumed responsibility to the public to provide carriage or lodging. In the absence of any requirement for consideration, their duties were recognised to arise "independently of contract, and whether [their] defaults took the form of acts or of omissions", based upon the "supposition 'that every one who undertakes any office,

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72 Mitchell, "*Hedley Byrne & Co Ltd v Heller & Partners Ltd* (1963)", in Mitchell and Mitchell (eds), *Landmark Cases in the Law of Tort* (2010) 171 at 195. See also Sales, "Pure economic loss and assumption of responsibility: the Peter Taylor Memorial Address for the Professional Negligence Bar Association 20 April 2023" (2023) 39 *Journal of Professional Negligence* 113 at 114, 127.

73 See *Swick Nominees Pty Ltd v LeRoi International Inc [No 2]* (2015) 48 WAR 376 at 443-444 [368]-[373].

74 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 at 492, 528-530, 532-533.

75 Winfield, *The Province of the Law of Tort* (1931) at 93-94.

76 Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (1987) at 409. See also Sales, "Pure economic loss and assumption of responsibility: the Peter Taylor Memorial Address for the Professional Negligence Bar Association 20 April 2023" (2023) 39 *Journal of Professional Negligence* 113 at 118-119.

employment, trust, or duty, contracts with those who employ or entrust [them], to perform it with integrity, diligence, and skill'".[77]

62 Beyond these instances of common callings and bailment, an assumption of responsibility is also the reason that obligations arise from undertakings in unilateral formal deeds and unilateral declarations of trusts. It is the reason that in *Nocton v Lord Ashburton*, the "assumed" duty of a fiduciary to exercise care was recognised in circumstances described as "equivalent to a contract".[78] In all these instances, the obligation can arise outside the law of contract because the undertaking can be given without consideration.

63 It is therefore entirely accurate to say that in the law of torts in the twentieth century plaintiffs deployed an assumption of responsibility to "sidestep the doctrine of consideration" by "uncannily echoing both the reasoning and the language of the lawyers of the fifteenth century".[79] As Professor Beever has astutely observed:[80]

> "[T]he notion that the law of contract is a completely separate area of the law from the law of tort has done considerable harm to our understanding of the law as a whole ... [B]reach of contract is the wrong of failing to keep one's assumed obligations in exactly the same way as 'negligent misrepresentation', breach of many trusts, or perhaps breach of a fiduciary obligation are violations of assumed obligations."

64 The source of the modern application of assumption of responsibility in the law of torts is the speeches of their Lordships, and particularly Lord Devlin, in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*.[81] Although a disclaimer precluded any finding of an undertaking in that case, their Lordships recognised that liability could arise following an undertaking that care would be taken concerning the accuracy of a statement. As Lord Devlin explained, it would be an "extreme assertion" to suggest that liability based upon an assumption of responsibility could only arise in instances of breach of a "contractual or fiduciary duty". That assertion would mean that a patient who gave up their occupation could

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77 Winfield, "The History of Negligence in the Law of Torts" (1926) 42 *Law Quarterly Review* 184 at 188-189; see also at 185-186.

78 *Nocton v Lord Ashburton* [1914] AC 932 at 948, 971. See also *Peek v Gurney* (1871) LR 13 Eq 79 at 97; *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 at 528-529.

79 Ibbetson, *A Historical Introduction to the Law of Obligations* (1999) at 239.

80 Beever, *Rediscovering the Law of Negligence* (2007) at 312.

81 [1964] AC 465.

recover damages from a doctor in a private hospital if, for a fee, the doctor had negligently advised the patient that they could not pursue their occupation, but could not recover damages if the same advice had been given in a public hospital without a fee. Lord Devlin rightly explained that this was "nonsense". It was "a refusal to make sense".[82] Lord Devlin continued, explaining that an assumption of responsibility could not be confined to categories such as common callings:[83]

> "If a defendant says to a plaintiff: 'Let me do this for you; do not waste your money in employing a professional, I will do it for nothing and you can rely on me,' I do not think [the defendant] could escape liability simply because [the defendant] belonged to no profession or calling, had no qualifications or special skill and did not hold [themself] out as having any."

In other words, *Hedley Byrne* recognised that liability could arise based upon the breach of an undertaking "which, because there is no consideration, is not enforceable under the rules of contract".[84]

65 Like the position in English law,[85] the "position in Australia"[86] is that an assumption of responsibility, in the sense explained in *Hedley Byrne* and "unanimously affirm[ed]" by the High Court,[87] is sufficient for the law of torts to recognise a duty to take reasonable care when that is what had been expressly or impliedly undertaken. Of course, like any action for the tort of negligence, liability requires proof that the defendant's actions, for which responsibility had been assumed by the defendant's express or implied undertaking, had caused

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82 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 at 517.

83 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 at 531.

84 Jaffey, "Contract in tort's clothing" (1985) 5 *Legal Studies* 77 at 102-103.

85 See *Customs and Excise Commissioners v Barclays Bank plc* [2007] 1 AC 181 at 190 [4].

86 *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241 at 275. See also *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 254 CLR 185 at 226 [122].

87 See *Australian Breeders Co-operative Society Ltd v Jones* (1997) 150 ALR 488 at 523-524.

consequential loss (including, in some cases, following reasonable reliance upon the defendant's conduct).[88]

Application to this appeal

66 It naturally follows from the nature of an assumption of responsibility as an express or implied undertaking made to a person that the obligation is owed only by those who objectively provide the undertaking and owed only to those to whom they provided the undertaking.[89] An undertaking that founds an assumption of responsibility is to a person or group of people. No undertaking will be implied if it is not reasonably expected that it would be made to that person or group in those circumstances.[90]

67 Therein lies the insurmountable hurdle for the appellant growers. Contrary to their submission, it is not accurate to say that the respondent producer "assumed responsibility for ... the manufacture [of the seed]". An assumption of responsibility by the respondent producer that care would be taken to ensure that the grain sorghum seed was free from contamination might be implied in its dealings with its customers, the distributors. But there is no basis in any of the evidence for an implication that the respondent producer gave any undertaking to third parties that care would be taken to ensure that the grain sorghum seed was free from contamination. To the contrary, the "Conditions of Sale and Use" printed on the bags disclaimed any undertaking that could form the basis of an assumption of responsibility to ultimate consumers.

68 In order to avoid the constraint that an assumption of responsibility only gives rise to obligations owed to the person or group to whom the undertaking is made, the appellant growers relied upon the decision of this Court in *Hill v Van*

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88 *HXA v Surrey County Council* [2024] 1 WLR 335 at 359 [90], 364 [108]. See Stevens, *Torts and Rights* (2007) at 11, 14-15; Nolan, "Assumption of Responsibility: Four Questions" (2019) 72 *Current Legal Problems* 123 at 153-156.

89 Nolan, "Assumption of Responsibility: Four Questions" (2019) 72 *Current Legal Problems* 123 at 136, referring to *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830; [1998] 2 All ER 577 and *Playboy Club London Ltd v Banca Nazionale del Lavoro SpA* [2018] 1 WLR 4041; [2019] 2 All ER 478. See also Sales, "Pure economic loss and assumption of responsibility: the Peter Taylor Memorial Address for the Professional Negligence Bar Association 20 April 2023" (2023) 39 *Journal of Professional Negligence* 113 at 117.

90 See *Great Lakes Reinsurance (UK) plc (as Subrogee of Modrono's Bimini Place Ltd) v RAV Bahamas Ltd* [2024] UKPC 11 at [26].

Erp.[91] In that case, a solicitor was held liable to an intended beneficiary under a will for negligently causing economic loss to the intended beneficiary arising from the will being prepared without proper attestation. The solicitor had contractually assumed responsibility to the deceased testator, who was her client. But, as McHugh J observed in dissent, the solicitor had assumed no responsibility to the intended beneficiary.[92]

69 The best justification for the result in *Hill v Van Erp* is provided in the reasons of Gummow J, which were relied upon by the appellant growers in this appeal. Gummow J held that although the solicitor had not assumed responsibility to any person other than the deceased testator, to whom the solicitor owed a contractual duty,[93] that contractual duty was "one of imperfect obligation".[94] In other words, the breach of duty would only result in loss when the testator was deceased and the loss would only be incurred by third parties. His Honour held that "[t]he law of tort operates in such circumstances to complete and vindicate fulfilment of that contractual obligation".[95] As Dr Liau has explained of the claims by intended beneficiaries in an equivalent English decision,[96] "they were exceptionally empowered with the standing to enforce their own secondary rights to damages, 'derived' from the wrong done to [the deceased testator]".

70 There is no justification for extending the exceptional principle in *Hill v Van Erp* to this case: any contractual duty owed by the respondent producer to the distributors was not one of imperfect obligation like the obligation in *Hill v Van Erp*. Whatever the obligation to take reasonable care was that was expressed or implied in contracts between the respondent producer and the distributors, and the evidence at trial was greatly lacking on this point,[97] there was no suggestion that it

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91 (1997) 188 CLR 159.

92 *Hill v Van Erp* (1997) 188 CLR 159 at 200.

93 *Hill v Van Erp* (1997) 188 CLR 159 at 230-231.

94 *Hill v Van Erp* (1997) 188 CLR 159 at 233.

95 *Hill v Van Erp* (1997) 188 CLR 159 at 233.

96 Liau, *Standing in Private Law: Powers of Enforcement in the Law of Obligations and Trusts* (2023) at 226, referring to *White v Jones* [1995] 2 AC 207.

97 *Mallonland Pty Ltd v Advanta Seeds Pty Ltd* (2021) 7 QR 234 at 262-265 [110]-[126].

was an obligation where "the only persons who might have a valid claim ... [would] suffer[] no loss and the only persons who [would] suffer[] a loss ... had no claim".[98]

Recovery of economic loss arising from "salient features"

71 In the absence of any undertaking by the respondent producer amounting to an assumption of responsibility to the appellant growers, the duty of care (if any) owed by the respondent producer must be one that is imposed by law. But there was no infringement of any right of the appellant growers to their person or property. Hence, the loss sought to be recovered by the appellant growers arose in a "pure" sense; it was not consequential upon any infringement of a right to person or property. But just as there is no general duty at common law upon a non-fraudulent defendant not to expose a plaintiff to "pure" economic loss *intentionally*,[99] there also can be no general duty of care at common law upon a defendant not to expose a person to "pure" economic loss *negligently*. So what could be the nature of a duty in this case that could permit recovery of such "pure" economic loss?

72 The appellant growers correctly did not assert that there was a general duty not to expose a person to "pure" economic loss negligently. Instead, they relied upon a more limited, yet uncertain, duty not to expose a person to economic loss in particular cases bearing "salient features". The authority relied upon most heavily by the appellant growers, *Caltex*, was a case of economic loss caused to a plaintiff by negligent infringement of the property rights of a third party. At first blush, it seems highly implausible that the common law would recognise a duty of care to avoid exposing a plaintiff to economic loss due to the negligent infringement of the property rights of a third party. There is no duty of care to avoid exposing a plaintiff to economic loss by negligently causing the death of, or severe injury to, a third party.[100] Why should there be a duty of care to avoid exposing a plaintiff to economic loss by negligently infringing the property rights of a third party?

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98 *Hill v Van Erp* (1997) 188 CLR 159 at 235, quoting *Goodwill v British Pregnancy Advisory Service* [1996] 1 WLR 1397 at 1403; [1996] 2 All ER 161 at 167.

99 *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 254 CLR 185 at 226 [122], citing *Allen v Flood* [1898] AC 1.

100 *Baker v Bolton* (1808) 1 Camp 493 [170 ER 1033]; *Admiralty Commissioners v SS Amerika* [1917] AC 38; *Paul v Royal Wolverhampton NHS Trust* [2024] 2 WLR 417 at 421-422 [2]; [2024] 2 All ER 681 at 685. See *Barclay v Penberthy* (2012) 246 CLR 258 at 273 [1], 277 [21(1)].

73 The *Restatement (Third) of Torts: Liability for Economic Harm* ("the *Restatement*")[101] rejects the existence of a duty of care in the circumstances of the *Caltex* case relied upon by the appellant growers, stating a clear principle that a plaintiff with only a mere contractual interest in relation to property "cannot recover in tort when the property is damaged". The *Restatement* gives the illustration of a vessel that negligently damages a bridge that a railroad operator has a contractual right to use, but in which the operator has no property right. If the railroad operator suffers loss due to a need to send its trains on a more expensive route, it cannot recover from the owner of the vessel.[102] That clear principle and illustration reflects the longstanding position in the United States.[103] It also reflects longstanding English law.[104] Canadian law might allow a plaintiff's claim in such circumstances as a categorical exception that permits recovery of "contractual relational economic loss" in the absence of a right to person or property.[105] But it has been observed that the recoverability of pure economic loss in Canada has become "extraordinarily complex" and that the failure of Canadian courts "to insist that claimants seeking to recover pure economic loss demonstrate injury to a legally cognizable right is at the root of much of the difficulty that lawyers and judges have encountered in litigating and adjudicating such claims".[106] Since 1976, when this Court also recognised such a claim, in a decision which it

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101 American Law Institute, *Restatement (Third) of Torts: Liability for Economic Harm* §7, comment c.

102 American Law Institute, *Restatement (Third) of Torts: Liability for Economic Harm* §7, illustration 6.

103 *Louisville and Nashville Railroad Co v The Tug M/V Bayou Lacombe* (1979) 597 F 2d 469. See also *Robins Dry Dock & Repair Co v Flint* (1927) 275 US 303.

104 *Cattle v The Stockton Waterworks Co* (1875) LR 10 QB 453; *Simpson & Co v Thomson* (1877) 3 App Cas 279; *La Société Anonyme de Remorquage à Hélice v Bennetts* [1911] 1 KB 243; *Weller & Co v Foot and Mouth Disease Research Institute* [1966] 1 QB 569; *Margarine Union GmbH v Cambay Prince Steamship Co Ltd* [1969] 1 QB 219; *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* [1973] QB 27; *Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd* [1986] AC 785.

105 *Canadian National Railway Co v Norsk Pacific Steamship Co* [1992] 1 SCR 1021 at 1037. See also *Bow Valley Husky (Bermuda) Ltd v Saint John Shipbuilding Ltd* [1997] 3 SCR 1210 at 1240-1243 [45]-[50]; *Martel Building Ltd v Canada* [2000] 2 SCR 860 at 879-880 [44]-[46].

106 Brown, *Pure Economic Loss in Canadian Negligence Law* (2011) at x, xi. See also Neyers and Botterell, "*Tate & Lyle*: Pure Economic Loss and the Modern Tort of Public Nuisance" (2016) 53 *Alberta Law Review* 1031 at 1045-1046.

has been said that even Canadian law would regard as incorrectly decided,[107] the same problem has plagued Australian law.

The mule

74 In *Caltex*,[108] a dredge called the "Willemstad" was used to dredge a deep-water channel in the bed of Botany Bay. Due to carelessness in navigation and charting, the dredge fractured an underwater oil pipeline causing the loss of oil that was contained in the pipeline and resulting in a period during which the pipeline could not be used. The pipeline connected an oil refinery to an oil terminal. The refinery and the pipeline were owned by Australian Oil Refining Pty Ltd ("AOR"). The terminal and the oil were owned by the appellant, Caltex Oil (Australia) Pty Ltd ("Caltex").

75 Caltex did not seek to recover for the lost oil that was being transported through the pipeline. AOR had taken the risk of that loss. Nor did Caltex seek to recover for the damage to the pipeline, which it did not own. Instead, in its Admiralty claim in rem (brought, and enforceable, against the dredge), Caltex claimed $95,000 for the loss it had incurred due to the inability to exercise its contractual right to use AOR's pipeline, arising from (i) obtaining alternative transport for petroleum products from AOR's refinery to Caltex's terminal rather than through the exercise of its contractual right to use AOR's pipeline and (ii) taking delivery of low sulphur fuel oil at a different Caltex terminal.[109] In essence, Caltex sought to recover economic loss that it suffered due to the interference by the dredge in Caltex's contractual arrangements with AOR.

76 The reasoning of each of Gibbs J and Mason J focused upon the need to identify an individual plaintiff (as distinct from an unascertained class of persons) who the defendant knew would suffer economic loss as a consequence of the defendant's negligence.[110] The reasoning of Jacobs J focused upon the "physical propinquity" of the dredge to the terminal owned by Caltex.[111] And Murphy J thought that there was a general duty of care not to cause economic loss subject to

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107 Brown, *Pure Economic Loss in Canadian Negligence Law* (2011) at 76 [2.36].

108 (1976) 136 CLR 529.

109 *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529 at 544.

110 *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529 at 555, 592-593.

111 *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529 at 604.

reasons which would deny recovery. His Honour found "no reason for limiting recovery".[112] Each of these approaches has its own particular difficulties.

77 It is the reasons of Stephen J, however, that have come to be treated as the basis for recovery of "pure" economic loss in the law of torts. His Honour's approach involved an attempt to find "sufficient proximity between tortious act and compensable detriment" by reference to five "salient features" of the case: (i) the defendant knew that the pipelines, if damaged, were inherently likely to cause consequential economic loss; (ii) the defendant knew, or had means of knowledge, that the pipelines extended from AOR's refinery to Caltex's terminal; (iii) the loss suffered by Caltex was a consequence of a breach of a duty of care owed by the defendant to AOR not to cause physical damage to its pipeline; (iv) the loss suffered by Caltex arose from the loss of use of the pipeline; and (v) the loss suffered by Caltex, being the expense of employing alternative modes of transport, was a direct consequence of its inability to use the pipeline.[113]

78 In *Candlewood Navigation Corporation Ltd v Mitsui OSK Lines Ltd*,[114] the Privy Council thought that no ratio decidendi could be extracted from the decision in *Caltex*. Their Lordships seem to have assumed that a ratio decidendi must be identified with considerable particularity. At a more general level,[115] however, the ratio decidendi of the decision (or at least the basis upon which it might be said to be binding) might be expressed in terms of the "salient features" approach of Stephen J, albeit that the relevant salient features might be identified differently, or be attributed different weight, by different judges. In this manner, the reasons of Stephen J encompassed the features with which Gibbs J and Mason J were concerned. Indeed, Stephen J's factors (i) and (ii) were said by his Honour to "lead to the conclusion that Caltex was within the reasonable contemplation of the defendants as a person likely to suffer economic loss if the pipelines were cut".[116] Ultimately, the salient features approach of Stephen J, like that of the other

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112 *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529 at 606.

113 *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529 at 575-577.

114 [1986] AC 1 at 21-22.

115 See *Garlett v Western Australia* (2022) 277 CLR 1 at 87 [239]-[240].

116 *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529 at 577.

members of the Court, was rightly described as "moulding a notion of 'proximity' to fit particular aspects of the case".[117]

The progeny

79 In *Perre v Apand Pty Ltd*,[118] an importer of potato seed carelessly supplied diseased seed to potato growers in South Australia which infected their land. Statutory regulations in Western Australia prohibited the importation of potatoes that had been grown within a 20 kilometre radius of land infected with the disease. Claims were brought against the importer for economic losses due to an inability to import potatoes into Western Australia.

80 One claim was brought by a company ("the proximate grower company") that grew potatoes within 20 kilometres of the infected land and, after processing by a potato processing facility, sold many of those potatoes in Western Australia. A second claim was brought by members of the family ("the landowners") who owned the land on which the proximate grower company grew the potatoes. A third claim was brought by a company ("the processor company"), in which the landowners were shareholders, which owned or leased the potato processing facility and associated land. A fourth claim was brought by the landowners, as owners of a business entity ("the distant grower business owners") whose potatoes were sold to the proximate grower company and then processed at the potato processing facility.

81 In seven separate judgments, this Court held that the importer owed a duty of care not to cause economic loss to all of: (i) the proximate grower company, (ii) the landowners (Hayne J dissenting), (iii) the distant grower business owners (Hayne J dissenting), and (iv) the processor company (McHugh J and Hayne J dissenting). There was considerable variety in the approaches taken to the basis of recovery across the various reasons in *Perre*, but central to all the reasons was the decision in *Caltex*. In the 154 pages of the Commonwealth Law Report of that case, the *Caltex* decision is referred to more than 130 times.

82 Gleeson CJ rejected as "intolerable" any general rule that one person owes to another a duty to take reasonable care not to cause reasonably foreseeable financial harm.[119] But Hayne J and Callinan J treated this general rule as the starting point, which was subject to the need for "a control mechanism".[120]

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117 Brown, *Pure Economic Loss in Canadian Negligence Law* (2011) at 75 [2.34].

118 (1999) 198 CLR 180.

119 *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 192 [4].

120 *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 303 [335], 324 [402].

Gummow J (with whom Gleeson CJ agreed on this point[121]) favoured a general "salient features" approach[122] and Callinan J followed a similar approach.[123]

83 As to relevant salient features, McHugh J placed particular reliance upon what his Honour saw to be the vulnerability of the parties who suffered economic loss.[124] But Kirby J thought that this concept of vulnerability was neither essential nor even relevant to every case.[125] Gleeson CJ, Gummow J and Callinan J considered that a relevant factor was the control exercised by the importer over the relevant activity.[126] But Gaudron J relied upon control in a different sense, developing reasoning which bore some similarities to an objective assumption of responsibility[127] by focusing upon whether "a person is in a position to control the exercise or enjoyment by another of a legal right".[128] McHugh J thought that control in the sense described by Gaudron J was not sufficient, but did not deny that it was relevant,[129] treating control as instead part of the test for vulnerability.[130] McHugh J rejected the relevance of insurance.[131] Kirby J appeared to embrace it.[132]

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121 *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 194 [12].

122 *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 254 [201].

123 *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 326 [406].

124 *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 220 [104].

125 *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 285 [286].

126 *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 195 [15], 259-260 [215]-[216], 326 [406], [408].

127 See, especially, *Bennett v Minister of Community Welfare* (1992) 176 CLR 408.

128 *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 201 [38].

129 *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 213 [84].

130 *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 225-226 [119], 229-230 [129].

131 *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 230 [130].

132 *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 271 [250], quoting *Canadian National Railway Co v Norsk Pacific Steamship Co* [1992] 1 SCR 1021 at 1130-1131.

84 One observation in *Perre* cannot be disputed. As Kirby J said, the state of the law was one of "disorder and confusion" requiring "a measure of reconceptualisation".[133]

The errors

85 The force of the learned and strongly argued reasoning of Stephen J in *Caltex*, supported in various respects by the other judgments, may have contributed to the long life that the decision in *Caltex* has enjoyed. One of the most apparently compelling aspects of the reasoning of Stephen J was his Honour's argument, developed from that of Professor Atiyah,[134] that a rule which permits recovery only of economic loss consequent upon damage to person or property can appear to have arbitrary effects.[135] For instance, the rule had the effect that the time charterer, with only contractual rights to use a ship, cannot recover for the same economic loss as the demise charterer with proprietary rights to the ship. But the suggested arbitrariness of this difference vanishes when it is appreciated that it involves a distinction between contractual rights and property rights. The distinction is no more arbitrary than the different legal effects of a licence and a lease.[136]

86 The reasoning of Stephen J, however attractive it appears, involved two errors. Those errors were also present in the other reasons for decision but it is convenient to focus upon the "salient features" approach of Stephen J, which has been treated as the ratio decidendi in *Caltex*. The decision in *Perre*, and later reasoning in this Court,[137] encouraged or required a "regrettable resort"[138] to the "salient features" approach that had been heralded by Stephen J in *Caltex*.

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133 *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 264 [233].

134 Atiyah, "Negligence and Economic Loss" (1967) 83 *Law Quarterly Review* 248, especially at 266-267.

135 *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529 at 568-569.

136 *BA v The King* (2023) 275 CLR 128 at 156 [69]. See also *Radaich v Smith* (1959) 101 CLR 209 at 216-217, 220, 222; *Lewis v Bell* (1985) 1 NSWLR 731 at 734; *Western Australia v Ward* (2002) 213 CLR 1 at 222 [501]; *Georgeski v Owners Corporation SP49833* (2004) 62 NSWLR 534 at 562 [102].

137 *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 624-625 [236], 664 [321]; *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at 530-531 [22]-[23].

138 Stapleton, *Three Essays on Torts* (2021) at 62, fn 104.

87 The first error made by Stephen J was to treat his "salient features" approach as an extension of the recognition of a duty of care that arose in cases based upon an assumption of responsibility, particularly *Hedley Byrne*. Senior counsel for the dredge had argued that the principle of assumption of responsibility, as expressed in *Hedley Byrne*, was an anomalous exception that allowed recovery of economic loss.[139] Stephen J rightly recognised that the principle of an assumed duty of care in *Hedley Byrne* was not an anomaly but his Honour erroneously saw that principle as the basis for recognition of duties of care that are not assumed by a defendant, but are imposed upon a defendant. Although also relying upon a case where recovery of economic loss was permitted for very different reasons,[140] Stephen J focused heavily upon the decision in *Hedley Byrne*, saying that it had:[141]

> "given rise to speculation whether [the prohibition on recovery of 'pure economic loss' in negligence] is now, or indeed ever was, the law. Lord Devlin, at least, considered that the fundamental question settled by their Lordships' decision was that purely economic loss will be recoverable if there is sufficient proximity between the parties to give rise to a special duty relationship."

88 For the reasons already explained, this reasoning of Stephen J does not accurately reflect the decision of Lord Devlin, whose statement of principle in *Hedley Byrne* was concerned with relationships where one party had assumed responsibility by giving an express or implied undertaking to another. The statement of principle in *Hedley Byrne* was not concerned with general relationships of "proximity" (a concept that has now been rejected in Australian law[142]) nor with an even more generalised "control mechanism based upon notions of proximity".[143] The same error was repeated in a number of the judgments in *Perre*, which conflated the principle upon which *Hedley Byrne* was based with a duty of care that is imposed by law. As Professor Feldthusen has observed, "[w]hat

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139 *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529 at 534.

140 *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529 at 570-571, referring to *Morrison Steamship Co Ltd v Greystoke Castle (Cargo Owners)* [1947] AC 265. See *Murphy v Brentwood District Council* [1991] 1 AC 398 at 468.

141 *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529 at 558.

142 *Sullivan v Moody* (2001) 207 CLR 562 at 578-579 [48].

143 *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529 at 574.

the justices in *Perre v Apand* identified as a notorious exception to the exclusionary rule [being the rule in *Hedley Byrne*] is really an independent line of authority that had not ever, and need not have now, anything to do with an exclusionary rule pertaining to relational economic loss".[144]

89 The second error was to treat the whole concept of a duty of care as abstract, not referable to any right of the plaintiff but based upon a class of potentially unlimited "salient features". The same error was made by Kiefel J when her Honour later said in *Barclay v Penberthy*[145] that "[i]n the common law, an abstract concept of duty of care is employed ... In German law, only the enumerated legal interests of life, body, health, freedom, property and 'other right[s]' are protected". But, until recognition of a duty of care based on "salient features", the private duty of care at common law was equally concerned only with a plaintiff's rights, either (i) rights to person or property or (ii) rights arising from an assumption of responsibility where "[a]s in Germany there was a significant extension of liability for negligently false information in the twentieth century".[146] A duty of care at common law did not exist in the abstract. Hence, for many years before *Caltex*, and for many years since, it has been accepted that there is "no negligence in the air".[147] Apart from duties assumed by undertaking, as the joint reasons in this case rightly express the point, the long-standing general rule at common law is that "damages are not recoverable in negligence for pure economic loss, that is, for loss that is not consequential upon injury to person or property".[148]

90 The duties of care that are imposed based on rights to person or property are concerned with the protection of that which has long been regarded as a person's natural rights.[149] Even on a minimalist conception of the State, the

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144 Feldthusen, "Pure Economic Loss in the High Court of Australia: Reinventing the Square Wheel?" (2000) 8 *Tort Law Review* 33 at 39.

145 (2012) 246 CLR 258 at 317-318 [166].

146 Jansen, *The Structure of Tort Law: History, theory, and doctrine of non-contractual claims for compensation*, Steel trans (2021) at 389.

147 *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 266 CLR 428 at 488-489 [151], citing *Martin v Herzog* (1920) 126 NE 814 at 816, *Palsgraf v Long Island Railroad Co* (1928) 162 NE 99 at 101, *Chester v Waverley Corporation* (1939) 62 CLR 1 at 12, *Bourhill v Young* [1943] AC 92 at 101-102, 108, 116-117, and *Seltsam Pty Ltd v McNeill* (2006) 4 DDCR 1 at 4 [4].

148 Joint reasons at [30].

149 Locke, *Second Treatise of Government* (1690), Ch II "Of The State of Nature", §6.

securing of those rights has been said to be the essence of a State's duty.[150] Blackstone said that "the rights of the people of England ... may be reduced to ... the right of personal security,[151] the right of personal liberty; and the right of private property".[152] A century later it was said that these were "all the personal rights that are known to the [common] law".[153] Hence, although German law and the common law have both faced pressure to expand imposed duties of care beyond these rights, as Gummow J observed in *Perre*, quoting Professor Markesinis,[154] "it could be argued that in no other area of its law of torts does German law demonstrate such an ideological affinity with the Common law as in its refusal to compensate pure economic loss through the medium of tort rules".

91 One difficulty with creating an exceptional new imposed duty of care, abstracted from a plaintiff's rights to person or property and based on vague and potentially unlimited "salient features", is that no sufficient justification for such an exceptional form of the duty of care has ever been given. Since the plaintiff has no general abstract right not to be exposed to economic loss, what justification is there to create an almost-general abstract duty based on the existence of vague, salient features? The duty of care in such cases is a duty "in the air", but one that is only inflated in unspecified circumstances.

92 Another difficulty is that the salient features analysis has led to the recognition of duties of care in cases which conflict with the requirements of other primary or secondary duties.[155] For instance, in *Caltex*, the claim by Caltex for pure economic loss based on negligence was one that circumvented the requirements of the tort of intentionally inducing a breach of contract. Caltex's loss was caused by the effect of the dredge's action upon Caltex's contractual arrangements with AOR. The common law recognises a tort of intentionally inducing the breach of another's

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150 Nozick, *Anarchy, State, and Utopia* (1974) at ix. See also at 10-11, 26, 52, 132-133.

151 "The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation": Blackstone, *Commentaries on the Laws of England* (1765), bk 1, ch 1 at 125.

152 Blackstone, *Commentaries on the Laws of England* (1765), bk 1, ch 1 at 125.

153 *Allen v Flood* [1898] AC 1 at 29.

154 *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 250 [188], quoting Markesinis, *A Comparative Introduction to the German Law of Torts*, 3rd ed (1994) at 43.

155 See *Sullivan v Moody* (2001) 207 CLR 562 at 580 [53].

contract,[156] but that is a tort of accessory liability,[157] which depends upon infringement of the plaintiff's contractual rights by another party to the contract. By contrast, the duty recognised by the Court in *Caltex* avoided the need to establish that the action of the dredge had been done with the intention, and with the result, of causing a breach by AOR of its contract with Caltex. In effect, the tort of accessory liability for intentionally inducing a breach of contract was reformulated as a tort of negligent interference with contractual relations based upon salient features.[158]

The uncertainty and indeterminacy

93 The salient features approach is, on one view, little more than an insistence that each case will turn upon its own facts, with undetermined and indeterminate salient features relevant to a relationship to be identified from those facts. This approach is indistinguishable from an assessment of "proximity", which was, for a time, the approach that was at the forefront of cases concerning novel duties of care in Australian law. The nature of the salient features approach as a "proximity" approach by another name is apparent from the express reliance by Stephen J upon "proximity" in *Caltex*[159] and from the best explanation of the salient features approach as one that is "intended to assist an examination of a relationship to determine whether there exist in the relationship the requisite closeness, control and vulnerability".[160]

94 The comments made by this Court about proximity are thus equally apt to apply to an approach based on salient features: the salient features approach "gives little practical guidance in determining whether a duty of care exists in cases that are not analogous to cases in which a duty has been established".[161] Indeed, in *Caltex Refineries (Qld) Pty Ltd v Stavar*,[162] Allsop P identified from the cases a non-exhaustive list of 17 different salient features that might be relevant to determining whether the requisite relationship exists for a duty of care to be imposed. Even economic evidence "concerning the impact upon tort law of a

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156 See *James v The Commonwealth* (1939) 62 CLR 339 at 370; *Zhu v Treasurer of New South Wales* (2004) 218 CLR 530 at 569-570 [114].

157 See *OBG Ltd v Allan* [2008] AC 1 at 19 [5].

158 Compare *OBG Ltd v Allan* [2008] AC 1 at 40 [86].

159 (1976) 136 CLR 529 at 574-577.

160 *Minister for the Environment v Sharma* (2022) 291 FCR 311 at 385 [211].

161 *Sullivan v Moody* (2001) 207 CLR 562 at 578 [48].

162 (2009) 75 NSWLR 649 at 676 [103].

recognition of a duty of care to avoid economic loss in [the] circumstances" has been treated as a salient factor.[163] With a potentially unlimited list of factors, and without any explanation as to the relative weight of each factor, the salient features approach has been described by Professor Nolan as one that has: [164]

> "generated disastrous levels of complexity, inconsistency and uncertainty in Australia, the only jurisdiction in which it has been adopted".

95 In *Metal Roofing and Cladding Pty Ltd v Eire Pty Ltd*,[165] Bailey J referred to the "present disgraceful uncertainty in the law dealing with claims for pure economic loss in negligence" and added that "[w]ith the greatest of respect, there is nothing [in the decision in *Perre*] in terms of agreement on basic guiding principles to assist with resolution of claims such as the present".

Vulnerability

96 In some cases it has been suggested that the most significant of the "salient features" should be the feature of "vulnerability". Following *Perre*, in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*,[166] four members of this Court said that "the vulnerability of the plaintiff has emerged as an important requirement in cases where a duty of care to avoid economic loss has been held to have been owed". Vulnerability was described "as a reference to the plaintiff's inability to protect itself from the consequences of a defendant's want of reasonable care, either entirely or at least in a way which would cast the consequences of loss on the defendant".[167] In *Perre*, McHugh J considered that vulnerability was the salient feature that was "likely to be decisive".[168] Vulnerability is a concept that promised much. But it has delivered little. It is perhaps unsurprising that it is not uncommon for intermediate appellate courts to apply this concept with different results

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163 *Swick Nominees Pty Ltd v LeRoi International Inc [No 2]* (2015) 48 WAR 376 at 448 [385], referring to *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* (2003) Aust Torts Reports ¶81-692.

164 Nolan, *Questions of Liability: Essays on the Law of Tort* (2023) at 7.

165 (1999) 9 NTLR 82 at 96 [24].

166 (2004) 216 CLR 515 at 530 [23].

167 *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at 530 [23], citing Stapleton, "Comparative Economic Loss: Lessons from Case-Law-Focused 'Middle Theory'" (2002) 50 *UCLA Law Review* 531 at 558-559.

168 *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 220 [104].

reached by different judges within each court and with different results reached by different courts in cases with some comparable features.[169]

97 In some cases, the concept of vulnerability has been conflated with an assumption of responsibility based upon an implied undertaking. In these cases, vulnerability is just a fifth wheel on the coach. For instance, in *Barclay v Penberthy*[170] this Court concluded that a pilot (and, by vicarious liability, his employer) was liable to pay damages for economic loss occasioned by the pilot's breach of a duty of care owed to a company whose employees had been injured, and whose intellectual property had been lost, when a plane crashed due (in part) to the pilot's carelessness. After referring to the principles in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*, which included the importance of vulnerability, five members of this Court held that the company was not required to "establish that it could not have bargained with [the pilot's employer] for [contractual protection from economic loss]".[171] In short, their Honours appeared to be saying that in order to succeed based upon principles of vulnerability the company was not required to prove that it was vulnerable.[172]

98 Unsurprisingly, the pilot's duty of care in *Barclay v Penberthy* was later re-explained by Crennan, Bell and Keane JJ as a "duty which arose from the defendant's assumption of responsibility". The pilot's employer had, their Honours said, assumed responsibility by an implied term of the contract with the company and the pilot had assumed responsibility without contract but "the content of the duty was the same in contract and tort".[173] This assumption of responsibility explanation resonates with other decisions.[174] An assumption of responsibility, rather than a vulnerability, explanation was also relied upon by the appellant growers as a way to re-explain the problematic reasoning of a majority of this

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169 See *Fortuna Seafoods Pty Ltd v The Ship "Eternal Wind"* [2008] 1 Qd R 429; *Marsh v Baxter* (2015) 49 WAR 1.

170 (2012) 246 CLR 258 at 323-324, orders 4 and 5 in each appeal.

171 *Barclay v Penberthy* (2012) 246 CLR 258 at 285 [47].

172 Compare *Barclay v Penberthy* (2012) 246 CLR 258 at 294-295 [87].

173 *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 254 CLR 185 at 233 [143]. See also *Barclay v Penberthy* (2012) 246 CLR 258 at 321 [176]-[177].

174 *Swick Nominees Pty Ltd v LeRoi International Inc [No 2]* (2015) 48 WAR 376 at 449-450 [389]-[390], discussing *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 AC 520.

Court in *Bryan v Maloney*.[175] The reasoning of the majority in that case "depended upon"[176] the now-rejected[177] concept of "proximity" to hold that a builder of a dwelling house owed a duty of care to a subsequent purchaser of the property.[178] It is unnecessary on this appeal to address the detail of the facts in *Bryan v Maloney* to assess whether the builder could truly be said to have manifested an unusual undertaking to an unknown subsequent purchaser of the property, with whom the builder had no contract, that care would be taken in the work done. It suffices to say that if there were truly an assumption of responsibility in *Bryan v Maloney*, then any reference to "vulnerability" would be superfluous and confusing at best.[179]

99 Beyond cases where vulnerability is used as a proxy for an assumption of responsibility, vulnerability remains a concept that is highly uncertain and contestable. There is uncertainty in what is meant by a plaintiff's "inability to protect itself", particularly if the issue requires a collateral investigation of the insurance market. In *Perre*, McHugh J held that an ability to insure against a risk was irrelevant to an assessment of the plaintiff's vulnerability to that risk.[180] But the ability of a person to bargain for and obtain a contractual indemnity, which is a matter that has been held to reduce vulnerability,[181] could itself be described as a form of insurance. And, in rejecting a general duty of care to avoid causing economic loss to another, the *Restatement* treats the ability to insure or to obtain contractual indemnity alike:[182]

> "[V]ictims of economic injury often can protect themselves effectively by means other than a tort suit. They may be able to obtain first-party insurance

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175 (1995) 182 CLR 609.

176 *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at 528 [18].

177 *Sullivan v Moody* (2001) 207 CLR 562 at 578-579 [48].

178 *Bryan v Maloney* (1995) 182 CLR 609 at 627-628, 663-664.

179 Compare *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at 531 [24].

180 *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 230 [130].

181 *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 254 CLR 185 at 228-229 [130]-[132].

182 American Law Institute, *Restatement (Third) of Torts: Liability for Economic Harm* §7, comment b.

against their losses, or recover in contract from those who do have good claims against the defendant."

100 The salient feature of vulnerability was also relied upon in the Court of Appeal of the Supreme Court of Queensland in *Fortuna Seafoods Pty Ltd v The Ship "Eternal Wind"*.[183] In that case, the appellant carelessly sank a fishing vessel. Fortuna Seafoods Pty Ltd, a related company to the company that owned the fishing vessel, claimed for its economic losses arising from its inability to process and sell fish caught from the vessel. In the majority, McMurdo P held that the appellant owed a duty of care to Fortuna Seafoods in part because Fortuna Seafoods "could do little to realistically protect itself" from the negligence of the appellant.[184] Yet, as has been observed,[185] there is no apparent reason why Fortuna Seafoods could not have obtained an indemnity for such losses from the company whose vessel was sunk by the appellant. This is particularly so since, as Dutney J (also in the majority, but not placing any reliance upon vulnerability) observed, the two companies were so closely related "that in reality there is only one business".[186]

101 In dissent, Jerrard JA relied upon the concept of separate corporate identity to deny that Fortuna Seafoods was owed a duty of care.[187] Plainly, the company that owned the vessel that was destroyed could recover its consequential losses. But if Fortuna Seafoods could also recover, his Honour held, "then so could each wholesaler or selling agent to whom the owner of an out-of-action fishing vessel might provide its catch, now no longer available for sale".[188] Indeed, the more remote a wholesaler or selling agent might be from the company, the less ability that such a wholesaler or selling agent would have to protect itself by contractual indemnity from the economic effects in a "niche market"[189] flowing from the sinking of the fishing vessel.

102 A central focus upon the salient feature of vulnerability also presents difficulties in explaining the results of *Caltex* and *Perre*. In the former, Caltex had

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183 [2008] 1 Qd R 429.

184 *Fortuna Seafoods Pty Ltd v The Ship "Eternal Wind"* [2008] 1 Qd R 429 at 441 [23].

185 Rolph et al, *Balkin & Davis Law of Torts*, 6th ed (2021) at 562 [13.54].

186 *Fortuna Seafoods Pty Ltd v The Ship "Eternal Wind"* [2008] 1 Qd R 429 at 463 [105].

187 See *Salomon v A Salomon & Co Ltd* [1897] AC 22 at 31: "[e]ither the limited company was a legal entity or it was not".

188 *Fortuna Seafoods Pty Ltd v The Ship "Eternal Wind"* [2008] 1 Qd R 429 at 458 [79].

189 *Fortuna Seafoods Pty Ltd v The Ship "Eternal Wind"* [2008] 1 Qd R 429 at 444 [39].

bargained with AOR for the risk of damage or loss to Caltex's oil to be borne by AOR.[190] It has been observed that there is no apparent reason why Caltex was not able to bargain for AOR to bear the risk of further consequential losses arising from increased transport costs if the pipeline were damaged.[191] Similarly, the successful plaintiffs in *Perre* were able to recover despite being in an apparent position to arrange their commercial affairs to protect against economic loss. As Professor Feldthusen has said:[192]

> "[I]t is not clear how the plaintiffs in *Perre v Apand* were especially vulnerable ... If anything, *Perre v Apand* confirms the observation that relational claimants are generally better able to protect themselves from loss than random victims of physical harm. The relational plaintiffs were closely related to one another and to [the proximate grower company]. The family members arranged their commercial affairs in the manner that suited them best. Given their dependence on [the proximate grower company], they could have arranged their affairs differently to protect themselves."

103 As a matter of principle, vulnerability is also difficult to justify as a central salient feature. Even if the successful plaintiffs in *Perre* could all be said to have been vulnerable, why should they be able to recover at common law whilst the infant dependants of a deceased or severely injured tort victim cannot?[193] Further, as Professor Stevens has powerfully argued:[194]

> "If we consider the duty of care in the law of torts to be a *duty* owed to another imposed by law, is it acceptable to require parties in the real

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190 *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529 at 535.

191 See Rolph et al, *Balkin & Davis Law of Torts*, 6th ed (2021) at 561 [13.52], referring to *Canadian National Railway Co v Norsk Pacific Steamship Co* [1992] 1 SCR 1021 at 1125-1127 and *Rail Corporation New South Wales v Fluor Australia Pty Ltd* (2009) Aust Torts Reports ¶82-038 at 63,725-63,726 [130]-[133].

192 Feldthusen, "Pure Economic Loss in the High Court of Australia: Reinventing the Square Wheel?" (2000) 8 *Tort Law Review* 33 at 50.

193 See *Baker v Bolton* (1808) 1 Camp 493 [170 ER 1033]; *Admiralty Commissioners v SS Amerika* [1917] AC 38; *Paul v Royal Wolverhampton NHS Trust* [2024] 2 WLR 417 at 421-422 [2]; [2024] 2 All ER 681 at 685. See also *Barclay v Penberthy* (2012) 246 CLR 258 at 273 [1], 277 [21(1)].

194 Stevens, "The Divergence of the Australian and English Law of Torts", in Degeling, Edelman and Goudkamp (eds), *Torts in Commercial Law* (2011) 37 at 51 (emphasis in original).

world to deduce their obligations one to another by deduction from such a subtle, indeed Byzantine, concept as that of vulnerability?"

Application to this appeal

104 On the state of Australian law it is necessary to apply a "salient features" analysis to determine whether a duty of care should be imposed upon the respondent producer, who accepted no responsibility for economic loss that might be suffered by the appellant growers. For the reasons above, however, in the absence of any challenge to an analysis based upon salient features, any application of that analysis should be as narrow as possible.

105 The appellant growers relied upon the salient features of the case as involving: (i) reasonable foreseeability of economic loss to end-users such as the appellant growers if the seed was contaminated; (ii) a group such as the appellant growers forming a determinate class of persons; (iii) knowledge of the respondent producer of the risk of economic harm to growers if reasonable care were not taken in seed production; and (iv) the ability of the respondent producer to control that risk by taking reasonable precautions and conversely the vulnerability of the appellant growers, who could not protect themselves from the consequences of a failure by the respondent producer to take reasonable care.

106 As to the reasonable foreseeability of loss to a determinate class of persons, these salient features can be accepted to have been present, but they have never been sufficient for the recognition of a duty of care to avoid causing pure economic loss to another. An approach that narrowly confines the recognition of a duty of care by application of a salient features analysis must insist upon far more than these factors. The issue is whether the force of the third and fourth factors is sufficient.

107 As to the respondent producer's knowledge of the risk of economic harm, it can be accepted that in a case like *Caltex* the type of economic harm known, or which might reasonably have been expected to be known, to AOR was described at a high level of generality involving economic loss consequent upon damage to a pipeline used by Caltex. But the specificity of knowledge that should be required as a salient feature was not the subject of argument in *Caltex*. The less specific the knowledge, the less force the salient feature will have. In this case, as the joint reasons observe, the knowledge of the respondent producer was limited.[195] In broad terms that knowledge was that end-users would have difficulty in controlling or eradicating the consequences of contaminated seed.

108 As to the salient features of control and vulnerability, the undisturbed findings of the primary judge were that the respondent producer had failed: (i) to

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195 Joint reasons at [51].

undertake a comprehensive roguing and crop inspection during the production process to ensure the purity of the seed; and (ii) to conduct a commercial grow out before supplying seed for commercial sale to growers to prevent contaminated seed from being supplied. Further, the respondent producer did not seek to disturb the finding concerning the vulnerability of the appellant growers, that "it may be unrealistic to say that the end purchaser is in a position to protect itself against economic loss caused by the negligence of the producer by an appropriate contractual warranty obtained from the retailer".[196]

109 Nevertheless, speaking of the vulnerability of the appellant growers to this risk of contaminated seed (and, by extension, of the corresponding control over this risk by the respondent producer), the respondent producer submitted that in transactions for the sale of goods "such vulnerability is of limited utility as a salient factor". That submission should be accepted, at least in the circumstances of this case. The appellant growers had methods by which they could reduce the extent of their vulnerability to the risk controlled by the conduct of the respondent producer. As the joint reasons observe,[197] those methods included choosing not to plant the seed or choosing to return the seed after reading the "Conditions of Sale and Use" printed on the bags, which warned about contamination.

110 The weak justification for any existence of a duty of care based on salient features requires a high bar to establish the presence of salient features of sufficient force. In this case, in the absence of any assumption of responsibility by the respondent producer to the appellant growers, the weaknesses of the two central salient features relied upon by the appellant growers are fatal to their submission that the respondent producer owed them a duty of care, to be imposed by law, to take reasonable care to avoid causing them economic loss that was not consequent upon infringement of any of their rights to person or property.

Conclusion

111 I agree with the orders proposed in the joint reasons dismissing the appeal with costs.

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196 *Mallonland Pty Ltd v Advanta Seeds Pty Ltd* (2021) 7 QR 234 at 281 [190].

197 Joint reasons at [53]-[54].