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Bleeding Hearts and Peeling Floors: Compensation for Economic Loss at the House of Lords

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BLEEDING HEARTS AND PEELING FLOORS: COMPENSATION FOR ECONOMIC LOSS AT THE HOUSE OF LORDS

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The decision of the House of Lords in *Junior Books Ltd. v. Veitchi Ltd.*[1] represents an unwarranted development in the law of tort and contract, unless its rationale and limitations are fully appreciated. This reform in such an important area is premature "in the absence of hard data on the probable impact of such an extension"[2] of liability. Much of the published commentary on recovery of economic loss in tort,[3] and on this decision in particular, has been written from the *ex post* perspective of accident compensation doctrine and theory. Most writers have been concerned with the development of positive rules of law designed to provide compensation and redress

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[1] [1982] 3 ALL E.R. 201, [1982] 3 W.L.R. 477. I will refer to the case as *Junior Books,* and all citations will be to the W.L.R. This decision is supported by recent Canadian cases which arrive at a similar result. See *Gold et al. v. DeHavilland Aircraft of Canada Ltd.* (1983) 25 C.C.L.T. 180, at 188 (B.C.S.C.). *Cf. Soursos and Soursos v. Canadian Imperial Bank of Commerce et al.* [1983] 3 W.W.R. 716 (B.C.S.C.); *Hofstrand Farms Ltd. v. The Queen in Right of British Columbia and B.D.C. Ltd.* (1982) 131 D.L.R. (3rd) 464, [1982] 2 W.W.R. 492 (B.C.C.A.).
Junior Books has already been the subject of academic comment. See S. Waddams, *Tort Liability for Economic Loss: Junior Books Ltd. v. Veitchi Co. Ltd.* (1983-84) 8 CAN. BUS. L.J. 101; J. Holyoak, *Tort and Contract After Junior Books* (1983) 99 L.Q. REV. 590.

[2] 1 Ontario Law Reform Commission, REPORT ON THE SALE OF GOODS (1979), at 243.

[3] The more important articles on recovery of economic loss in tort to which the reader is referred include J. A. Smillie, *Negligence and Economic Loss* (1982) 32 U. OF T. L.J. 231; R. E. Speidel, *Products Liability, Economic Loss and the U.C.C.* (1973) 40 TENN. L. REV. 309; P. F. Cane, *Physical Loss, Economic Loss and Products Liability* (1979) 95 L.Q. REV. 117; P. S. Atiyah, *Negligence and Economic Loss* (1967) 83 L.Q. REV. 248; L. L. Stevens, *Negligent Acts Causing Pure Financial Loss: Policy Factors at Work* (1973) 23 U. OF T. L.J. 431. Other leading articles are cited in later footnotes.

to an individual who alleges a loss or injury to his economic interests. This paper takes a different approach, and examines the larger social and economic issues. It is important to articulate private legal rules and policies (developed incrementally in contract and tort claims, or more dramatically in regulatory agendas) insofar as they encourage or prevent individual choice to be exercised in decisions to assume risks to economic interests. *Junior Books* is simply an incremental development in the evolution of legal rules which may restrict choice, and which provide individuals with protection against the occurrence of an expanding universe of risks. Whether that is desirable depends on one's view of distributive justice, individual autonomy and efficient allocation of risk.[4]

The facts in *Junior Books* have been set out by Professor Smith in the past volume of this *Review*,[5] and I will describe them only briefly. The defendants[6] were flooring specialists who in the fall of 1969 and the spring of 1970, laid the flooring in the production area of a factory under construction for the plaintiff owners. The flooring was a magnesium oxychloride composition which was laid on a concrete base.[7] The defendants carried out the work pursuant to a contract with Ogilvie (Builders) Ltd., the main contractors. Ogilvie (Builders) Ltd., who were not parties to the litigation, had contracted with the owners to build the factory. The terms of this construction contract were not considered by the judges and thus the contractual performance obligations of the main contractors, and any relevant exclusion clauses, were not subject to analysis.[8] It is accepted that there was no element of risk of physical injury or of

4 The House of Lords does not agree. It seemed, at least to Lord Roskill, that the decision was to be made as a matter of principle rather than policy: *Junior Books*, *supra*, note 1, at 488. He thus refused to consider the administrative and social costs of permitting such claims. For an analysis of the principle/policy distinction see R. Dworkin, *Hard Cases* (1975) 88 HARV. L. REV. 1057; D. Horowitz, THE COURTS AND SOCIAL POLICY (1977), at 34.

5 J. C. Smith, *Economic Loss and the Common Law Marriage of Contracts and Torts* (1984) 18 U.B.C. L. REV. 95.

6 The case was in the House of Lords on appeal from the Second Division of the Court of Session of Scotland. I have chosen not to use the Scottish legal terminology of defenders, pursuers, delict, interlocut, condescendence, and averments, in the interests of readers who may not be thoroughly familiar with the terminology.

The Scottish law of delict and the English law of negligence are not materially different on the issues discussed in the case. *Junior Books*, *supra*, note 1, *per* Lord Roskill, at 486.

7 *Id.*, at 480.

8 *Id.* This omission, while it was referred to in the judgments of Lord Roskill at 495, and of Lord Fraser at 483, is of critical importance in determining what is meant by "defective" flooring. See *infra* at text accompanying note 93.

property damage, or any economic loss other than that which related to the replacement of the flooring.[9]

Some time in 1972, the plaintiff discovered that the flooring was lifting from its concrete base. The explanation for the separation of the magnesium oxychloride compound from the base was variously attributed to the proportion of the chemicals and water used in producing the solution, and to the nature of the floor laying activities of the defendant.[10] The plaintiff sought to recover £206,000 representing: the cost of replacing the floor (£50,000),[11] book storage costs (£1,000), machinery relocation expenses (£2,-000), lost profits on the temporary closing of the factory (£45,000), contractual liability to employees (£90,000), overhead (£16,000) and investigation costs associated with the flooring replacement (£3,000).[12]

The House of Lords decided[13] that the plaintiff could in theory recover compensation for all these kinds of losses in an action in tort. There was no requirement that the economic losses be linked to actual or potential personal injury, to actual or potential damage to other property of the plaintiff, or even to an accident to the property distributed to the plaintiff. The compensable economic injury was associated only with a "quality" attribute of the product manufactured by the defendant, and with associated economic losses. The decision is directly contrary to all authoritative Canadian decisions on point which, for a variety of reasons, have denied recovery in such cases.[14] Traditional (and exceedingly enigmatic)

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9 It is important to note that the issue is one of *risk* rather than loss. As I point out later, the limitation on recovery is based on the absence of risk rather than losses related to personal injuries or property damage.

10 Since the case was decided on an interlocutory motion, the nature of the defendant's activities and whether they constituted negligence were not at issue.

11 Lord Keith, however, articulated this loss to represent a reduction in profits associated with the defendant's negligence rather than a loss related to a diminution in the value of the floor. See *Junior Books, supra,* note 1, at 485.

12 A strong argument can be made that the plaintiffs, if allowed to recover for all of these losses, would certainly be over-compensated. See *Sunnyside Greenhouses Ltd. v. Golden West Seeds Ltd.* (1972) 27 D.L.R. (3d) 434 (ALTA. S.C. APP. D.), aff'd (1973) 33 D.L.R. (3d) 384 (S.C.C.); N. Biger and A. S. Rosen, *A Framework for the Assessment of Business Damages for Breach of Contract* (1981) 5 CAN. BUS. L.J. 302, at 308-26.

13 *Supra,* note 1, with Lord Brandon of Oakbrook dissenting, at 496.

14 See *Ital-Canadian Investments Ltd. v. North Shore Plumbing and Heating Co. et al.* [1978] 4 W.W.R. 289 (B.C.S.C.); *Rivtow Marine Ltd. v. Washington Iron Works et al.* [1974] S.C.R. 1189, 40 D.L.R. (3d) 530, [1973] 6 W.W.R. 692.

decisions describe the inability of an individual to recover economic losses in tort as a result of the losses being too remote,[15] or not being causally related to the allegedly tortious act.[16] Other equally abstruse decisions state that no duty of care is owed in such circumstances.[17] A more functional analysis articulated by some judges and commentators regards the purpose of tort law as the promotion of safety. This thesis holds that a reduction in the value of an article which is "safe but shoddy" is not recoverable.[18] A related rationale, commonly expressed in American case law, is that economic loss associated with "loss of bargain" is appropriately dealt with by contract law.[19] Clearly, the decision in *Junior Books* requires a reconsideration of all of these limitations on recovery.

For the purposes of this comment, and in light of the facts in *Junior Books* itself, I will consider the issue of recovery of economic loss in tort in the context of a product manufactured by a remote manufacturer, who distributes the good to an intermediate supplier, who then distributes the good to a buyer. The first contract, between the remote manufacturer and intermediate supplier, will be referred to as the wholesale contract. The second contract, between the intermediate supplier and the buyer, I will refer to as the retail contract. I will assume, as was the case in *Junior Books*, that the buyer alleges that the product does not function in accordance with his expectations and that he has suffered the following financial losses:

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[15] See *S.C.M. (United Kingdom) Ltd. v. W. J. Whittal & Son Ltd.* [1971] 1 Q.B. 337, at 344 (C.A.); A. Linden, CANADIAN TORT LAW (3rd ed. 1982), at 441; *Yumerovski et al. v. Dani* (1978) 18 O.R. (2d) 704 (ONT. CO. CT.); *Weiner v. Zoratti* (1970) 11 D.L.R. (3d) 598 (MAN. Q.B.); *Gypsum Carrier Inc. v. The Queen* (1977) 78 D.L.R. (3d) 175 (F.C.T.D.), at 187-94; *Trappa Holdings Ltd. v. District of Surrey* (1979) 95 D.L.R. (3d) 107 (B.C.S.C.).

[16] *MacMillan Bloedel Ltd. v. Foundation Co. of Canada Ltd.* (1977) 75 D.L.R. (3d) 294, [1977] 2 W.W.R. 717 (B.C.S.C.).

[17] *Dutton v. Bognor Regis Urban District Council* [1972] 1 Q.B. 373, at 414 (C.A.); *Bethlehem Steel Corp. v. St. Lawrence Seaway Authority et al.* [1978] 1 F.C. 464, 79 D.L.R. (3d) 522 (F.C.T.D.); *Spartan Steel & Alloys Ltd. v. Martin & Co. (Contractors) Ltd.* [1973] Q.B. 27 (C.A.).

[18] J. G. Fleming, THE LAW OF TORTS (6th ed. 1983), at 476. *Ital-Canadian Investments Ltd. v. North Shore Plumbing and Heating Co. Ltd., supra,* note 14; *Thomas et al. v. Whitehouse* (1979) 95 D.L.R. (3d) 762, at 767 (N.B.S.C., APP. D.); *Young & Marten Ltd. v. McManus Childs Ltd.* [1969] 1 A.C. 454, at 469 (H.L.); *Nielson et al. v. City of Kamloops* (1981) 129 D.L.R. (3d) 111 (B.C.C.A.), leave to appeal to Supreme Court of Canada granted, 41 N.R. 538. S. Schwartz, *Jurisprudential Developments in Manufacturers' Liability for Defective Products when the only Damage is Economic Loss* (1979-80) 4 CAN. BUS. L.J. 164, at 177.

[19] P. F. Cane, *supra,* note 3, at 130.

a) a loss representing the difference between the retail contract price and the value of the product he expected to receive;

b) a loss representing the difference between the retail contract price and the market value of the defective goods;

c) a loss representing the cost of repairing the object. The repair costs are limited either by the contract price or the expected value of the good;

d) a loss representing expenses incurred by the buyer which are wasted as a result of the malfunctioning product;

e) a loss representing expenses incurred by the buyer which would not have been necessary if the good had functioned in accordance with the buyer's expectations;

f) a loss representing a financial gain (other than those in (a)) which was not achieved as a result of the malfunctioning; and

g) a loss representing consequential financial liability to third parties caused by the malfunction.

Junior Books, on its face, suggests that all of these losses are now recoverable in tort.[20]

Junior Books is only one of a number of tools which have been used by the courts, or which have been adopted by regulators, to shift economic risks from one individual (the buyer) to another (the remote supplier) when we think it appropriate to do so.[21] First, there are collateral contracts, based on remote supplier representations, which in the case of "direct" relationships can shift all economic risks described above to the remote supplier.[22] It is, of course, much more difficult to persuade the courts to shift these risks in the context of general advertising programs where the parties are not dealing directly with one another. Second, the courts have

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20 However, Lord Keith specifically denied recovery for losses representing a diminution in the value of the good distributed.

21 Although in some cases the courts suggest that the legislature ought to take this decision. See *Attorney-General for Ontario v. Fatehi et al.* (1981) 34 O.R. (2d) 129, 18 C.C.L.T. 97 (ONT. C.A.).

22 See *Shanklin Pier Ltd. v. Detel Products Ltd.* [1951] 2 K.B. 854; *Wells (Merstham) Ltd. v. Buckland Sand and Silica Ltd.* [1965] 2 Q.B. 170; *Murray v. Sperry Rand Corp. et al.* (1979) 96 D.L.R. (3d) 113, 23 O.R. (2d) 456 (ONT. H.C.). The requirement of a direct relationship was explicitly recognized in *Lambert et al. v. Lewis et al.* [1979] R.T.R. 61, at 93-94; rev'd in part [1980] 2 W.L.R. 299, at 327 (C.A.). The decision was varied on appeal, [1981] 1 ALL E.R. 1185 (H.L.).

Of course, where the issue is compensation for physical injuries, the scope of the collateral contract doctrine might be expected to be much broader and thus may not require the direct relationship. See *Leitz v. Saskatoon Drug and Stationary Co. and T.C. Distributors (1970) Ltd. (No. 2)* (1980) 4 SASK. L.R. 35 (SASK. Q.B.).

used the negligent misrepresentation doctrine as an economic risk-shifting tool.[23] In these decisions, again limited to cases where the remote supplier is in a direct relationship with the buyer, the courts impose liability for economic losses where the risk is "voluntarily accepted or undertaken".[24] Third, where the direct relationship is contractual in nature, the courts will shift these economic risks under the guise of implied terms of merchantability and fitness for purpose.[25] Finally, civilian doctrine has been developed at the Supreme Court of Canada which, drawing from principles developed in French law,[26] establishes a continuing or transferable warranty flowing from manufacturers to ultimate consumers.[27] Under this floating warranty doctrine, a buyer in Quebec can recover pure economic losses from a remote supplier. Indeed, the remote supplier cannot by contract limit the liability associated with the application of this legal warranty. There is little doubt that the decision was as significant to the civil law as *Junior Books* is to the common law.[28]

These common law and civilian developments are themselves simply an aspect of a much broader program of legislative reform directed to the same end. Proposed consumer warranty and sales

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[23] E.g., *Herrington et al. v. Kenco Mortgage & Investments Ltd. et al.* (1981) 125 D.L.R. (3d) 377 (B.C.S.C.) (negligent misrepresentation of value of property secured by mortgage influencing decisions of purchaser of mortgage from mortgage broker); *McBean v. Bank of Nova Scotia et al.* (1981) 15 B.L.R. 296 (ONT. H.C.) (negligent advice of bank as to economic risks of investment decision).

[24] *Hedley Byrne & Co. v. Heller & Partners Ltd.* [1964] A.C. 465; [1963] 2 ALL E.R. 575 (H.L.), *per* Lord Devlin, at 529.

[25] The similarity between recovery of economic loss in tort and the implication of implied terms in a contractual setting was noted by several members of the Court in *Junior Books, supra*, note 1. See Lord Brandon at 499, Lord Roskill at 495.

[26] See D. Tebbens, INTERNATIONAL PRODUCT LIABILITY (1979), at 97; B. S. Markesinis, *The Not So Dissimilar Tort and Delict* (1977) 93 L.Q. REV. 78, at 101.

[27] *General Motors Products of Canada Ltd. v. Kravitz* [1979] 1 S.C.R. 790, 93 D.L.R. (3d) 481. The Supreme Court decision anticipated proposed revisions to the Civil Code which imposed direct warranty obligations on manufacturers, and the enactment of the Quebec Consumer Protection Act, S.Q. 1978 c. 9, s. 53. Both would seem to extend protection for pure economic loss to buyers. See Quebec Civil Code Revision Office, 1 REPORT ON THE QUEBEC CIVIL CODE (1977); Draft Civil Code, Book Five, OBLIGATIONS, s. 102.

[28] An entire issue of the MCGILL LAW JOURNAL was devoted to the case. (1980) 25 MCGILL L.J. 296. S. Schwartz, *The Manufacturers' Liability to a Purchaser of a "Lemon": A Review of the Situation in Canada After General Motors Products of Canada Ltd. v. Kravitz* (1979) 11 OTTAWA L. REV. 583.

legislation in Ontario,[29] proposed sales reform in Alberta,[30] the Uniform Sale of Goods Act recently proposed by the Uniform Law Conference of Canada,[31] and consumer protection legislation currently in force in New Brunswick[32] will permit recovery of pure economic loss against remote suppliers in various contexts. In addition Saskatchewan, Manitoba, Prince Edward Island and Alberta have for several decades permitted buyers of farm implements to recover economic losses from remote suppliers under a floating warranty theory.[33]

This sales and warranty legislative reform, which reflects attitudes similar to those evident in *Junior Books*, is complemented by trade practice legislation[34] which provides for recovery of economic losses from remote suppliers in cases of disappointed consumer expectations associated both with positive acts of misrepresentation and with "conduct" and non-disclosure of information which leads to disappointed expectations.[35] It could be argued that the introduction of products into the marketplace may create reasonable expectations of product quality,[36] and that privity of contract is not a prerequisite to recovery under trade practice legislation.[37]

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29 Ontario Law Reform Commission, REPORT ON CONSUMER WARRANTIES AND GUARANTEES IN THE SALE OF GOODS (1972), at 71. *Cf. supra*, note 2, at 243-55.

30 Institute of Law Research and Reform, Report No. 38, THE UNIFORM SALE OF GOODS ACT (1982), at 115-27.

31 PROCEEDINGS OF THE SIXTY-THIRD ANNUAL MEETING OF THE UNIFORM LAW CONFERENCE OF CANADA (1981), Appendix 5b at 185-321; Section 5.18 of the Uniform Sale of Goods Act.

32 Consumer Product Warranty and Liability Act, S.N.B. 1978, c. C-18.1, ss. 23 and 2.

33 Farm Implement Act, R.S.A. 1980, c. F-4; The Agricultural Implements Act, R.S.S. 1978, c. A-10; Farm Machinery and Equipment Act, S.M. 1971, c. 83; Farm Implements Act, R.S.P.E.I. 1974, c. F-3.

34 See Business Practices Act, R.S.O. 1980, c. 55; Trade Practices Act, S. Nfld. 1978, c. 10; Business Practices Act, S.P.E.I. 1977, c. 31; Unfair Trade Practices Act, S.A. 1975, c. 33; Trade Practice Act, R.S.B.C. 1979, c. 406; Consumer Protection Act, S.Q. 1978, c. 9.

35 *Id.*: British Columbia, ss. 3(1)(a), 3(3)(4); Ontario, s. 2(a)(xiii); Alberta, s. 4(1)(i); Newfoundland, s. 5(1). See G. Q. Taperell, TRADE PRACTICES AND CONSUMER PROTECTION (2nd ed. 1978), at 494; A. K. Turner, ESTOPPEL BY REPRESENTATION (3rd ed. 1977), at 46-47; *Bodger v. Nicholls* (1873) 28 L.T. (N.S.) 441 (Q.B.); *Mullet v. Mason* (1866) 1 L.R.C.P. 559; *C.R.F. Holdings Ltd. et al. v. Fundy Chemical International Ltd. et al.* (1982) 19 C.C.L.T. 263 (B.C.C.A.).

36 B. J. Reiter, *Contracts, Torts, Relations and Reliance*, Study 8 in J. Swan and B. J. Reiter (eds.), STUDIES IN CONTRACT LAW (1980), at 307.

37 *Supra*, note 34. Both Alberta and British Columbia have apparently abolished the privity doctrine in the context of the distribution of goods by commercial

This expansion of liability for economic losses, reflected in the evolution of common law contract and tort doctrine, in civil law, and in sales and trade practice legislative reform, has not met with universal approval. The Hague Convention on the Law Applicable to Products Liability of 1972 specifically excludes recovery for pure economic loss.[38] As well, the English Law Commission in its *Report on Liability for Defective Products* recommended against the application of strict liability to economic losses.[39] In Canada, the Saskatchewan Consumer Products Warranties Act,[40] while it extends implied warranty protection to remote users, limits recovery to cases of personal injury. American developments in tort and contract demonstrate a similar ambivalence towards this issue, although the majority of states have adopted rules denying recovery of some if not all kinds of pure economic loss. The American Restatement[41] requires as a prerequisite to recovery in a strict product liability action that the product be "unreasonably dangerous to the user or consumer or to his property", thus precluding recovery for losses related only to quality or performance inadequacies.[42] American courts, although they are not unanimous, limit strict products liability recovery to damages to person or property.[43] Similarly, most

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enterprises: British Columbia, s. 1, definition of supplier; Alberta, s. 1(h). The Ontario legislation only provides for remedies against persons who make the offending consumer representations. Thus in Ontario, the potential defendants are limited to those suppliers who "make" a representation, statement, offer, request or proposal relating to consumer goods or services (s. 4(3)); the same would seem to be true of Prince Edward Island (s. 4(2)).
While the privity restriction would seem to be implicitly avoided in Ontario, it would still seem to be necessary to demonstrate that a particular supplier engaged in positive information dissemination activities with respect to the product in question. The mere supply of a consumer good to an intermediate supplier would appear to be insufficient. In Newfoundland (s. 2(g)) the term "supplier" is defined to include non-direct suppliers who "offer or advertise" the sale of consumer goods to a consumer. Again it would seem to be necessary to demonstrate that the "supplier" engaged in information dissemination.

38 *Supra*, note 26, at 341-42. The Convention is set out in Ontario Law Reform Commission, REPORT ON PRODUCTS LIABILITY (1979), at 165.

39 Law Commission, REPORT No. 82 (1977), at 35.

40 R.S.S. 1980, c. C-30, s. 5. The rationale for this limitation is discussed in L. J. Romero, *The Consumer Products Warranties Act* (1978-79) 43 SASK. L. REV. 81, at 189-92.

41 American Law Institute, RESTATEMENT (SECOND) OF THE LAW OF TORTS (1965) s. 402A. See Comments g, h, i.

42 W. Kimble and R. O. Lesher, PRODUCTS LIABILITY (1979), at 79-80; *Texsun Feed Yards Inc. v. Ralston Purina Co.* 447 F.2d 660 (5th CIR. 1971).

43 See *Seely v. White Motor Co.* 403 P.2d 145 (CAL. SUP. CT. 1965) at 150-51; *Morrow v. New Moon Homes, Inc.* 548 P.2d 279 (ALASKA SUP. CT. 1976);

American courts have denied recovery in negligence for economic losses.[44] As well, recovery against remote suppliers under implied warranty doctrines of the Uniform Commercial Code has not been extended to pure economic loss. The vast majority of states has adopted a formulation of Article 2-318 of the Code which limits buyer recovery to personal injuries. Only three states extend recovery to pure economic loss.[45]

Junior Books, as a common law decision, must be evaluated in light of this array of common law and legislative reform. Its significance should not be underestimated, as it clearly demonstrates a judicial attitude which favours expansion of tort recovery. The paradigm which I set out earlier[46] implicitly acknowledges that the focus of my attention is on the activities or processes which occur before the loss which the plaintiff is asking the court to shift to the defendant. This *ex ante* approach to *Junior Books* looks at *risks* of economic loss, and assesses judicial decisions which signal actors that they must take into account the possibility that others may be less well off (or worse off) as a result of their activities. This view reflects my concern that the legal rules we choose will influence behaviour, so that we must assess recovery of economic loss from the perspective of decision-making in situations where the relevant actors are aware of the future uncertain probability of accidents and damage valuation. The result of this analysis is not always the same as that obtained through the "traditional *ex post* approach to legal scholarship".[47]

Iowa Electric Light & Power Co. v. Allis Chalmers Mfg. Co. 360 F. Supp. 25 (1973); *Avenell et al. v. Westinghouse Electric Corp.* 324 N.E.2d 583 (Ohio Ct. App. 1974); *Nobility Homes of Texas, Inc. v. Shivers et al.* 557 S.W.2d 77 (Texas Sup. Ct. 1977), at 79. See generally, P. Sherman, Products Liability (1981), at 287-90; J. E. Beasley, Products Liability and the Unreasonably Dangerous Requirement (1981), at 639-44.

The minority view is reflected in such decisions as *Russell v. Ford Motor Co.* 575 P.2d 1383 (Or. Sup. Ct. 1978); *John R. Dudley Construction Inc. v. Drott Mfg. Co.* 66 A.D.2d 368 (N.Y.A.D. 1979); *Santor v. A. & M. Karaghuesian Inc.* 207 A.2d 305 (N.J. Sup. Ct. 1965).

44 W. P. Keeton, D. G. Owen and J. E. Montgomery, Products Liability and Safety (1980), at 932-33; *Chrysler Corp. v. Taylor* 234 S.E.2d 123 (Ga. Ct. of App. 1977); *Clark v. International Harvester Co.* 581 P.2d 784 (Idaho Sup. Ct. 1978). Compare *Berg v. General Motors Corp.* 555 P.2d 818 (Wash. Sup. Ct. 1976).

45 J. Honnold, The Law of Sales and Sales Financing (4th ed. 1976), at 149-51.

46 See text *supra*, following note 19.

47 C. G. Veljanovski, *The Economic Theory of Tort Liability — Toward a Corrective Justice Approach*, Ch. 5 in P. Burrow and C. G. Veljanovski, The Economic Approach to Law (1981), at 128.

It is my view that this *ex ante* approach has several advantages in the evaluation of recovery of economic losses in tort. First, it explains cases in which what the court describes as economic loss has been recovered, but in which the activity at issue created a risk of damage to property,[48] or a risk of physical injury or loss of life.[49] Second, when one conceptualizes the activity as the creation of a risk of physical injury or property damage (rather than analyzing the *ex post* situation of the plaintiff), it makes perfect sense that "economic loss" incurred to eliminate a risk of personal injury or property damage is treated in the same fashion as the injury or damage itself, and thus is recoverable in tort.[50] Third, the *ex ante* allocation of risk analysis avoids the result selective and analytically bankrupt doctrinal distinction between property damage to the product sold or distributed (which represents a non-compensable loss) and property damage to other property (which is compensable).[51] The distinction, while appealing at a superficial level, is subject to a considerable degree of judicial manipulation permitting recovery where the court, for unexpressed reasons, considers it appropriate.[52] Fourth, this risk analysis meets the argument that it is artificial to develop different rules for property damage and economic loss, since it is "often accidental whether a defective product causes one type of loss, or another, or both".[53] Finally, this approach explains the distinction between permitting recovery of the

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48 See *John R. Dudley Construction Inc. v. Drott Mfg. Co., supra,* note 43; *Morrison Steamship Co. v. Greystoke Castle (Cargo Owners)* [1947] A.C. 265 (H.L.).

49 *Lambert v. Lewis, supra,* note 22. In that case the Court of Appeal was of the view that the "economic loss" of a retailer, incurred through his contractual liability to a customer which resulted from the death of members of the plaintiff's family, was not recoverable in a tort action brought by the retailer against a remote manufacturer. The House of Lords, however, indicated that this economic loss might very well be recoverable. [1981] 1 ALL E.R. 1185, at 1192.

50 *Rivtow Marine Ltd. v. Washington Iron Works, supra,* note 14, at 551; *Anns v. Merton London Borough Council* [1978] A.C. 728 (H.L.) *per* Lord Wilberforce, at 760; *Batty and Another v. Metropolitan Property Realizations Ltd.* [1978] Q.B. 554, [1978] 2 W.L.R. 500 (C.A.).

51 See J. G. Fleming, *supra,* note 18, at 166-67; P. F. Cane, *supra,* note 3; *Ital-Canadian Investments Ltd. v. North Shore Plumbing and Heating Co. Ltd., supra,* note 14.

52 *Rivtow Marine Ltd. v. Washington Iron Works, supra,* note 14, *per* Ritchie J., at S.C.R. 1207, D.L.R. 542; *Chabot v. Ford Motor Company of Canada Ltd. et al.* (1982) 138 D.L.R. (3d) 417, at 447 (ONT. H.C.); *Trans World Airlines Inc. v. Curtiss-Wright Corp.* 148 N.Y.S.2d 284 (N.Y. SUP. CT. 1955), at 290.

53 Ontario Law Reform Commission, *supra,* note 2, at 246.

cost of replacing or repairing an article which is "defective" in that it presents a risk of an accident "of violence or collision with external objects",[54] and disallowing recovery of repair or replacement costs associated with quality defects evidenced by internal deterioration or breakdown.[55] The criterion is the type of risk not the type of loss.[56] It is the potential danger which justifies recovery, since it is the potential (marginal) cost which a remote supplier must assess in determining (marginal) investments in accident avoidance and reduction measures.

If one accepts that an understanding of the recovery of economic loss in tort can be gained through an analysis of the allocation of risks between non-contracting parties, a further step must be taken to differentiate among the kinds of economic risks to which the remote supplier might have directed its attention. *Direct* economic risks include first, the risk that the product is not as valuable as the price which the buyer paid; and second, the risk that the product is not as valuable as that which the buyer expected to receive.[58] Obvi-

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[54] *Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co.* 652 F.2d 1165 (3rd CIR. 1981), at 1170; *Fuller v. Ford Motor Company of Canada Ltd.* (1978) 94 D.L.R. (3d) 127, 22 O.R. (2d) 764 (ONT. CO. CT.).

[55] *Pennsylvania Glass Sand Corp v. Caterpillar Tractor Co., supra,* note 54; W. Prosser, LAW OF TORTS (4th ed. 1971), at 665.

[56] *Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co., supra,* note 54, at 1172; *Northern Power & En'g Corp. v. Caterpillar Tractor Corp.* 623 P.2d 324 (ALASKA SUP. CT. 1981), at 329.

I admit that the line may not be easy to draw in some cases. See *Industrial Uniform Rental Company v. International Harvester Co.* 61 PHILA. 141 (C. P. PHILA. 1981), discussed in C. C. Fallon, *Physical Injury and Economic Loss — the Fine Line of Distinction Made Clearer* (1981-82) 27 VILLANOVA L. REV. 483, at 498. A similar phenomenon is apparent in the case of "ineffective" drugs. The drug does not pose a risk to health or safety in the sense that it "causes" injury, and thus may be viewed as creating only an economic risk. At the same time the user may, in choosing an ineffective drug, fail to use an effective product and thus expose himself to a risk to personal safety or health.

[57] See Note, *Economic Loss in Products Liability Jurisprudence* (1966) 66 COLUM. L. REV. 917. My definition is somewhat different than that set out in the note. See also Comment, *Manufacturers' Liability to Remote Purchasers for "Economic Loss" Damages Tort or Contract?* (1966) 114 U. PA. L. REV. 539, at 541.

[58] Recovery of this "loss of bargain" or disappointed expectation has consistently been denied in tort actions: *Doyle v. Olby (Ironmongers) Ltd.* [1969] 2 Q.B. 158, [1969] 2 ALL E.R. 119 (C.A.); *Morin Technical Services (1978) Ltd. v. Morin et al.* (1982) 20 B.L.R. 191, at 213-15 (ALTA. Q.B.). *Beaver Lumber Co. Ltd. v. McLenaghan et al.* (1983) 143 D.L.R. (3d) 139, at 148-49 (SASK. C.A.).

However, in *Esso Petroleum Co. Ltd. v. Mardon* [1976] Q.B. 801, [1976] 2 ALL E.R. 5, [1976] 2 W.L.R. 583 (C.A.), Lord Denning permitted recovery of an "alternate opportunity cost" representing the foregone profits available or an alternative investment which would have been made had the tort

ously there is considerable overlap between these two sub-categories of economic risks. It is not clear which is discussed in *Junior Books*. In many cases these risks can be re-articulated as the risk that the buyer will incur expenses to repair or replace the good so that the buyer possesses a good with a market value equivalent either to the contract price or to the buyer's expected value.[59] These risks are, at least in their formulation, clearly related to the contractual concepts of merchantability and reasonable fitness for purpose, a similarity that was acknowledged by the House of Lords.[60] Until *Junior Books*, the risk of direct economic losses resulting from "qualitative defects",[61] and of disappointed expectations of value associated with activities which present no risk of property damage or physical injury, have been allocated, as between a remote supplier and a buyer, to the buyer both in contract[62] and in tort.[63]

In addition to these risks of direct economic loss, tort law has also had to assign the risk of *consequential* financial losses either to the remote supplier or buyer. This consequential economic risk may be further broken into two subsidiary elements. First, either the remote supplier or the buyer must take into account the risk that the buyer may incur expenses which would not otherwise be required if the

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not been committed. See also *Woolridge v. H. B. Nickerson & Sons, Ltd. et al.* (1980) 40 N.S.R. (2d) 388, at 404-07 and at 444-45 (N.S.S.C. App. D.), aff'g (1980) 39 N.S.R. (2d) 45 (N.S.S.C.); *Ross v. Caunters* [1980] 1 Ch. 297, at 321 (Ch. D.).

59 Note, *supra*, note 57, at 918; S. Waddams, Products Liability (2nd ed. 1980), at 32; P. F. Cane, *supra*, note 3, at 130.

60 See *Junior Books, supra*, note 1, *per* Lord Keith, at 485 and *per* Lord Roskill, at 495.

61 R. M. Wattson and D. E. Bland, *Economic Loss: A Subrogated Insurer's Kiss of Death* (1983) 18 Forum 649, at 650.

62 In contract law the doctrine of privity of contract precludes recovery. See *Fraser-Bruce Maritimes Ltd. v. Central Mortgage and Housing Corporation* (1981) 117 D.L.R. (3d) 312 (N.S.S.C. App. D.); *Greenwood Shopping Plaza Ltd. v. Beattie et al.* [1980] 2 S.C.R. 228, 111 D.L.R. (3d) 257; *Sigurdson et al. v. Hillcrest Service Ltd.* (1977) 73 D.L.R. (3d) 132, [1977] 1 W.W.R. 740 (Sask. Q.B.). See J. A. Smillie, *supra*, note 3, at 277. This restriction is subject to *collateral* contract claims which are permitted in direct relations. See cases cited *supra*, note 22.

63 See cases cited *supra*, note 14. *Thomas et al. v. Whitehouse* (1979) 95 D.L.R. (3d) 762 (N.B.S.C.). But see *Western Processing and Cold Storage Ltd. et al. v. Hamilton Construction Co. Ltd. et al.* (1965) 51 D.L.R. (2d) 245 (Man. C.A.).

Of course, if the remote supplier and buyer are dealing directly with each other in a planned activity, the court may award costs of repairs on *Hedley Byrne* principles. See cases cited *supra*, note 23. See also *Robert Simpson Co. Ltd. et al. v. Foundation Co. of Canada Ltd. et al.* (1982) 36 O.R. (2d) 97, at 113-14 (Ont. C.A.).

product accords with his expectations.[64] Second, either the remote supplier or buyer must take into account that the buyer may not be able to generate revenue or profits to the same degree as he could have had the product performed as expected.[65] Again the generally accepted view is that consequential economic loss is not recoverable in tort against remote suppliers.[66] *Junior Books* clearly and unequivocally establishes that, in principle, both kinds of direct economic risks and both kinds of consequential economic risks[67] will, at least in a limited set of cases, be assigned to the remote manufacturer.[68]

It is my view that, on balance, the decision in *Junior Books* is an undesirable development in the law. As I explain, the decision might be supportable if limited to the allocation of catastrophic consequential economic risks to direct non-contractual suppliers in non-commercial settings where loss-spreading and consumer misperception of quality provide persuasive arguments for recovery. At the same time I believe, for several reasons, that it is inappropriate in most cases to assign the risk of direct and consequential economic losses to remote suppliers.

First, the benefits associated with the internalization of these costs to the manufacturing process must be evaluated in light of the costs of the loss-shifting mechanism, which in this case include the increased social and private costs of judicial administration of such claims. It is difficult to understand the view of the House of Lords that the social costs engendered through the establishment of the

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64 These expenses may themselves be further described as out of pocket expenses, and liability to third parties associated with the malfunctioning or inadequate product: W. Prosser, *supra*, note 55, at 665-67.

65 See Note, *supra*, note 57; S. Waddams, *supra*, note 59, at 35. For the purposes of this discussion, consequential economic loss will refer to any financial liability or expectation which is incurred or frustrated as a result of the supply of a product, except direct economic loss. The range of possible consequential economic losses is infinite. See S. Waddams, *id.*, generally.

66 See cases cited *supra*, note 14, and *S.C.M. (United Kingdom) Ltd. v. W. J. Whittal & Son*, *supra*, note 15, at 344. But see *Maughan et al. v. International Harvester Co. of Canada Ltd.* (1980) 112 D.L.R. (3d) 243, at 249 (N.S.S.C. APP. D.).

However, if the buyer articulates his claim as a negligent failure to warn, consequential economic losses related to the untimeliness of the warning or to the failure to warn in general may be recoverable. See *Rivtow Marine Ltd. v. Washington Iron Works*, *supra*, note 14; *Labrecque v. Saskatchewan Wheat Pool* (1977) 78 D.L.R. (3d) 289 (SASK. Q.B.).

67 It is clear, in addition, that expectation interests represented by future profits were considered compensable entitlements. See *Junior Books*, *supra*, note 1, at 480.

68 *Supra*, note 11.

right to compensation must be ignored by legal decision-makers. The "floodgates" argument is neither specious nor doctrinaire as Lord Roskill so bluntly put it.[69] Given limited judicial resources, the allocation of some part of those resources to the shifting of economic losses from one individual to another must mean that those resources will not be available for other purposes. The trade-off is inevitable, and in assessing the desirability of using the courts to resolve disputes relating to economic risks, we must identify the foregone opportunities which such a decision entails.[70] Shifting losses is a social activity which has its own costs and should not be undertaken unless one can demonstrate a net social gain.[71]

A second rationale for denying recovery of economic losses is related to this concern with litigation costs. Some commentators have expressed the view that legal rules should be developed so as to channel economic losses through one party when an activity presents risks to numerous potential plaintiffs.[72] Where the economic losses are likely to be relatively small (as in the case of direct economic losses), and possibly widespread, and where the loss-shifting litigation costs are high, social welfare may be maximized by denying recovery for economic losses by buyers against remote suppliers. This denial of recovery will result, where contracting costs are relatively low, in the channelling of the economic losses to the intermediate supplier.[73] Buyers, since they are in direct contractual relationships with their intermediate suppliers, can at a low marginal transaction cost either shift the risk to the intermediate suppliers, or assume the risk in exchange for a price reduction.[74] If these arrangements can occur (and in the factual paradigm I have presented this is likely to be the case), the *ex post* loss-shifting mechanism between

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[69] *Junior Books*, *supra*, note 1, at 494, citing Cooke J., in *Bowen v. Paramount Builders (Hamilton) Ltd.* [1977] 1 N.Z.L.R. 394, at 394 and 422. Compare *Robins Dry Dock & Repair Co. v. Flint et al.* 275 U.S. 303 (1927); *Electrochrome Ltd. v. Welsh Plastics Ltd.* [1968] 2 ALL E.R. 205 (ASSIZES).

[70] See D. N. Dewees, J. R. S. Prichard, M. J. Trebilcock, CLASS ACTIONS AS A REGULATORY INSTRUMENT (1980).

[71] S. Shavell, *An Analysis of Causation and the Scope of Liability in the Law of Torts* (1980) 9 J. OF LEG. STUD. 463.

[72] M. J. Rizzo, *A Theory of Economic Loss in the Law of Torts* (1982) 11 J. OF LEG. STUD. 281, at 283-84. Rizzo develops this thesis in the context of channeling losses through one person who has suffered personal injury or property damage, but there seems to be no reason to limit the argument to that case.

[73] *Id.*

[74] Where he has assumed the risk, recovery should also be denied. See *infra*, at text accompanying notes 93 and 100.

buyers and remote supliers can be replaced by these channelling contracts. The courts have on several occasions expressly endorsed this rationale and have held that remote suppliers should not be responsible for losses from which the buyers could have protected themselves under an intermediate contract at a low marginal cost.[75] Channelling costs are obviously low in the products liability context, and expected litigation costs will certainly exceed them. If channelling contracts are desirable (and I demonstrate later that this is likely to be so), then denial of recovery for economic losses is preferred if it produces a tendency for these channelling terms to emerge.

A third rationale for the denial of recovery of economic losses looks at the positive benefits which the alleged tort creates. Put simply, while the alleged negligence may result in a private cost to the plaintiff, it will in many cases also result in a benefit to an unknown third party whose resources will now be allocated to produce the economic benefits which the plaintiff can no longer enjoy. The lost revenue of the plaintiff will be offset to some degree by revenue generated by a competing firm or firms who will enter the market in substitution for the plaintiff. What appears to be a net social loss will in many cases simply represent a transfer payment from one individual to another.[76] If that is true, and it will be at least to some degree, *ex post* loss-shifting may not be desirable, since net social welfare has not been reduced in any way by the apparent injury. In fact, if negligently inflicted economic losses (and thus benefits) are randomly distributed, then in the long term an individual's apparent economic injury associated with one negligent act may be offset by the quite invisible economic benefits which he may enjoy due to still another negligent act.[77] Thus the administrative costs of loss-shifting may not be necessary. Alternatively, if the law permits recovery of economic losses, it should perhaps equally oblige the beneficiaries (whoever they are) to compensate tortfeasers for these positive externalities. The latter solution would clearly impose

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[75] See *Byrd v. English* 43 S.E. 419 (SUP. CT. OF GEORGIA 1903), at 420; *Robins Dry Dock & Repair Co. v. Flint, supra*, note 69. *Deap Sea Tankers Ltd. v. S.S. Tricape* [1958] S.C.R. 585, 16 D.L.R. (2d) 600.

[76] W. Bishop, *Economic Loss in Tort* (1982) 2 OXFORD J. OF LEGAL STUD. 1, at 3 and 14-17. But see *supra*, note 72, at 286-88.

[77] A similar point has been made in the context of governmental decisions affecting economic welfare. See M. J. Trebilcock and J. Quinn, *Compensation, Transition Costs, and Regulatory Change* (1982) 32 U. OF T. L.J. 117, at 160.

substantial administrative costs, if it were possible at all, and in the end it may be better to leave the economic losses (and gains) where they fall.

A fourth rationale for denying recovery of economic losses (i.e., for refusing to sanction *ex ante* shifting of economic risks) is that contrary to the view of the House of Lords,[78] economic losses are *not* the same as personal injury and property damage. Where consequential losses relate to personal injury or to damage to property, one function of tort law is to provide mandatory insurance to product users in respect of these kinds of risks.[79] It is quite possible to argue that our concern with loss-spreading through the establishment of this "safety net"[80] and our apparent social attitudes that health and safety risks (and care) should not be allocated through the market are concerns and attitudes which do not apply to financial losses. Where personal injury and property damage occur, we create almost unlimited private law compensatory rules, identical for all intents and purposes in contract and tort.[81] Economic risks are, however, qualitatively and categorically distinct from risks of personal injury and property damage.

Some writers have suggested that we intuitively view injury to one's person as more significant than injury to one's economic status.[82] And a review of the history of social welfare legislation suggests that social planners, in allocating resources to social insurance, have consistently emphasized insurance for personal injuries

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78 See *Junior Books, supra,* note 1, *per* Lord Roskill, at 490-91.

79 G. Calabresi, THE COSTS OF ACCIDENTS (1970); J. A. Smillie, *supra,* note 3, at 234-35. F. Harper and F. James, THE LAW OF TORTS (1956), at 759-84.

80 That is not to say that we ignore individual economic catastrophes, but simply that we do not perceive them nor treat them in the same way as we do individual personal injury.

81 *H. Parsons (Livestock) Ltd. v. Uttley Ingham & Co.* [1978] 1 Q.B. 791 (C.A.) (contrasting personal injury, property damage and ensuing expense, with lost profits). See H. L. A. Hart and A. M. Honoré, CAUSATION IN LAW (1959), at 281-87. *Asamera Oil Corp. Ltd. v. Sea Oil & General Corporation: Bund Corp. N.V. v. Brook* [1979] 1 S.C.R. 633, 89 D.L.R. (3d) 1. See C. Coval, J. C. Smith and J. Rush, *"Out of the Maze": Towards a "Clear Understanding" of the Test for Remoteness of Damages in Negligence* (1983) 61 CAN. BAR REV. 559, at 575.
The distinction has been recognized in the United States. See *Posttape Associates v. Eastman Kodak Co.* 537 F.2d 751 (3rd CIR. 1976), *Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co., supra,* note 54. *Cf. Caltex Oil (Aust.) Pty. Ltd. v. The Dredge "Willemstad"* (1976) 136 C.L.R. 529 (AUST. H.C.).

82 See R. Hayes, *The Duty of Care and Liability for Purely Economic Loss* (1979) 12 MELBOURNE UNIV. L. REV. 79, at 80-81. See E. Weinrib, *The Case for a Duty to Rescue* (1980) 90 YALE L.J. 247, at 286-87.

and property damage over pure economic losses.[83] For reasons which space does not permit me to canvass here, we have decided that health care benefits should be allocated by non-market (non-contractual) social institutions.[84] It would be inconsistent to allocate health benefits and health risks in different ways. Thus tort law recovery has obvious application to personal injury claims, while the uninsured distribution of economic risks is left to the market.

In addition, personal injury and property damage (and indeed out-of-pocket expenses) represent a movement from a position of wealth to a position of less wealth on the part of the plaintiff. This actual loss, compensable in tort,[85] must be contrasted with the lost opportunity of obtaining economic benefits. Recently, commentators have suggested that the value one places on what one hopes or expects to obtain (i.e., the expressed willingness to pay for a good) is consistently and demonstrably less than the value one places on what one has (i.e., one's asking price for an "owned" good).[86] The injury represented by an unrealized economic opportunity may not be perceived to be as serious as personal injury, property damage, or injury to existing wealth,[87] and thus the demand for legal recognition is attenuated. The entitlement represented by "expectation of economic gain", while recognized in contract,[88] may have been quite rightly recognized (if recognized at all) as a weak interest in tort law reflecting the view that the social costs of loss-shifting may be substantial and that the perceived private costs of the accident are low.

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83 See D. Guest, THE EMERGENCE OF SOCIAL SECURITY IN CANADA (1980), at 98-100. Workers Compensation legislation exemplifies this attitude: see Ch. 4.

84 See B. M. Dickens, *The Control of Living Body Materials* (1977) 27 U. OF T. L.J. 142, at 167-68.

85 See *Dominion Tape of Canada Ltd. v. L. R. McDonald & Sons Ltd. et al.* [1971] 3 O.R. 627 (ONT. Co. CT.). But see the comments of Wilson J.A., in *Attorney-General for Ontario v. Fatehi, supra,* note 21, at C.C.L.T. 115, 117.

86 D. Kennedy, *Cost-Benefit Analysis of Entitlements Problems: A Critique* (1981) 33 STAN. L. REV. 387; S. Kelman, *Consumption Theory, Production Theory and Ideology in the Coase Theorem* (1979) 52 S. CAL. L. REV. 669; D. Kahneman, A. Tversky, *Prospect Theory: An Analysis of Decision Under Risk* (1979) 47 ECONOMETRICA 263; D. H. Gjerdingen, *The Coase Theorem and the Psychology of Common-Law Thought* (1983) 56 S. CAL. L. REV. 711, at 753.

87 J. G. Fleming, *supra,* note 18, at 166, 476.

88 But even here the recognition has been described as counter-intuitive. As well, the rationale for contract recognition of expectation interests may extend beyond the redress of actual injury to the facilitation of economic planning. See L. L. Fuller and W. R. Perdue, *The Reliance Interest in Contract Damages* (1936) 46 YALE L.J. 52, at 57.

The fifth and perhaps most persuasive argument against recovery of economic losses in tort relates to the relative ability of the remote manufacturer and buyer to acquire knowledge of the risk of economic losses and to take appropriate accident prevention measures.[89] Empirical evidence[90] supports the intuitive view that consequential economic risks are knowable, controllable, and insurable[91] at a lower marginal cost by ultimate users than by remote manufacturers.[92] This point deserves to be investigated closely. In providing recovery for economic losses in the products liability context one is obliged (in deciding to compensate "losses") to first determine the injured party's reference point, namely the non-injured state to which the law will return her. In product liability cases this reference point can only be determined, as Lord Roskill recognized,[93] by assessing the buyer's contractual expectation. In many cases it will be the buyer who will be in the better position to know what that means. I will ignore the obvious doctrinal difficulties raised by decisions which suggest that the liability of the remote manufacturer in tort can be defined or affected by the terms of the contract between the buyer and intermediate supplier.[94] If the buyer is in a better position to

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89 See D. Riley, CONSEQUENTIAL LOSS INSURANCE AND CLAIMS (4th ed. 1977).

90 G. L. Priest, *A Theory of the Consumer Product Warranty* (1981) 90 YALE L.J. 1297, at 1307-19.

91 The risks may be insurable at a lower marginal cost simply because the insurer can assess the risk in the case of first party insurance much more accurately than in the case of third party "economic product liability" insurance. The latter may not even be available. See S. Waddams, *supra*, note 59, at 217-19.

Of course, this may not always be true. Professional liability insurance providing third party liability coverage to lawyers, accountants and other information brokers will often provide coverage for economic risks, and it is precisely here that tort law has expanded to provide recovery for pure economic loss. See *Ross v. Caunters*, *supra*, note 58; N. Rafferty, *The Tortious Liability of Professionals to their Contractual Clients*, in F. N. Steele and S. Rogers-Magnet, eds., ISSUES IN TORT LAW (1981), at 251-56.

92 See W. Bishop, *The Contract-Tort Boundary and the Economics of Insurance* (1983) 12 J. OF LEG. STUD. 241, at 254.

93 *Supra*, note 1. Lord Roskill admitted that an exclusion clause in the intermediate supplier-buyer retail contract "might in some circumstances limit the duty of care". See also Lord Fraser of Tullybelton, at 481.

It is interesting to note that the statutory reforms which have been suggested in this context, usually in sales legislation, adopt a similar view: that is, that the "reference point" from which one assesses the plaintiff's injury is defined, at least in part, by reference to all the terms of the immediate sales contract, including any exclusion clause, between the ultimate consumer and his seller. See Ontario Law Reform Commission, *supra*, note 2, at 243-55, and Draft Bill s. 5.18(3) and s. 5.18(4).

94 See *Greenwood Shopping Plaza Ltd. v. Beattie*, *supra*, note 62; *Canadian General Electric Co. Ltd. v. Pickford & Black Ltd.* [1971] S.C.R. 41, 14 D.L.R. (3d) 372. The same point has arisen, for example, in negligent

predict the probability and magnitude of the economic risk, to invest in preventive measures, and to obtain insurance against residual risks, what purpose (other than a simple wealth transfer[95]) is served by tort rules which shift the loss from the buyer to the remote manufacturer?

It may be true that the remote manufacturer may be in a position to produce a good of a "better" quality in some sense of the word. In the normal case, however, the remote manufacturer will not know what "better" means. The variables which may influence a buyer's expectation of value may include product design (in a variety of aspects relating perhaps to component compatibility, regulatory compliance, and sub-contract terms), durability (in a broad range of uses and environments), ability to utilize specific raw materials, storage requirements, operating environment requirements, country of origin, and an infinite range of performance characteristics. It is impossible even to begin to define "value". Thus it is nonsensical to attempt to describe the remote manufacturer as having produced a "defective" good in some abstract sense. When the remote manufacturer can do little to reduce the magnitude or probability of economic risks, the application of *Junior Books* will simply transfer wealth from remote manufacturers to a small subgroup of buyers who can persuade the courts that the manufacturer was negligent. But that is not the end of the story.

What *will* occur if liability for economic risks is shifted to the remote manufacturer is that the manufacturer will respond to the legal disincentives by taking steps to ameliorate forseeable consequences of this legal allocation of risk. First, it may attempt to obtain third party economic loss insurance. The evidence available

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misrepresentation cases where a contractual exclusion clause between A and B may be relied upon by C when sued by A. See *Hedley Byrne & Co. v. Heller & Partners Ltd., supra*, note 24.

One explanation for the relative ease with which the House of Lords dealt this issue may be that *Junior Books* is a Scottish case, and these common law doctrinal difficulties do not exist in Scots law. Gt. Brit. Law Revision Committee, SIXTH INTERIM REPORT, STATUTE OF FRAUDS AND THE DOCTRINE OF CONSIDERATION (1937), at 25-30.

95 Economists would say that the loss, once it has occurred, is a "sunk cost" and rationally should be irrelevant in respect of decisions as to the future. The transfer of wealth from the remote manufacturer to the buyer simply transforms the world from State A in which the buyer is $X poorer, to State B in which the remote manufacturer is $X poorer. See P. Burrows and C. G. Veljanovski, *Introduction: The economic approach to law*, Ch. 1 in P. Burrows and C. G. Veljanovski (eds.), *supra*, note 47, at 5.

The law cannot retrospectively change the fact that the world is $X poorer.

at this time suggests that insurance is not commonly available in respect of such risks.[96] Alternatively, or perhaps in addition, remote manufacturers can take steps to reduce the costs of their activity by self-insuring,[97] or by taking preventive measures to reduce the probability of the accident occurring: in other words, by "improving" the quality of its products.

As I argued above, it is not clear that the marginal cost of accident prevention through improved quality is low. Given the range of variables which relate to quality, the costs of product improvement may be quite high. Moreover, if the remote manufacturer is unable to distinguish between classes of buyers to whom the product will be directed, the improved-quality goods, whatever that means, must be directed at some hypothetical consumer. The problem is that users are apt to value different quality parameters in quite different ways and certainly to different degrees. Some users may prefer to pay a lower price for low quality goods; others may be willing to pay a higher price for high quality goods.

If the remote manufacturer determines that modification of product quality is not feasible, and perhaps even if some product quality alteration takes place, residual risks will be dealt with by insurance. Again however, an inability to discriminate among buyers will result in inefficiencies. Certainly highly risk-averse consumers will be purchasing insurance coverage at a lower price than would otherwise be the case, since they will, to some degree at least, be subsidized by less risk-averse consumers who are purchasing insurance they would prefer to do without or at a higher price than they would willingly pay. This subsidization is undesirable for at least two reasons. First, highly risk-averse consumers will be receiving benefits at below the price which they would otherwise be willing to pay (i.e., under a direct sales contract or insurance scheme). This represents a foregone opportunity to the manufacturer which represents one aspect of welfare loss. In addition, less risk-averse consumers pay a price

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96 See Heppel, PRODUCTS LIABILITY INSURANCE (1967), Ch. 3; S. Waddams, *supra*, note 59, at 214-18; M. Dewis, D. C. Hutchins and P. Madge, PRODUCT LIABILITY (1980), at 156-57; D. Tebbens, *supra*, note 26, at 131. See *Canadian Equipment Sales & Service Co. v. Continental Insurance Co.* (1975) 9 O.R. (2d) 7, 59 D.L.R. (3d) 333 (ONT. C.A.); *Hartford Fire Ins. Co. v. Benson & Hedges (Canada) Ltd.* (1978) 85 D.L.R. (3d) 467 (S.C.C.).

97 An alternative which may be available only to those enterprises which have a large enough class of product buyers to spread the loss through marginal pricing decisions.

which exceeds the value they place on the benefit.[98] This also represents a welfare loss. It is not clear to me that we want a legal rule which results in those losses, and one cannot ignore the distributive consequences of this insurance subsidization program from one group of users to another.[99]

An evaluation of these remote manufacturer responses must also recognize the possibility that buyers will be insuring themselves against product quality risks. Buyers can do this in a number of ways, the most obvious of which is to obtain a contractual obligation from their intermediate supplier pursuant to which the intermediate supplier assumes responsibility for economic losses associated with defective goods. It is clear that at least some judges and commentators are aware of this possibility, and thus in determining the plaintiff's loss in *Junior Books* would have taken as their reference point the contractual expectations of the remote buyer. Once we say that the buyer assumes the risk or risks at issue under the intermediate supplier-buyer contract (the retail contract), we deny him recovery against all parties.[100] Where a buyer can be said to have assumed certain risks under the retail contract, it is because he has received a benefit under the exchange relationship (reflected in a relative price reduction, an additional non-price benefit, or in a reduction in non-price costs which he would otherwise bear) which he values more than the risk he assumes under the contract. Over a number of transactions we can assume that the buyer will consider himself to be better off through receiving these immediate transactional benefits (and assuming the relevant economic risk) than he would be by not receiving the benefits and instead being able to sue the intermediate supplier for the loss once it occurs. It is efficient for the purchaser to assume the risk (as we may assume it is, looking only at the two contracting parties)[101] and we consider that the risk-shifting is desirable, we should, in evaluating *Junior Books*, recog-

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98 See R. Hirshhorn, *Regulating Quality in Product Markets* in D. Dewees (ed.), THE REGULATION OF QUALITY (1983), at 76. See also W. Oi, *The Economics of Product Safety* (1973) 4 BELL J. OF ECON. 3.

99 These distributive consequences may very well be desirable in decisions to allocate risks and accident prevention costs relating to personal safety.

100 One way in which this issue has been analyzed is by stating that the plaintiff should not be able to recover where he has a contract with a third party in which the relevant risk was allocated to him. If recovery is based on reliance, one can argue that in such a case the plaintiff's reliance on the remote manufacturer's representations or conduct is unreasonable. See B. J. Reiter, *supra*, note 36, at 290-94.

101 See R. Coase, *The Problem of Social Cost* (1960) 3 J. LAW & ECON. 1.

nize that establishing a right of recovery in tort against a remote manufacturer will discourage the contractual risk-shifting.[102]

It is this analysis which permits cost-benefit analysts (and indeed the House of Lords itself) to state correctly that contractual risk allocation to the ultimate purchaser should preclude recovery by that purchaser. The function of the law is not to shift that loss to the remote manufacturer, for if recovery is permitted the purchaser in effect recovers twice: he gets paid to assume the risk, and then when the risk occurs he gets paid again! As Mishan argues, the loss "takes its place as one of a number of economic consequences"[103] which the decision-maker faces. The individual's reaction to the loss which occurs, no matter how catastrophic, is irrelevant. "Person A, for example, may . . . rue his decision to take the risk. But this is only a painful reminder of the fact that people come to regret a great many choices they make."[104] Thus recovery of economic losses in tort, if it is recognized at all, must be limited, as was intimated correctly in *Junior Books*, to those risks for which the buyer did not assume responsibility under its direct contract with her intermediate supplier.[105] Looking at the same issue from another perspective, it

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102 It is true that recovery of economic losses will encourage manufacturer internalization of social costs and will provide incentives to manufacturers to increase investment in product quality. As I suggest, however, it is not clear that manufacturers will be able to do this effectively.

As well, even if we think that cost internalization is desirable, allocation of economic risks to manufacturers *reduces* the incentives of both contracting parties (the buyer and intermediate supplier) to take measures to reduce the risk of accidents and the consequences of accidents which do occur. See W. Oi, *The Economics of Product Safety*, *supra*, note 98; R. A. Epstein, MODERN PRODUCTS LIABILITY LAW (1980), at 41-42.

This consequence of risk allocation to remote manufacturers may not be as serious in the case of personal injury risks as it is in the case of economic risks if one assumes that consumers may underestimate risks of product safety and that intermediate suppliers and consumers normally can do little to reduce the potential injuries and property damage associated with product use. This is especially true if the risk is borne by non-contracting product users, a situation more likely to occur in the case of physical injuries and property damage than in the case of economic losses. In the case of economic risks relating to product value, it is quite clear that the exchange transaction permits the buyer and seller to reduce the risk by negotiating its allocation by price adjustments and through modification of product description.

103 E. J. Mishan, ELEMENTS OF COST BENEFIT ANALYSIS (2nd ed. 1976), at 104.

104 *Id.*, at 108. See also A. D. Twerski, A. S. Weinstein, W. A. Donaher and H. R. Piehler, *The Use and Abuse of Warnings in Products Liability — Design Defect Litigation Comes of Age* (1976) 61 CORN. L. REV. 495; J. Guss, *Product Quality — A Multidisciplinary Policy Perspective in The New Consumer Protection Act of Quebec*, MEREDITH MEMORIAL LECTURES (1979), at 159.

105 See S. M. Waddams, *supra*, note 1, at 104-05.

seems plausible to argue that recovery should be denied whenever the plaintiff *could* have made (*ex ante*) at a relatively low cost an appropriate contract to shift economic loss "up stream" so to speak, thus reducing the costs of litigation.[106]

Finally, recovery should be denied when the buyer has assumed the risk of loss, since in cases where the risk has been assumed knowingly, the expected accident costs will have been taken into account in the price of the good. When the price for the good reflects the product's expected cost (including all expected "losses" associated with quality defects and consequential expenses) then the apparent "external" losses will have been internalized *ex ante* through a reduction in price. Recovery of economic losses in this case will result in internalization twice, and thus an overinvestment in quality and accident-reduction measures, and underproduction of the good.[107] What looks like an externality is not.[108] When buyers have appropriate information about product economic risks, the expected accident losses will be internalized *ex ante*, and thus *ex post* loss-shifting is unnecessary.[109]

I have attempted so far to demonstrate that loss-shifting between buyers and remote manufacturers for economic losses will in many cases be unnecessary, may provide buyers with double recovery, will reduce incentives both for contractual risk allocation and for alternate buyer accident reduction measures, may exacerbate subsidization of high-risk buyers by low-risk buyers, and finally may not in the end reduce the costs of accidents to any significant degree. While there may be arguments in favour of recovery in a limited context, these arguments support neither the principle nor the result established in *Junior Books.*

The primary arguments in favour of recovery of economic losses in tort focus on the ability of the remote manufacturer to control this risk *ex ante*. We must recognize that there are at least *two*

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106 M. J. Rizzo, *supra*, note 72, at 284-85.

107 S. Star, *The Efficiency of Liability Rules in Determining Optional Product Quality*, in PAPERS AND COMMENTS DELIVERED AT THE EIGHTH ANNUAL WORKSHOP ON COMMERCIAL AND CONSUMER LAW (1980), at 153.

108 See C. G. Veljanovski, *supra*, note 47, at 139-40; H. Demsetz, *Wealth Ownership and the Ownership of Rights* (1972) 1 J. OF LEG. STUD. 223.

109 There may, therefore, be an argument in favour of permitting recovery in cases where information imperfections may result in imperfect *ex ante* bargains. Where buyers underestimate expected economic losses, tort recovery may serve a valuable function in providing remote manufacturers with incentives to provide information. See C. G. Veljanovski, *supra*, note 47, at 139-40.

techniques which would allow manufacturers to reduce accidents, that is, to control the economic risks which tort law would allocate to her. First, as I discussed earlier, the manufacturer can obtain insurance against these risks, or self-insure if that is not possible. As we have seen, however, this will certainly result in subsidization of highly risk-averse buyers by less risk-averse buyers. In fact it is logical to assume that high-risk buyers will attempt to select to purchase such products, since if the remote manufacturer cannot effectively distinguish among buyers they will be able to purchase protection at a lower marginal cost than they would otherwise be willing to pay. This problem of subsidization and adverse selection[110] may be reduced by providing an incentive, as we do in contract law, for buyers who face "unusual" economic risks to disclose them to their suppliers.[111] In contract law the information is disclosed to sellers; in tort law this analysis would support mandatory disclosure to remote manufacturers in respect of information which is likely to be known to buyers,[112] thus reducing the distributive consequences of buyer subsidization and permitting more accurate pricing.[113] If insurance is the remote manufacturer's response to tort risks for economic losses, we should perhaps limit buyers' recovery to expected losses which are likely to be borne by substantial percentages of the buyer population.

The second possible response of the manufacturer to potential tort losses is to redefine his wholesale contract obligations to his *immediate* buyer, the intermediate supplier in my factual paradigm. If tort liability to the buyer is premised upon a determination that the remote manufacturer has breached his wholesale contract with the intermediate supplier, the manufacturer can at a relatively low marginal cost define and thus control the risks which he is assuming in tort to unknown buyers.[114] This limiting principle is supported by one judgment in *Junior Books*[115] and conforms to the "floating

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[110] W. Bishop, *supra*, note 92, at 246, 254-55.

[111] This is the classic instrumental rationale for *Hadley v. Baxendale* (1854) 9 EXCH. 341. See R. Danzig, *Hadley v. Baxendale: A Study in the Industrialization of the Law* (1975) 4 J. OF LEG. STUD. 249; R. Posner, ECONOMIC ANALYSIS OF LAW (2nd ed. 1977), at 95.

[112] See K. Swinton, *Forseeability: Where Should the Award of Contract Damages Cease, supra*, note 36, at 70-74.

[113] W. Bishop, *supra*, note 92, at 255, 261.

[114] See Institute of Law Research and Reform, *supra*, note 30, at 124-25.

[115] See *supra*, Note 1: Lord Fraser at 482-83 and Waddams at 103-04; *Young & Marten Ltd. v. McManus Childs Ltd., supra*, note 18, *per* Lord Reid, at 469; note, *Another Look at the "pure economic loss rule"* [1983] BUS. L.J. 64, at 65.

warranty" concept which has been adopted in Quebec,[116] and several American jurisdictions,[117] and which is proposed in Ontario[118] in the context of economic loss recovery by buyers against remote manufacturers. This analysis has several advantages. First, as I said earlier, under this formulation of liability, the remote manufacturer can control his risks to a far greater degree than would otherwise be the case. Second, the investment of judicial resources needed to define what we mean by "negligence" in the context of product quality risks is reduced to an absolute minimum.[119]

Yet this accident control technique is far from perfect. First, the remote manufacturer who seeks to rely on the terms of the wholesale contract between himself and the intermediate supplier when sued in tort by a buyer may face considerable doctrinal difficulties.[120] Second, the remote manufacturer even when defining his direct contractual relationship must take into account unknown potential product users and unknown economic product risks. Thus while the "floating warranty" concept does permit a measure of remote manufacturer accident control, it still leaves untouched a considerable area of risk. This difficulty may, however, be reduced significantly if one limits recovery to relatively probable buyer risks

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[116] *Supra*, note 27.

[117] See Article 2-318 of the Uniform Commercial Code.

[118] Section 5.18 of the Draft Sale of Goods Act proposed by the Ontario Law Reform Commission limits a buyer's rights and damage recovery against manufacturers to the kinds of risks and liability limitations which the manufacturer assumed with the intermediate party. See Ontario Law Reform Commission, *supra*, note 29.

[119] Any other definition of negligence would require the courts to decide that efficient accident prevention measures could have been, but were not, undertaken by the remote manufacturer. Information about the marginal costs of accident reduction techniques available to the manufacturer at both pre- and post-production and distribution phases of his enterprise, about the marginal benefit of such activities and about the pre-purchase and post-purchase marginal costs of accident reduction activities of the buyer (and about the marginal benefits of those activities) is notoriously difficult to obtain. See A. I. Ogus, *Social Costs in a Private Law Setting* (1983) 3 INT. REV. OF L. AND ECON. 27, at 35.

The "negligence as breach of contract" formulation permits us to take advantage of the evidence that, as between the remote manufacturer and intermediate supplier, the remote manufacturer is the least cost avoider, and reduces the judicial resources which would otherwise be necessary to establish negligence standards. See Veljanovski, *supra*, note 47, at 131; D. N. Dewees, G. F. Mathewson, M. J. Trebilcock, *Policy Alternatives in Quality Regulation*, Ch. 2 in D. N. Dewees (ed.), *supra*, note 98, at 32; Posner, *supra*, note 111, at 137; H. Demsetz, *When Does the Rule of Liability Matter?* (1972) 1 J. OF LEG. STUD. 13, at 28.

[120] Since the remote manufacturer is not a party to the contract, he will not generally be able to rely on its provisions to limit his legal responsibility in tort. See cases *supra*, note 94.

and to economic risks faced by buyers with whom the manufacturer deals directly. Finally, the "floating warranty" concept ignores the expectations and perhaps reliance of the buyer (whose loss is defined, as we have seen, by the terms of *his* contract).[121] Unless the buyer knows the terms of the wholesale contract (as was likely the case in *Junior Books*), this control technique may not in reality reduce accident costs.

A third argument which favours recovery of economic losses looks to the nature and consequences of the economic injury. When the economic losses are "catastrophic" it may be possible to justify recovery on the ground that society places a value on recovery that is significantly higher than the private costs measured by the dollar amount of the loss. The benefits to the individual and to others from loss-spreading in the case of catastrophic losses may not be fully taken into account by the individual buyer who, even where he accurately assesses and values the risks, will only take into account his personal expected dollar amount of recovery.[122] Put another way, the social benefit associated with recovery in these cases increases as the magnitude of the individual loss increases.[123] As well in these cases, the increase in social welfare concomitant to recovery may be associated with lower litigation costs.[124] Accordingly, in cases of consequential economic loss of a catastrophic nature, and perhaps when these economic losses are suffered by individuals rather than firms,[125] tort law should permit recovery. This policy may explain both the case law[126] and legislative reform of farming equipment transactions which permit recovery against remote suppliers.[127] It may also explain the suggestion of the Ontario Law Reform Commission in its *Report on Products Liability* to per-

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121 *Junior Books*, *supra*, note 1, *per* Lord Roskill, at 495.

122 *Supra*, note 72, at 284.

123 *Id.*, at 304.

124 *Id.*

125 Where economic losses are suffered in a personal context, the view that the injured party will have first party insurance against these losses, and will be in a better position to know of and to take preventive measures, which may justify non-recovery of consequential economic loss in a business context, is unrealistic. Ontario Law Reform Commission, *supra*, note 38, at 82. P. S. Atiyah, ACCIDENTS, COMPENSATION AND THE LAW (3rd ed. 1980), at 89-91.

126 See cases cited *supra*, note 23. *Cf.*, *Glanzer v. Shepard* 135 N.E. 275 (N.Y.C.A. 1922).

127 *Supra*, note 33.

mit recovery of economic losses in non-business contexts.[128] As one court put it, "commercial losses often are reflected in personal sorrow."[129] Unfortunately the decision in *Junior Books* was neither limited to catastrophic losses nor to personal economic injury.

A fourth argument which favours recovery is that in some limited set of cases we might believe that a reduction in consumer choice may be desirable. If a particular class of transaction is characterized by consumer misperception of quality then the regulatory impact of tort recovery may be to remove from the market certain alternatives which consumers should not have chosen and would not have chosen if they had full knowledge.[130] Again, however, *Junior Books* itself is not obviously a case of buyer misperception of quality nor does it appear representative of a class of cases where misperception might be thought likely.

A fifth possible argument in favour of recovery of economic loss is the avoidance of multiple transaction costs associated with individual insurance. If we believe that protection from a particular economic risk is likely to be valued highly by a considerable proportion of the market, then "mandatory insurance" through tort law and concomitant product pricing by remote manufacturers will constitute a single transaction alternative to multiple individual buyer protection transactions either through contract or first party insurance.[131] The Court did not address the matter, but it seems unlikely that any of the risks encountered in *Junior Books* are of this type. Even where such risks occur, one should keep in mind the subsidization and adverse selection ineffeciencies discussed earlier which are the cost of the notional insurance policy established by tort recovery.[132]

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128 Ontario Law Reform Commission, *supra*, note 38, at 84, 135. As well, the New Brunswick Consumer Product Warranty and Liability Act, S.N.B. 1978, c. C-18.1 while it provides for recovery of pure economic loss, excludes recovery of losses suffered in a business capacity.

129 *Monsanto Company v. Alden Leeds Inc.* 326 A.2d 90 (1974), at 97; R. M. Wattson and D. E. Bland, *supra*, note 61, at 661; D. W. Noel and J. J. Phillips, PRODUCTS LIABILITY (2nd ed. 1982), at 293-94.

130 See R. Hirshhorn, *Product Safety Regulation and the Hazardous Products Act*, ECONOMIC COUNCIL OF CANADA, TECHNICAL REPORT NO. 10, REGULATION REFERENCE (1981), at 9.

131 J. Goldring and A. J. Duggan, *Manufacturers' Liability and the Trade Practice Act* in A. J. Duggan and L. W. Darrell (eds.), CONSUMER PROTECTION LAW AND THEORY (1980), at 72.

132 These inefficiencies can be reduced, to a degree, by restricting recovery to immediate parties for high probability economic losses.

This analysis of the arguments favouring recovery of economic losses suggests that *Junior Books*, if restricted (or perhaps narrowed) in its application, may represent a positive step in tort law. My concern with the general application of *Junior Books* is considerably reduced if recovery is limited to cases where the parties are dealing "face to face" or as the House of Lords put it, are in a situation "falling only just short of a direct contractual relationship."[133] The reasons for this critical limitation are incontrovertible. First, recovery will be permitted only where the remote manufacturer is in a position to know of or to acquire information relating to the product quality characteristics valued by the buyer. This will ensure that accident prevention measures directed at the particular buyer will be feasible. Second, because the parties are dealing directly with one another, the marginal transaction costs associated with shifting the risk to the buyer where he is the more efficient cost avoider will be low. Third, the direct relationship will permit manufacturers to control the risks which they face by providing the specific product user with relevant product information: a method of accident reduction which is considered to be the least costly regulatory measure available to remedy market dysfunction.[134]

If *Junior Books* is limited to direct relationships when the marginal costs of bilateral information transfer are low, or perhaps to cases of private consequential economic losses of a kind that large numbers of consumers are apt to value highly, the decision may in fact be justified. In a sense, economic risks will be shifted as a result of reliance in precisely the same fashion as risk shifting under the implied warranty provisions of sales legislation. The limiting principle of directness ensures that the marginal costs of private reallocation of such risks will be minimized. Unless these limiting principles are respected, the socialization of risks with its attendant administrative costs, subsidization and welfare losses will have reached its ultimate stage.[135] A riskless society is simply not possible.

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133 *Supra*, note 1, *per* Lord Fraser, at 482. The same point was made in *Hedley Byrne & Co. v. Heller and Partners*, *supra*, note 24, *per* Lord Devlin who described the tort action as associated with relationships equivalent to contract at A.C. 525-30.

134 As well, information disclosure will reduce the search costs of the buyer. See *supra*, note 119: D. N. Dewees, G. F. Mathewson, M. J. Trebilcock, at 27-31; R. Hirshhorn, *supra*, note 98, at 57-60, 62-63; R. Hirshhorn, *supra*, note 130, at 19-20.

135 It may be that the decision is a reflection of a growing tendency to dispense with evidence of formal exchange transactions and voluntary express risk assumption and to recognize a legal duty not to disappoint the reasonable

The risks will be borne by firms (and thus by entrepreneurs, investors, employees, creditors, and consumers) rather than by individuals and that in itself will not necessarily improve the welfare of society.

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reliance of others. See *supra*, note 36, at 242. For a decidedly negative judicial commentary on this development, see Taylor J. in *Soursos and Soursos v. Canadian Imperial Bank of Commerce*, *supra*, note 1, at 724.