IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Sable Offshore Energy Inc. v. Ameron International Corporation, 2006 NSSC 332

Date: 20061106
Docket: SH 220343
Registry: Halifax

Between:

Sable Offshore Energy Inc., as agent for and on behalf of the Working Interest Owners of the **Sable Offshore Energy Project, ExxonMobil Canada Properties, Shell Canada Limited, Imperial Oil Resources, Mosbacher Operating Ltd.**, and **Pengrowth Corporation; ExxonMobil Canada Properties** as operator of the **Sable Offshore Energy Project**

Plaintiffs

and

Ameron International Corporation; Ameron (UK) Limited; Ameron B.V.; Allcolour Paint Limited; Amercoat Canada; Rubyco Ltd.; Danroh Inc.; Serious Business Inc.; Barrier Limited; Parker Brothers Contracting Limited; Rko Steel Limited; Cherubini Metal Works Limited; Comstock Canada Ltd.; Adam Clark Company Ltd.; A.B. Mechanical Limited; A & G Crane Rentals Limited carrying on business as **A & G Crane Limited; A.M.L. Painting Limited; Argo Protective Coatings Incorporated; Allsteel Coating Limited; Mills Painting & Sandblasting Limited**

Defendants

and

Amec E & C Services Limited, successor to Agra Monenco Inc., in their own right, **Kellogg Brown & Root**, a division of Haliburton Group Canada Inc. and **Amec Black & McDonald** Limited operating as BMS Offshore, successor to BMS Offshore Limited, in their own right and/or collectively operating as BBA, a joint venture

Third Parties

Judge:	The Honourable Justice Suzanne M. Hood
Heard:	July 18, 2006 in Halifax, Nova Scotia
Written Decision:	November 6, 2006
Counsel:	**Robert G. Belliveau, Q.C.** , **Harvey L. Morrison, Q.C.** and **Christopher C. Robinson, Q.C**. for the plaintiffs
	John P. Merrick, Q.C. and **Darlene A. Jamieson** for Ameron International Corporation and Ameron B.V.

By the Court:

[1] Two defendant companies bring an application to strike part of the claim of the plaintiff.

ISSUE

[2] Should part of the claim be struck either because a) it does not disclose a reasonable cause of action or b) alternatively because the pleadings are not adequate?

FACTS

[3] The Sable Offshore Energy Project involved the construction of both offshore and onshore facilities to produce and deliver natural gas and natural gas liquids. The Sable owners are ExxonMobil Canada Properties, formerly Mobil Oil Canada Properties, Shell Canada Limited, Imperial Oil Resources, successor to Imperial Oil Resources Limited, Mosbacher Operating Ltd., and Pengrowth Corporation.

[4] Up until February 1, 2002, Sable Offshore Energy Inc. acted as agent for the Sable owners. ExxonMobil Canada Properties now operates the Sable Offshore energy Project.

[5] The construction of the Project occurred under an Alliance Agreement and seven EPC (Engineering, Procurement and Construction) Works Agreements, one with each of the seven Alliance contractors, who are not defendants in the within action, although one is a third party.

[6] This claim arises from allegations by the plaintiffs of paint failures on the projects' facilities. The plaintiffs have commenced action against the Ameron defendants (Ameron International Corporation and Ameron BV) with whom they did not have a contractual relationship and also against the "applicators", those who prepared surfaces for painting, applied paint or contracted with others to do the foregoing.

[7] The claims against the Ameron defendants are for negligent misrepresentation and negligence. It is the latter which is in issue in this application.

[8] The Ameron defendants bring this application pursuant to *Civil Procedure Rules 13, 14.25(1)(a) and 25*. In my view, the relevant *Rule* is *14.25(1)*. *Rule 13.01* provides:

> **Application for a summary judgment**
>
> **13.01.** After the close of pleadings, any party may apply to the court for judgment on the ground that:
>
> (a) there is no arguable issue to be tried with respect to the claim or any part thereof;
>
> (b) there is no arguable issue to be tried with respect to the defence or any part thereof; or
>
> (c) the only arguable issue to be tried is as to the amount of any damages claimed

[9] It requires a two step process, the first step of which is to establish there is no arguable issue of material fact for trial. I agree with the plaintiffs' submission that *Rule 13* focuses principally on the factual foundation of the claim. In *Dawson v. Rexcraft Storage and Warehouse* Inc. (1998), 164 D.L.R. (4th) 257 (Ont. C.A.),

Borins, J.A. said, at para. 13, in contrasting the purposes of the summary judgment rule and the rule with respect to striking of pleadings:

> [13] ... However, as most motions for summary judgment focus on the factual foundation of the claim, or defence, their legal sufficiency does not arise frequently on a motion for summary judgment.

[10] That case and its analysis of the distinction between the two types of applications has been cited with approval by Moir, J. in *Binder v. R.B.C. et al* (2003), 216 N.S.R. (2d) 363 (S.C.).

[11] I also agree with the plaintiffs that there are many material facts in dispute. This is apparent from the pleadings. In their defences, the Ameron defendants have generally denied the allegations of negligence set out in the plaintiffs' statement of claim, particularly in para. 75 thereof. In paragraphs 42-45 of their defences, they have made specific denials. The onus is on the applicants, the Ameron defendants, to satisfy me that there are no material facts in dispute. They have not done so.

[12] *Civil Procedure Rule 25* provides:

Preliminary determination of questions of law, etc.

25.01.

(1) The court may, on the application of any party or on its own motion, at any time prior to a trial or hearing,

(a) determine any relevant question or issue of law or fact, or both;

(b) determine any question as to the admissibility of any evidence;

(c) order discovery or inspection to be delayed until the determination of any question or issue;

(d) give directions as to the procedure to govern the future course of any proceeding, which directions shall govern the proceeding notwithstanding the provision of any rule to the contrary;

(e) where the pleadings do not sufficiently define the issues of fact, direct the parties to define the issues or itself settle the issues to be tried, and give directions for the trial or hearing thereof;

(f) order different questions or issues to be tried by different modes and at different places or times.

> (2) Where in the opinion of the court, the determination of any question or issue under paragraph (1) substantially disposes of the whole proceeding, or any cause of action, ground of defence, counterclaim or reply, the court may thereupon grant such judgment or make such order, as is just. [E.33/7]

[13] This *Rule* permits the court to determine relevant questions of law, usually where there is an agreed statement of facts. There are exceptional cases where that has been found to be unnecessary. However, recourse to *Rule 25* is not necessary on this application since *Rule 14.25(1)* clearly covers what the Ameron defendants seek to do. That was the case in *Keating v. Southam Inc. et al* (2000), 189 N.S.R. (2nd) 153 (S.C.). In that case, MacDonald, A.C.J. (as he then was) said in para. 38:

> [38] Finally, the Defendants also sought relief under Civil Procedure Rule 25.01 which allows me to determine issues of law on a preliminary basis. This is exactly what I have done under Civil Procedure Rule 14.25 on the basis of Pugley *(sic)*, J.A.'s, direction in **Future Inns**, supra. The outcome of this Application would therefore be the same in any event. Therefore, there is no need for me to consider Civil Procedure Rule 25.01.

In its rebuttal brief, the Ameron defendants agree that *Rule 14.25(1)* is the primary rule under which the application is brought.

[14] *Rule 14.25(1)(a)* provides:

> **Striking out pleadings, etc.**
>
> **14.25.**
>
> (1) The court may at any stage of a proceeding order any pleading, affidavit or statement of facts, or anything therein, to be struck out or amended on the ground that,
>
> (a) it discloses no reasonable cause of action or defence;

[15] The test is not in dispute between the parties. The leading case in Nova Scotia on *Rule 14.25* is *Vladi Private Islands Ltd. v. Haase et al* (1990), 96 N.S.R. (2d) 323 (C.A.). Macdonald, J.A. said in para. 8:

> [8] The proper test to be applied when considering an application to strike out a statement of claim has been considered by this Court on numerous occasions. It is clear from the authorities that a judge must proceed on the assumption that the facts contained in the statement of claim are true and, assuming those facts to be true, consider whether a claim is made out. An order to strike out a statement of claim will not be granted unless on the facts as pleaded the action is 'obviously unsustainable'.

[16] Macdonald, J.A. also said in para. 9:

> [9] In considering an application to strike out a pleading it is not the court's function to try the issues but rather to decide if there are issues to be tried. The power to strike out pleadings is to be used sparingly and where the statement of claim raises substantial issues it should not be struck out. ...

[17] Earlier in *Curry v. Dargie* (1984), 62 N.S.R. (2d) 416 (C.A.), Macdonald, J.A. had stated the test in para. 40 as follows:

> [40] The law is quite clear that the summary procedure under Rule 14.25 can only be adopted where the claim is, on the face of it, absolutely unsustainable. Thus, if it is clear beyond any doubt that an action cannot possibly succeed there is no reason for refusing to strike out the statement of claim. The mere fact, however, that the plaintiff appears unlikely to succeed at trial is no ground for striking out the statement of claim.

[18] In *Hunt v. Carey Canada Inc*., [1990] 2 S.C.R. 959, Wilson, J. said at p. 979:

> While this Court has had a somewhat limited opportunity to consider how the rules regarding the striking out of a statement of claim are to be applied, it has nonetheless consistently upheld the 'plain and obvious' test. ...

[19] This was restated in *Pleau v. Canada (Attorney General)* (1999), 181 N.S.R. (2d) 356 (C.A.), where Cromwell, J.A. said in para. 3:

> [3] ... The applicable test under rule 14.25, although at various times described in different words, is whether it is plain and obvious that the claim cannot succeed.

[20] The purpose of the test was stated by Tidman, J. in *353905 Ontario Ltd. (c.o.b. Steeplejack Services) v. Nova Scotia*, [1998] N.S.J. No. 265 (S.C.). He said in para. 10:

> The test is perhaps best defined by McQuaid, J. in Touche Ross Ltd. et al v. McCardle et al, 66 Nfld & P.E.I.R. 257 at p. 258:
>
> > The essence of a properly drawn pleading is clarity and disclosure. With respect to a statement of claim in particular, the Defendant, or each Defendant if there be more than one, must know from the face of the record precisely what case he, or each of them, has to answer. He must not be left to speculate or to guess the particulars of the case alleged against him and of the remedy sought from him. He must not be left to ascertain this through some esoteric process of divination.
> >
> > Perhaps the best test of a well and properly drawn pleading is this, that a stranger to the proceeding, reasonably versed in legal terminology, might pick up the document and upon first reading readily ascertain the particulars of the cause of action, the specific nature of the Defendant's alleged breach of duty or deficiency, the precise nature of the remedy sought and the reason why such a remedy is, in fact, sought. Unless all of this information is patently and readily available on the face of the record, then, it seems to me, the pleading is, itself, defective.

[21] It was recognized in *American Home Assurance Co. v. Brett Pontiac Buick GMC Ltd.* (No. 2) (1992), 116 N.S.R. (2d) 319 (C.A.) that striking a claim is a serious matter. Freeman, J.A. said in para. 10 of that decision:

> [10] The appellant faces an onerous double burden in appealing from the dismissal of an application to strike out the statement of claim, a serious matter that would result in the action being decided against the respondent plaintiffs without trial. ...

He continued in para. 12:

> [12] The appellant can succeed only if the respondent's action is certain to fail.
> ...

[22] There is a heavy onus on the party seeking to strike all or part of the statement of claim. As MacDonald, A.C.J. (as he then was) said in *Keating, supra*, at para. 8:

> [8] This provision places a heavy onus on the Defendants. Strong language has been used by our Courts to limit its application.

[23] In *Lamey v. Wentworth Valley Developments Ltd.* (1999), 175 N.S.R. (2d) 356, Glube, C.J.N.S. said in paras. 16 and 17:

> [16] It seems clear that Justice Wright embarked upon an exercise that is not contemplated by Civil Procedure Rule 15.01. He engaged in a extensive examination of the merits of the proposed amendment by examining the differing case law. The Chambers judge was presented with arguable and interesting interpretations of case law and statutes which should have been left to a trial judge to reach a decision based on the full merits and arguments of the case. There were clearly arguments for and against the proposed claim. This should have resulted in a bare finding, which is all that is necessary, that the proposed amendment raised a justiciable issue. Justice Wright said in his decision:
>
> > Once again, there are conflicting views on whether or not loss of expectation of earning capacity should be treated as part of loss of expectation of life ...
>
> [17] This indicates here was a triable issue in the proposed amendment to the statement of claim. At that point, without determining the issue, the amendment should have been allowed. The provisions of rule 15 have not been interpreted in this jurisdiction as authorizing a chambers judge to embark upon an assessment of the merits of the issue.

[24] Although the *Rule* at issue there was *Rule 15.01*, Glube, C.J.N.S. said in para. 20:

> [20] Counsel agreed the test for whether a proposed amendment raises a justiciable issue is essentially the same as whether it discloses a reasonable cause of action under rule 14.25(1)(a).

[25] In *Keating, supra*, MacDonald, A.C.J. referred to *Future Inns Canada Inc. v. Labour Relations Board (N.S.) et al* (1999), 179 N.S.R. (2d) 213; 553 A.P.R. 213 (C.A.). In *Future Inns*, Pugsley, J.A. said in para. 54:

> [54] In conclusion on this issue, with respect, I am of the opinion that questions of law may be determined under rule 14.25 when the law is clear, and no additional evidence is required to resolve he issues raised.

[26] Bateman, J.A. said in para. 13 of *CGU Insurance Co. of Canada v. Noble* (2003), 218 N.S.R. (2d) 49 (C.A.):

> [13] A question of law may be determined on an application pursuant to Civil Procedure Rule 14.25, which was recognized by Justice Wright, but such should occur only where the law is so clear that it is plain and obvious. ...

[27] Subsequent to these Court of Appeal decisions, Wright, J. said in *Joudrey v. Swissair Transport Co.* (2001), 197 N.S.R. (2d) 312 (S.C.) in para. 5:

> [5] The test therefore is not whether I, as the Chambers judge, discern that the claim has little likelihood of success. The test to be applied is whether or not the claim is, on the face of the pleadings alone, absolutely or obviously unsustainable with no justiciable issue having been raised.

[28] On an application to strike, the chambers judge is to proceed on the assumption that the facts contained in the statement of claim are true. Based upon them, the chambers judge is then to determine if the action is "obviously unsustainable" or if it is "plain and obvious" it cannot succeed. The power to strike is to be used sparingly because it is a serious matter to dispose of a claim without trial.

[29] In making this decision, the chambers judge is not to try the issue but only determine if there is an issue to be tried. Even if the plaintiff appears unlikely to succeed at trial, that is not reason to strike the claim.

[30] Notwithstanding this, the chambers judge can determine questions of law as long as the law is clear and no further extrinsic evidence is required. Where there are arguments for and against the proposed claim, that is an indication that the law is not settled. If the law is not settled, it should be left to a trial judge to reach a decision on the full merits and argument of the case.

[31] The cause of action at issue in this application is one of negligence by the Ameron defendants. They were not in privity of contract with the plaintiffs. With respect to negligence, the statement of claim claims against the Ameron defendants the following:

> 62. Based on the foregoing, the Defendant Ameron B.V. and the Defendant Amercoat Canada, as well as the other Defendant Ameron Suppliers, owed a duty of care to the Sable Owners, to:
>
> a. ensure the Amercoat 132 / PSX 700 System was suitable for the intende use on the Sable Project:
>
> b. ensure the Amercoat 132 had sufficient zinc content to allow for preferential corrosion; and
>
> c. ensure proper and consistent manufacturing with appropriate quality assurance and quality control of the Amercoat 132 and the PSX 700 topcoat.
>
> 73. The Amercoat 132 / PSX 700 System was not suitable for use on the Sable Project, and the Ameron Suppliers and Barrier, or either of them, breached their duty of care and were negligent in making the Advice and Representation that it was, particulars of which include: ...
>
> c. failing to make a proper assessment of the suitability of the Amercoat 132 / PSX 700 System for the Sable Project;

d. failing to take any or any reasonable steps to ascertain the paint requirements for the Sable Project.

e. failing to foresee that the Amercoat 132 / PSX 700 System would be unlikely to meet the conditions at the Sable Project;

f. failing to ascertain that the Amercoat 132 / PSX 700 System was not properly tested according to NORSOK requirements; and ...

75. The Ameron Paint Failures on the Sable Project were caused by the negligence of the Ameron Suppliers, particulars of which are:

a. providing the Amercoat 132 / PSX 700 System as a product suitable for use on the Sable Project;

b. failing to properly instruct and advise the Alliance and the Applicators on the proper storage, mixing, and thinning of the Amercoat 132 / PSX 700 System;

c. failing to warn the Alliance that the Amercoat 132 / PSX 700 was unsuitable for conditions on the Sable Project;

d. failing to warn the Alliance and the Applicators that the Amercoat 132 PSX 700 System would not provide the same cathodic protection as the Amercoat 68HS PSX 700 Systems or the traditional 3 or 4-Coat Systems that had been originally specified for use on the Sable Project;

e. failing to warn the Alliance and the Applicators that the Amercoat 132 / PSX 700 System had to be applied with greater care and attention to achieve specified dried film thickness than the traditional 3 or 4-Coat Systems originally specified, and as a result was more vulnerable to application errors than the traditional 3 or 4-Coat Systems;

f. failing to provide proper instruction to the Alliance and the Applicators on application techniques of the Amercoat 132 / PSX 700 System;

g. providing a product for use on the Sable Project that had poor edge retention;

h. providing a product for use on the Sable Project that was brittle;

i. providing a product for use on the Sable Project that had low-impact resistance;

j. providing a product for use on the Sable Project that had poor abrasion resistance;

k. failing to ensure Amercoat 132 had sufficient zinc content to function as a zinc rich primer and provide cathodic protection;

l. manufacturing the Amercoat 132 / PSX 700 System in a manner which made it unsuitable for use to the Sable Project;

m. manufacturing the Amercoat 132 with large foreign bodies present that prevented the Amercoat 132 from preferentially corroding;

n. failing to take any or adequate measures to ensure correct manufacture of the Amercoat 132, PSX 700, and their ingredients;

o. failing to design Amercoat 132 with sufficient zinc content to provide cathodic protection; and

p. such other breaches of contract or negligence s may appear.

78. As a result of the negligent misrepresentations, negligence, and breach of contract of the Defendants, as stated in the foregoing paragraphs, the Plaintiffs have suffered damages and will continue to suffer damages, and claim against the Defendants, and each of them, as follows: ...

ISSUE

Reasonable Cause of Action

[32] The Ameron defendants say there is no duty of care owed to a subsequent purchaser for pure economic loss suffered from non-dangerous defects in a product. They say this can be restated as a question of whether there is "tort liability for failure to supply a product of a certain quality." They say that is the essence of this claim. Alternatively, they say if the pleadings purport to bring the claim within *Winnipeg Condominium*, on the basis that they refer to dangerous defects, the pleadings are insufficient.

[33] The plaintiffs, however, say there are four reasons why this application should be dismissed and only one needs to succeed to effect that result. Firstly, they say that, if the loss is purely economic, there is no authority binding on this court which says there is no reasonable cause of action unless there is a dangerous defect. Secondly, they say, if it is a claim for economic loss, it fits within the test set out in *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*,

[1995] 1 S.C.R. 85 in that there is a dangerous condition. Thirdly, they say this is not a claim for pure economic loss in any event but a claim for property damage. Finally, they say a claim like this is within the statement of law set out in *Junior Books Ltd. v. Veitchi Co. Ltd*., [1982] 3 All E.R. 201 (H.L.) which they say has not been explicitly overruled in Canada. It stands for the proposition that there can be a claim for pure economic loss where there has been no physical damage or injury.

[34] I cannot conclude that the pleadings should be struck with respect to this part of the plaintiffs' claim. I conclude that it is not obviously unsustainable or plain and obvious that it cannot succeed. My reasons follow.

a) Pure Economic Loss for Non-Dangerous Product or Defect

[35] In Canada, the United Kingdom and elsewhere there has been judicial debate and evolution of the law over many years with respect to whether there is tort liability for pure economic loss suffered by a subsequent purchaser of a defective product. The law in Canada and that in the United Kingdom diverge on the

subject. In an oft-quoted passage from *Canadian National Railway Company v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, La Forest, J. said at p. 1049:

> ... Professor Feldthusen distinguishes five different categories of economic loss cases which involve different policy considerations: see Feldthusen, 'Economic Loss in the Supreme Court of Canada: Yesterday and Tomorrow' (1990-91), 17 *Can. Bus. L.J.* 356, at pp. 357-58. They are as follows:
>
> 1. The Independent Liability of Statutory Public Authorities;
>
> 2. Negligent Misrepresentation;
>
> 3. Negligent Performance of a Service;
>
> 4. Negligent Supply of Shoddy Goods or Structures;
>
> 5. Relational Economic Loss.

He had prefaced that by saying at p. 1048:

> To phrase the key issue in this case as a simple one of 'is pure economic loss recoverable in tort?' is misleading. I do not doubt that pure economic loss is recoverable in some cases. ...

La Forest, J. confirmed at p. 1054 that there was no absolute bar to, or exclusionary rule against, recovery for economic loss. He said:

> ... It is sufficient to say that I fully support this Court's rejection of the broad bar on recovery of pure economic loss in *Rivtow* and *Kamloops*.

[36] Although La Forest, J. wrote in dissent, McLachlin, J. (as she then was) concurred with La Forest, J. on the following points, stating at p. 1163:

> ... With respect to the reasons of La Forest J., we are in agreement that the broad and flexible approach set out in *Anns* governs the right to recover for economic loss in tort. We also agree that the law of tort does not permit recovery for all economic loss.

[37] The Supreme Court of Canada dealt with this issue in *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*, *supra*. In that case, subsequent owners of a condominium building sued the general contractor, the cladding subcontractor and the architects for negligence when the cladding of the building had to be replaced. The defect in the cladding made it likely to pull away from the building and in fact a large slab had fallen from the ninth floor to the ground. No damage was caused nor was anyone injured. An application was

brought to strike the claim. The application was dismissed at the trial level but allowed on appeal to the Manitoba Court of Appeal. The plaintiff Condominium Corporation appealed to the Supreme Court of Canada.

[38] Justice La Forest wrote for a unanimous court and concluded there was tort liability for dangerous defects even when damage had not occurred. He did not go further. He said in para. 41:

> 41 Given the clear presence of a real and substantial danger in this case, I do not find it necessary to consider whether contractors should also in principle be held to owe a duty to subsequent purchasers for the cost of repairing non-dangerous defects in buildings. It was not raised by the parties. ...

[39] In distinguishing between dangerous and merely defective products he said in para. 42:

> 42 Without entering into this question, I note that the present case is distinguishable on a policy level from cases where the workmanship is merely shoddy or substandard but not dangerously defective. In the latter class of cases, tort law serves to encourage the repair of dangerous defects and thereby to protect the bodily integrity of inhabitants of buildings. By contrast, the former class of cases bring into play the questions of quality of workmanship and fitness for purpose. These questions do not arise here.

[40] La Forest, J. went on in para. 49 to consider the issue of liability in an indeterminate amount. He said in that para.:

> 49 Secondly, there is no risk of liability in an indeterminate amount because the amount of liability will always be limited by the reasonable cost of repairing the dangerous defect in the building and restoring that building to a non-dangerous state.

[41] In the course of the decision, La Forest used phrases such as “clear presence of a real and substantial danger” (para. 41); “dangerously defective” (para. 42); “protect the bodily integrity of inhabitants of buildings” (para. 42); “real and substantial danger to the inhabitants of the building” (para. 49); and “serious risk to safety” (para. 49).

[42] La Forest, J. contrasted the situation with one where a product was sub-standard when he discussed the damages which would be recoverable. He said in para. 42:

> 42 ... Accordingly, it is sufficient for present purposes to say that, if Bird is found negligent at trial, the Condominium Corporation would be entitled on tis reasoning to recover the reasonable cost of putting the building into a non-

> dangerous state, but not the cost of any repairs that would serve merely to improve the quality, and not the safety, of the building.

[43] In my view, the law in Canada is clear after *Winnipeg Condominium*, *supra*, with respect to liability for dangerous defects. In the United Kingdom, the law with respect to dangerous defects is also clear but different from that in Canada. *Murphy v. Brentwood District Council* [1991] 1 A.C. 398 (H.L.) specifically over-ruled *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.) and *Dutton v. Bognor Regis Urban District Council*, [1972] 1 Q.B. 3733. In *Murphy*, the court concluded that a claim like that in *Winnipeg Condominium* should not succeed where the dangerous defect was remedied, before damage occurred.

[44] In *Norsk*, McLachlin, J. said Murphy was not the law in Canada. She said at paras. 250 and 263:

> [250] It is my view that the incremental approach of *Kamloops* is to be preferred to the insistence on logical precision of *Murphy*. It is more consistent with the incremental character of the common law. It permits relief to be granted in new situations where it is merited. Finally, it is sensitive to danger of unlimited liability.

> [263] I conclude that, from a doctrinal point of view, this Court should continue on the course charted in *Kamloops* rather than reverting to the narrow exclusionary rule as the House of Lords did in *Murphy*.

[45] The Ameron defendants say there are no cases in Canada after *Winnipeg Condominium* where liability has been found for non-dangerous defects and, therefore, there is no reasonable cause of action in this case. Applying the test for striking claims results, they say, in it being clear that the claim is "obviously unsustainable" or that it is "plain and obvious" that it cannot succeed. La Forest, J. in *Winnipeg Condominium* was dealing with a situation where there clearly was danger. The Supreme Court of Canada did not have to decide in that case if there might be other situations where liability might be found. The court did not say there could never be liability except in circumstances like those found in *Winnipeg Condominium*.

[46] To the contrary, La Forest, J. in para. 41 referred to the law in other jurisdictions where courts have "recognized some form of general duty of builders and contractors to subsequent purchasers with regard to the reasonable fitness and habitability of a building." He also referred to the *Civil Code of Quebec*, SQ.

1991, c. 64 which provides for a duty owed for economic loss. He concluded by saying:

> For my part, I would require argument more squarely focussed on the issue before entertaining this possibility. (my emphasis)

[47] The Ameron defendants cited several cases where economic loss was suffered from a defective product. These cases fall into two categories: 1) where liability was found for a dangerous product; and 2) where no liability was found because the product was not dangerous. The plaintiffs referred me to cases to the contrary.

[48] In Nova Scotia, the issue arose in *United Dominion Industries v. North Sydney Associates*, [2006] N.S.J. No. 191; 2006 N.S.C.A. 58. In that case, the issue on appeal was whether the trial judge had erred in concluding that all the weld repairs were necessary to correct a real and substantial danger. The Court of Appeal concluded this was a question of fact and the trial judge had made no palpable and over-riding error in his findings of fact. The trial judge had not

awarded damages for repair of non-dangerous defects; accordingly, that issue was not before him nor before the court on appeal.

[49] In *Mariani v. Lemstra*, [2004] O.J. No. 4283 (C.A.), the Ontario Court of Appeal referred to *Winnipeg Condominium, supra,* in para. 26 where Sharpe, J.A. said:

> 26 However, a claim for defective construction is a claim for purely economic loss, and recovery under the Winnipeg Condominium is subject to an important caveat. The structure must be dangerous, not merely shoddy, and it is only the cost of repairing the structure and restoring it to a non-dangerous state that is recoverable: see Winnipeg Condominium at para. 12...

[50] In that case, the trial judge had concluded the criterion of dangerousness had been met and the Court of Appeal said it would not interfere with that finding (para. 31).

[51] In *Plas-Tex Canada Ltd. v. Dow Chemical of Canada Ltd.* (2004), 245 D.L.R. (4th) 650 (Alta. C.A.), the Alberta Court of Appeal upheld the trial judge's conclusion that the defendant was liable for economic loss. Picard, J.A. said at para. 133:

> 133 In summary, policy considerations support liability in this, a products liability case where the defect presented a known danger to the public and the consumer was reasonable in relying on the manufacturer's expertise. I find that the trial judge committed no error in deciding that Dow should be liable for economic loss, that is the loss of profits, of the respondents and also for the cost of repairs.

[52] In *Privest Properties Ltd. v. Foundation Co. of Canada* 1997 CarswellBC 500 (B.C.C.A.), the British Columbia Court of Appeal dealt with a claim for economic loss where the key issue was whether the product supplied was dangerous. The court said in para. 12:

> 12 The pivotal question in this case is whether the MK-3 in the Building was a dangerous product. If the plaintiffs did not prove that it was dangerous, then all the other issues become academic.

The court relied upon *Winnipeg Condominium, supra*, in dismissing the appeal.

[53] In *M. Hasegawa & Co. v. Pepsi Bottling Group (Canada) Co.*, [2002] B.C.J. No. 1125 (B.C.C.A.), Chief Justice Finch said in para. 39:

> 39 On the law as it now stands, however, I am of the view that the learned trial judge did not err in finding no duty of care on the basis that the contaminated water did not pose a real and substantial danger to the health of potential consumers, and that no *prima facie* duty of care was created. I think this conclusion is determinative of the case, and is a proper basis on which to dismiss the appeal.

[54] A small percentage of bottles contained mould flocs. The government of Japan prohibited the sale of the glacial water and the plaintiff destroyed the bottled water. There was no evidence that personal injury or damage to property had occurred. The British Columbia Court of Appeal concluded it was not a property damage claim but one for pure economic loss. The plaintiff said it fell within two of the classes where claims for economic loss are recoverable: negligent performance of a service or negligent supply of shoddy goods. Finch, C.J.B.C. referred to *Anns, supra,* and its two part test for liability for negligence. He went on to say in para. 37:

> 37 The Supreme Court of Canada has, however, decided that the kind of harm which may potentially be suffered does indeed determine the existence of the duty of care. It has held that the product manufacturer's duty is to take reasonable care to avoid causing either personal injury or physical danger to property. But the duty does not extend to putting into circulation products which are merely defective or shoddy, if they are not dangerous. There can be no doubt that on the law as presently understood, the potential nature of the harm determines the existence of the prima facie duty of care.

[55] In para. 50, Finch, C.J.B.C. said with respect to the class of "negligent supply of defective goods":

> 50 Whether this product was potentially dangerous is a question of fact for the trial judge. In my respectful opinion, the learned trial judge did not err in holding that Mr. McSweeney's evidence was incapable of supporting such a finding.

[56] In *Brett-Young Seeds Ltd. v. Assie Industries Ltd.* (2002), 212 D.L.R .(4th) 492 (Man. C.A.), Philp, J.A. referred to *Winnipeg Condominium* and said in para. 15:

> 15 The test to be met in imposing liability for pure economic loss, unaccompanied by personal injury or property damage, is foreseeability of substantial danger to health and safety.

[57] He then upheld the decision of the Motions Judge not to add as a defendant a party against whom there were no allegations of "substantial danger to the health and safety of the occupants." (para. 17)

[58] In *Zidaric v. Toshiba of Canada Ltd.*, [2000] O.J. No. 4590, Cumming, J. struck a pleading after referring to *Winnipeg Condominium*, *supra*. He said in

para. 8 that, in that case: ... “La Forest J. at p. 96 set forth the approach for analysis as to the very limited occasions when there can be recovery for a pure economic loss under tort law.”

[59] In para. 9, he said:

> 9 ... However, the pleading does not, of course, suggest any risk of personal injury or property damage from the defective computer itself.

[60] On the other hand, in *Bondy v. Toshiba of Canada Ltd.*, [2006] O.J. No. 1665 (Sup. Ct. Just.), Brockenshire, J. refused to strike a pleading on the basis that (para. 15):

> 15 My conclusion is that it is not plain and obvious to me that the claim of negligence in design and manufacture, particularly when combined with the alleged claim of negligent misrepresentation, and also combined with the claim of direct relationship between the manufacturer and customer, cannot succeed. At this stage, without full pleadings and a factual basis, I can hardly be asked to determine if there are policy concerns that would block the claim. I decline to strike out that claim.

[61] In *Carleton Condominium Corp. No. 21* v. *Minto Construction Ltd.*, [2001] O.J. No. 5124 (Sup. Ct. Just.), Aitken, J. gave judgment for defective workmanship

or design of a condominium building concluding there was sufficient evidence "to meet the test of real and substantial danger" in [*Winnipeg Condominium*] (para. 435).

[62] In *Chaytor v. Walsh*, [1997] B.C.J. No. 733 (S.C.), Hunter, J. concluded in para. 43:

> 43 I am satisfied that proximity can be established directly through the contractual relationship and thus the 'dangerousness' aspect as described in Privest may not be, and in the matter before me is not, required to justify a recovery for pure economic loss. In other words, the existence of a real and substantial danger is only required where, without it, the relationship between the parties would be too remote to support a duty of care.

[63] In *Condominium Plan No. 9421710 v. Christenson*, [2001] A.J. No. 276 (Q.B.), Acton, J. refused to grant summary judgment. She said in para. 15:

> 15 Although no cause of action presently exists, it is not plain and obvious that the Respondent has no chance of success.

She concluded in paras. 17 and 18:

> 17 The Winnipeg Condo. case illustrates the fact that tort law is not static.
>
> ...
>
> 18 The Supreme Court of Canada has stated that damages for these type of economic losses may be considered when the case arises on the basis of a full argument and with reference to the unique and distinct policy issues raised. Considering these statements, and the development of the law in other jurisdictions, it is not plain and obvious that the Respondent has no chance of success.

[64] Master Funduk in *Del Harder v. Denny Andrews Ford Sales Inc.*, [1995] A.J. No. 608 (Q.B.) dismissed an application for summary judgment concluding that the issue of whether there is liability for economic loss when there is not a dangerous situation is a triable issue. He said in para. 29:

> 29 About all that can safely be said at this time is that the present state of Canadian law on this point is chaos.

[65] In determining whether the law is clear on this issue, I have regard to the words of La Forest, J. In *Winnipeg Condominium* and what has occurred since that decision.

[66] In *Winnipeg Condominium*, in my view, La Forest, J. left open the possibility that a claim for economic loss, where there is not the sort of danger that was found in that case, might succeed. In *Winnipeg Condominium*, as quoted above, La Forest, J. said he did not need to consider that issue since it was not before the court. He noted the approaches taken in other jurisdictions to make contractors liable to subsequent purchasers for "reasonable fitness and habitability of a building" (para. 41). He concluded that he would want to have argument on that issue "before entertaining the possibility." (para. 41)

[67] Some courts have proceeded on the assumption that there is no cause of action except where there is dangerousness. The British Columbia Court of Appeal in *Privest* and *Hasegawa*, *supra*, referred to *Winnipeg Condominium* for that proposition and upheld trial court decisions disallowing claims where the trial judge found no dangerousness. However, in *Privest*, the grounds of appeal (set out in para. 3) do not include the issue of whether there is liability where there is no dangerousness. In *Hasegawa*, the court did address that issue and, in response to the plaintiff's submission that there should be a new category for food products intended for human consumption, Finch, C.J.B.C. said in para. 58:

> 58 I can see no good reason for adopting the test proposed by the plaintiff, and much to recommend against it. I agree with the defendant's submissions that the law of contract and sale of goods already allocates risk for goods of poor quality, and that tort law should not interfere.

[68] The court then went on to specifically deal with *Junior Books*, *supra*, and whether it is good law in Canada. Finch, C.J.B.C. said of it in para. 68:

> 68 I agree with the defendant that Madam Justice Wilson's comments endorsing *Junior Books Ltd.* in *Kamloops (City)* were *obiter dicta*, given the facts and findings in each of those cases. In addition, Dickson J. spoke disapprovingly of the question addressed in *Junior Books Ltd.* in *obiter dicta* in *Fraser-Reid* [*Fraser-Reid v. Droumtsekas*, 1979 CarswellOnt 652 (S.C.C.)], *supra*, and La Forest J. explicitly refused to consider the issue in *Winnipeg Condominium Corp. No. 36, supra*. Accordingly, the Supreme Court of Canada has left open the issue addressed in *Junior Books Ltd.* and raised in the case at bar. This Court is therefore not bound to follow the result or reasoning in *Junior Books Ltd.* Given my view of this case, set out above, I decline to do so.

He declined to follow it. I will deal with that decision further hereinafter.

[69] In *United Dominion Industries Ltd. v. North Sydney Associates*, *supra*, the issue before the Nova Scotia Court of Appeal was not whether there was liability if the defective welds did not cause a danger. The issues for the court are set out in para. 7 where Roscoe, J.A. says:

7 The appellant defines the issues on appeal as follows:

> (1) Did the Learned Trial Judge err in law in concluding that the evidence presented by the Respondent met the evidentiary burden which enabled the Learned Trial Judge to conclude that the defects found in the various welds were significant defects which would constitute a real and substantial danger to the occupants of the Mall?
>
> (2) Did the Learned Trial Judge err in law in concluding that the evidence presented by the Respondent met the evidentiary burden which required proof on a balance of probabilities that the weld repairs undertaken by the Respondent were necessary to remove the real and substantial danger to occupants of the Mall?
>
> (3) Did the learned trial Judge err in law in placing an evidentiary burden on the Appellant to show that deficiencies in the welds fabricated by the Appellants did not constitute a real and substantial danger to occupants of the Mall.

[70] The underlying premise of the appellant's argument in that case was that there would be no liability unless the defects were dangerous.

[71] The Manitoba Court of Appeal in *Brett-Young Seeds Ltd. v. Assie Industries Ltd., supra,* upheld the motions judge who had struck a pleading and, in doing so, relied on *Winnipeg Condominium*.

[72] In *Sentinel Self-Storage Corp. v. Dyregrov* (2003) 233 D.L.R. (4th) 18 (Man. C.A.), the minority decision written by Steel, J.A. dealt with negligent supply of defective structures but the majority dealt with the matter as one of negligent performance of a service. The majority said, in para. 19, when that was the case, the principles were different from those set out in *Winnipeg Condominium*.

[73] In *Plas-Tex*, *supra*, the Alberta Court of Appeal extended the reasoning of *Winnipeg Condominium* to products liability and said in para. 90:

> 90 D.F. Edgell in the text, Product Liability in Canada, (Toronto: Butterworths Canada, 2000) says there is no reason not to extend the logic of Winnipeg Condominium to products liability. I agree. There is a duty, independent of any contractual obligation, to take reasonable care not to manufacture and distribute a product that is dangerous. Breach of such a duty can be pursued in negligence by persons who are in contract with the manufacturer (subject to the viability of limitation of liability clauses) and also by persons who are not in contract: Bow Valley, supra at para. 19 per McLachlin C.J. dissenting, but not on this point.

[74] In her decision, Picard, J.A. referred to *Norsk*, *supra*, saying in para. 118:

> 118 ... However, as stated by McLachlin J., in Norsk, supra, there is no single universal formula and the categories are not closed. What is required is a case-by-case analysis, where the appropriate legal tests for duty and causation and a thorough policy review are done.

In any event, in that case, the trial judge had found that the products supplied created a danger.

[75] Cases like *Zidaric*, *supra*, struck pleadings where no danger was alleged. In other cases, courts, on applications like this one, have sent the matter on for trial. In *Bondy*, *supra*, the Superior Court of Justice dealt with an application to strike out pleadings. Brockenshire, J. in para. 11 referred to *Gariepy v. Shell Oil Co*. (2002), 23 C.P.C. (5th) 360 where Nordheimer, J. said there was a possibility that such a claim might succeed, saying:

> It is at least clear that the issue is not foreclosed.

[76] Brockenshire, J. concluded in para. 12:

> 12 It is clear from the Supreme Court of Canada decisions and the appellate decisions, gathered by counsel, referred to in their factum and argued before me, as well as the discussions of the issue of pure economic loss both in *Canadian Tort Law*, (7th) Ed., by Mr. Justice Linden (Butterworts) and the *Law of Torts* in Canada, (2d) by Professor Friedman (Carswell) that developments in this are a have been policy driven, that there are differences in the law among Canada, England, Australia and the United States, and that the law is evolving. Indeed, Linden J.A., in his text, at p. 601, argues that the fact that the court in *Winnipeg Condominium* did not deal with *Junior Books Ltd. v. The Veitchi Co. Ltd..*, [1982] 3 All E.R. 201 (H.L.) could mean that Junior Books, which permitted an

> economic loss claim for poor workmanship without restriction, is ‘alive in Canada.’

In the end result, for a variety of reasons, not all relating to that issue, the application to strike was dismissed.

[77] In *Carleton Condominium Corp. No. 21, supra,* Aitken, J. said that La Forest, J. had left the question open. In *Condominium Plan No. 9421710*, *supra*, summary judgment was refused by Acton, J. who said in para. 17:

> 17 The Winnipeg Condo. case illustrates the fact that tort law is not static. ...

[78] She then referred to La Forest, J.’s comments quoted above about considering damages for economic loss is other cases. She then concluded in para. 18:

> 18 ... Considering these statements and the development of the law in other jurisdictions, it is not plain and obvious that the Respondent has no chance of success.

[79] In my view, *Hughes v. Sunbeam Corporation (Canada) Limited et al*, [2002] O.J. No. 3457 (C.A.), is a most useful decision. The issue was whether a reasonable cause of action was disclosed in the pleadings. Laskin, J.A. allowed the claim to proceed. He said in para. 25:

> 25. [25] I accept that, under the current state of the law, Hughes' negligence claim against First Alert would likely fail. But this appeal is from a rule 21.01(a)(b) motion, where causes of action should not be barred simply because they are novel. In my view, compelling reasons exist to allow the negligence claim against First Alert to get over the rule 21.01(1)(b) hurdle.

[80] Laskin, J.A. went on to say this was a borderline case and said in paras. 28 and 29:

> 28. [28] This claim thus shows that in the negligent supply of defective goods cases, the safety rationale for compensation does not always support a clear distinction between dangerous and non-dangerous defects.
>
> ...
>
> 29. [29] For these reasons, I am not persuaded that Hughes' negligence claim against First Alert discloses no reasonable cause of action. As a supplier of allegedly defective safety devices on which reliance is dangerous, First Alert may well owe a duty of care to a purchaser that is not defeated by the relevant policy considerations. This claim should not fail on a rule 21.01(1)(b) motion. Before

> deciding whether First Alert owes a duty of care to compensate Hughes for purely economic losses, the court should have an evidentiary record.

[81] However, he expressed concern about the implications of a trial decision finding liability and said in para. 35:

> 35. [35] These five considerations make the imposition of liability on First Alert problematic. ...

[82] However, he went on to say in that paragraph:

> ... But these concerns are better addressed on an evidentiary record. At the pleading stage, I do not consider it 'plain and obvious' that Hughes' negligence claim against First Alert must fail.

[83] Some courts have concluded that claims for economic loss where no danger or safety concerns are alleged should not go to trial but should be struck; others have sent the matter on for trial. At trial, courts have dismissed claims for economic loss where there are no safety issues. The Supreme Court of Canada has left the issue open. La Forest, J. did not say in *Winnipeg Condominium*, *supra*, (nor did he need to) that no such claim could ever be successfully made. In the United Kingdom, *Anns* has been over-ruled and a claim like that in *Winnipeg*

Condominium was disallowed *(Murphy, supra).* However, that is not the law in Canada.

[84] The chambers judge is to consider the two step *Anns*, *supra*, test not to determine if a duty of care will be recognized but to determine if it is plain and obvious that one cannot be recognized.

[85] I conclude from the statement of claim that it is not plain and obvious that there is no proximity between the plaintiffs and the Ameron defendants. There are facts pleaded which could lead the trial judge to conclude there is such proximity between the plaintiffs and the Ameron defendants that the latter could reasonably contemplate that carelessness on their part was likely to cause damage to the plaintiffs.

[86] In *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, Iacobucci, J. said at paras 49-50:

> 45 McLachlin C.J. and Major J. concluded, at para. 32 [in *Cooper v. Hobart*, [2001] 3 S.C.R. 537] that the term ‘proximity’ in the context of negligence law, is

> used to describe the type of relationship in which a duty of care to guard against foreseeable harm may rightly be imposed. As this Court stated in *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, at para 24:
>
> > The label 'proximity', as it was used by Lord Wilberforce in *Anns, supra*, was clearly intended to connote that the circumstances of the relationship inhering between the plaintiff and the defendant are of such a nature that the defendant may be said to be under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs.
>
> 50 Consequently, the essential purpose of the inquiry is to evaluate the nature of that relationship in order to determine whether it is just and fair to impose a duty of care on the defendant. The factors that are relevant to this inquiry depend on the circumstances of the case. As stated by McLachlin J. (as she then was) in *Norsk, supra*, at p. 1151, '[p]roximity may be usefully viewed, not so much as a test in itself, but as a broad concept which is capable of subsuming different categories of cases involving different factors' (cited with approval in *Hercules Managements, supra*, at para. 23, and *Cooper, supra*, at para. 35). Examples of factors that might be relevant to the inquiry include the expectations of the parties, representations, reliance and the nature of the property or interest involved.

[87] In para. 30 of the statement of claim, it states:

> For ease of reference, the Sable owners and the Alliance Contractors when acting collectively under the terms fo the Alliance Agreement ... are referred to herein as the 'Alliance.'

[88] Paras. 45 ff. refer to the dealings between the "Alliance" and the "Ameron Suppliers", defined to include the present Ameron defendants.

[89] According to the statement of claim, there were dealings between the plaintiffs and the Ameron defendants. The fact that the relationship is in the context of a commercial transaction between a purchaser and a supplier, although not a contractual relationship, does not necessarily mean that there is no proximity between them. It may, in fact, in certain circumstances, be the opposite. It is not plain and obvious to me that proximity could not be found.

[90] The next step of the *Anns* test is to ask if there are any circumstances which negate or reduce the scope of the *prima facie* duty determined under step one.

[91] It seems to me there are three principal arguments with respect to the policy considerations. The first is one which I have already canvassed: Whether the courts should extend liability for economic loss to a fact situation like this. I have concluded above that it is not plain and obvious that it cannot succeed on this basis.

[92] The second policy consideration is whether commercial law, particularly the law of contract, should be the system of law which governs disputes of this nature. That is the position taken by the Ameron defendants. They say that if tort law enters this field, where there is no danger from the product, questions of quality of workmanship and fitness for purpose come into play and these should be dealt with by contract.

[93] This policy consideration is intertwined with the 'floodgates' argument or as it was so eloquently stated by Cardozo, C.J. in *Ultramares Corp. v. Touche*, 174 N.E. 441 (N.Y. Ct. App., 1931) at p. 444: "liability in an indeterminate amount for an indeterminate time to an indeterminate class."

[94] That phrase is often quoted by those who oppose extending the ambit of liability for pure economic loss. In *Hasegawa, supra*, Finch, C.J.B.C. quoted it in para. 57 after saying:

> 57 ... A legal rule which imposed liability for the manufacture or supply of defective, but non-dangerous, goods would create an implied warranty of product quality for the sale of commercial products, in the absence of contract. ...

[95] He then concluded in para. 58:

> 58 I can see no good reason for adopting the test proposed by the plaintiff, and much to recommend against it. I agree with the defendant's submissions that the law of contract and sale of goods already allocates risk for goods of poor quality, and that tort law should not interfere.

[96] The Ameron defendants referred me to *Rivtow Marine Ltd. v. Washington Iron Works*, [1974] S.C.R. 1189 where Ritchie, J. said at para. 36:

> 36 ... the liability for the cost of repairing damage to the defective article itself, and for the economic loss flowing directly from the negligence, is akin to liability under the terms of an express or implied warranty of fitness and, as it is contractual in origin, cannot be enforced against the manufacturer by a stranger to the contract. ...

[97] However, the principles set out in the dissent of Laskin, J. in that case have now been accepted and widely quoted in subsequent cases. He said in para. 61:

> 61 ... If physical harm had resulted, whether personal injury or damage to property (other than to the crane itself), Washington's liability to the person affected, under its anterior duty as a designer and manufacturer of a negligently produced crane, would not be open to question. Should it then be any less liable for the direct economic loss to the appellant resulting from the faulty crane merely because the likelihood of physical harm, either by way of personal injury to a third person or property damage to the appellant, was averted by the withdrawal of the crane from service so that it could be repaired?

[98] The Ameron defendants also cited two American cases. In *Miller v. United States Steel Corp.*, 902 F. 2d 573 (7th Circ. 1990), Posner, Circuit Judge said at p. 574:

> ... tort law is a superfluous and inapt tool for resolving purely commercial disputes.

[99] In *East River Steamship Corp. v. Transamerica Delavel* (1986), 476 U.S. 858 (U.S.S.C.), Blackmun, J. traced the history of product liability law in the United States, beginning at p. 2299. At p. 2300, he cautioned:

> It is clear, however, that if this development were allowed to progress too far, contract law would drown in a sea of tort.

He also raised the spectre of indeterminate liability. He said at p. 2304:

> ... Permitting recovery for all foreseeable claims for purely economic loss could make a manufacturer liable for vast sums.

[100] The conclusion of the court was that claims like this should be dealt with as warranty claims that is, by contract law not tort law.

[101] Although illustrative of the differing approaches taken in other courts on this issue, this is not necessarily the state of the law in Canada.

[102] In *Martel Building Ltd. v. Canada*, [2000] 2 S.C.R. 860, Iacobucci and Major, JJ. delivered the decision of the court. At para. 37, they said:

> 37 ... it has been recognized that in limited circumstances damages for economic loss absent physical or proprietary harm may be recovered. The circumstances in which such damages have been awarded to date are few. To a large extent, this caution derives from the same policy rationale that supported the traditional approach not to recognize the claim at all. First, economic interests are viewed as less compelling of protection than bodily security or proprietary interests. Second, an unbridled recognition of economic loss raises the spectre of indeterminate liability. Third, economic losses often arise in a commercial context, where they are often an inherent business risk best guarded against by the party on whom they fall through such means as insurance. Finally, allowing the recovery of economic loss through tort has been seen to encourage a multiplicity of inappropriate lawsuits.

[103] The courts have dealt with concurrency of tort law and contract where the parties had a contractual relationship. In *Central Trust v. Rafuse*, [1986] 2 S.C.R. 147, the court concluded solicitors who were negligent could be liable in tort as

well as in contract. In *BG Checo v. B.C. Hydro and Power Authority*, [1993] 1 S.C.R. 12, the court concluded that a contract between the parties did not preclude an action in tort. These cases did not deal with a situation like this where a contractual relationship existed but not between the Ameron defendants and the plaintiffs.

[104] In my view, these policy considerations deserve a full airing at trial. Competing views have been expressed in the cases already cited about the roles of tort and contract law and about means by which indeterminate liability concerns can be addressed. These cannot be addressed properly at this early stage. The details of the contractual provisions affecting other parties will not be in evidence until trial. This was a complex project involving many parties. The inter-relationship of their contractual arrangements with the dealings between the plaintiffs and Ameron defendants can only be fully canvassed at trial.

[105] As Laskin, J.A. said in *Hughes* in para. 29:

> 29. [29] ... Before deciding whether First Alert owes a duty of care to compensate Hughes for purely economic losses, the court should have an evidentiary record.

[106] In my view, the views expressed by Wright, J. in *Joudrey* at para. 8 and 9 can be adapted to this case:

> [8] The question of law raised in the present case is whether or not the defendant owed a duty of care to this plaintiff in this fact situation. However novel the claim is in this case, as was ultimately decided in **Lamey** it cannot be said, solely on the face of the pleadings, to be obviously and absolutely unsustainable, especially where the tort law in respect of nervous shock/rescuer cases is in a continuing state of evolution and development.
>
> [9] I am mindful of the decision of the Nova Scotia court of Appeal in **Future Inns Canada Inc. v. Labour Relations Board (N.S.) et al**. (1999), 179 N.S.R. (2d) 213; 553 A.P.R. 213 (C.A.), which ruled that questions of law are appropriate for determination under Rule 14.25 but only in cases where the law is clear, and provided no further extrinsic evidence is required to resolve the issues raised. In my view, this is not one of those cases. One need only look at the various case authorities cited to see how the courts have wrestled with the legal issues and policy considerations prescribing the scope of liability and recoverability of damages in this area of the law. I consider that there are competing arguments that can be made for an against the plaintiff's claim with the result that this action should be decided on the full merits and argument of the case, and not on the summary basis as sought by the defendant here.

[107] I conclude the law with respect to recovery for economic loss is likewise "in a continuing state of evolution and development." For the same reasons as set out in para. 9, I conclude that the result should be determined after the full merits have

been argued after evidence has been tendered on the subject at trial. There are competing arguments for and against this claim.

[108] It is therefore not plain and obvious that the plaintiffs' claim would not succeed as a result of policy considerations negating a *prima facie* duty which may be found to arise from proximity between the plaintiff and the Ameron defendants. In the event that I am wrong, I will consider the alternative argument.

b) Does the claim fit within Winnipeg Condominium - are the pleadings adequate?

[109] In the application of *Winnipeg Condominium* in subsequent cases, in my view, some question has been raised about the level of dangerousness required to attract liability. The danger was quite apparent in *Winnipeg Condominium*. A large piece of cladding had already detached itself from the building and fallen nine stories only failing to injure persons or damage property because it occurred in the middle of the night. What other levels of danger might suffice has been canvassed in decisions since that.

[110] In *Privest Properties Ltd., supra,* the British Columbia Court of Appeal said in para. 16:

> 16 What does 'dangerous' mean in a hazardous building products suit? In *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co*., [1995] 1 S.C.R. 85, the court required the showing of "a real and substantial danger', and held that the plaintiff must prove a 'serious risk to safety' (at 125) and that 'the danger was substantial and foreseeable' (at 130). The parties appear to agree on this definition.

The parties there agreed that there must be a "serious risk to safety" and a "substantial foreseeable danger".

[111] In *Hasegawa, supra*, another British Columbia Court of Appeal decision, Finch, C.J.B.C. referred to the level of risk in para. 50 as a question of "Whether this product was potentially dangerous ... ."

[112] In *United Dominion Industries, supra*, the Nova Scotia Court of Appeal found no palpable and overriding error in the trial judge's findings. In para. 18, Roscoe, J.A. quoted passages from his decision, such as para. 35, where Cacchione, J. referred to evidence of an expert that "the welds were integral to the

structural integrity of the roof." Roscoe, J.A. also quoted in para. 19 from his review of the expert's evidence where the expert concluded:

> ... at some point the joist could fail

and his

> ... concern of a roof collapse ... .

[113] In para. 20, Roscoe, J.A. said the trial judge referred to *Winnipeg Condominium, supra:*

> 20 After properly reviewing the applicable law, including the **Winnipeg Condominium** case, the trial judge confirmed that it was necessary for the plaintiff to prove that the defects were dangerous, that they posed a real and substantial danger, not just that there was shoddy or substandard workmanship. ...

[114] In *Mariani v. Lemstra, supra,* Sharpe, J.A. of the Ontario Court of Appeal concluded in para. 31:

> 31 I would not interfere with the trial judge's findings with respect to dangerousness.

He said this after reviewing, in para. 29, the appellant's submission:

> 29 ... They submit that while the centre wall was unstable, the house was not dangerous in the sense that there was any risk to personal safety or of imminent collapse.

He also considered the trial judge's finding:

> 29 ... The trial judge found that the defective centre wall 'rendered the premises dangerous' but then added [para. 27]:
>
> > The various experts apparently did not conclude that it was unsafe in the sense that the house was likely to collapse but it is clear from that same evidence that the centre wall deficiencies made the house susceptible to movement or shifting in any significant wind or, as the case may be, snow load.

[115] He also referred in para. 30 to the trial judge's finding:

> The trial judge also found that the 'proliferation of mould ... presents a danger to the occupants of the house'.

[116] Sharpe, J.A. continued in para. 31:

> 31 ... While those same experts agreed that there was no danger of imminent collapse, there was evidence that the defect made the building unstable and that, if not repaired, it might collapse under a heavy snow load and that if not repaired, 'a catastrophic condition may prevail'. Similarly, with regard to the problem with the building envelope, it is evident from what has actually happened that if not remedied, the entry of water into the structure can lead to a condition hazardous to health and to property in the home.

And he concluded in para. 32:

> 32 In my view, the evidence on both defects is capable of bringing the case within the Winnipeg Condominium principle. That case does not require the level of immediate danger suggested by the argument advanced by the Lemstras. The operative principle is explicitly preventative. Recovery for the economic loss of repair is allowed to avoid the greater cost of recovery for personal injury should the danger materialize and this must mean that the plaintiff is entitled to claim for the cost of repairs required to avoid the danger and to prevent it from occurring.

[117] In *Carleton Condominium Corp. No. 21 v. Minto Construction Ltd., supra*, Aitken, J. heard evidence in a twenty-three day trial about defects in an eleven storey condominium apartment building. She said in para. 435:

> 435 ... I find that the nature, extent and combination of the deficiencies in the block wall, when compared to the by-law requirement, were significant enough to decrease the safety margin afforded to inhabitants of the building under the

> building by-law, thereby exposing them to increased risk of harm beyond that considered reasonable in our community. That suffices to meet the test of real and substantial danger in Bird.

She also said in para. 437:

> 437 Even if I were to find that the evidence in this case was insufficient to establish that rebar needed to be added to the back-up wall to prevent a real and substantial danger to the inhabitants of 373 Laurier, I would conclude that this is one of those cases where for policy reasons that test should be eased. Requiring the Plaintiff in this case to establish in some absolute way that the inhabitants of 373 Laurier were in 'a real and substantial danger' due to the documented defects in the exterior block wall would set an unattainably high burden of proof. In arriving at this conclusion I note in particular that (1) several isolated deficiencies creating unsafe conditions have been established by the evidence; (2) significant, generalized deviations from the applicable building by-law and code and from reasonable standards of safe construction have been established; and (3) the safety margin which the community has established as reasonable for a risk as serious as a catastrophic earthquake has been reduced noticeably. ...

[118] In *Gauvin v. Ontario (Ministry of Environment)*, [1995] O.J. No. 2525 (Gen. Div), Chadwick, J. dismissed a claim against the Ministry of the Environment because "The plaintiff called no evidence to show that the seepage in the septic system of untreated sewage was unsafe or dangerous." (para. 59).

[119] In *Roy v. Thiessen*, 2005 SKCA 45, Lane, J.A. of the Saskatchewan Court of Appeal, said in para. 38:

> [38] I agree with the trial judge *Winnipeg Condominium* does not impose a requirement of 'an imminent risk' of physical harm to found liability. In my view the imposition of such a standard seems contrary to the policy basis for assigning liability to contractors in these circumstances. The policy goal must be to encourage homeowners to make any necessary repairs as soon as possible in order to mitigate potential losses; they should not have to delay such repairs until there is an imminent danger of harm.

[120] Lane, J.A. in para. 41 specifically referred to the trial judge's finding based upon evidence:

> [41] In any event, the trial judge found on the evidence it was safe to conclude the experts 'contemplated such failure would occur during its [the house's] lifespan.

[121] In *Brett-young Seeds Ltd. v. K.B.A. Consultants Inc.*, [2004] M.J. No. 166 (Q.B.), Kennedy, J. allowed an appeal from a Master who granted an application to strike a claim in negligence. He referred to the pleadings and the decision in *Winnipeg Condominium*, *supra,* and concluded in para. 29:

> 29 Here the plaintiffs have alleged that the design is dangerous to the workers in the area in which they are required to operate, that the structure is not constructed with the proper grade steel to support the volume of grain stored, and that they have incurred considerable expense to restore the bins to the necessary safety level. Falling within these conditions satisfies in my view the requirement of the

> Winnipeg Condominium Corporation No. 36 case and establishes a prima facie cause of action.

[122] In *Hughes v. Sunbeam Corp. (Canada) Ltd.*, *supra*, Laskin, J,A,, in para. 26, said of *Winnipeg Condominium*:

> 26, [26] The underlying rationale for permitting recovery for pure economic loss in a case like *Winnipeg Condominium* is safety, the prevention of threatened harm. By compensating the owner of a dangerously defective product for the cost of repair, the law can encourage the owner to make the product safe before it causes injury to persons or property. By contrast compensation to repair a defective but not dangerous product will improve the product's quality but not its safety.

[123] He went on in para. 27 to apply *Winnipeg Condominium* to that case:

> 27. [27] This case falls on the border. A smoke detector that does not detect fires in time for occupants to escape injury is not itself dangerous, but relying on it is. The occupants are lulled into a false sense of security. The threatened harm to persons or property is no less than that from a dangerous defect. In other words, the safety considerations are similar. Safety justified compensating the owner of the apartment building in *Winnipeg Condominium* to eliminate the dangerously defective cladding. Safety may also justify compensating the owner of a defective smoke alarm to eliminate dangerous reliance on it.

He concluded the claim should not be struck on an application like one under our *Rule 14.25*. He did this even though he had concerns about whether the claim could succeed.

[124] In all these cases, the danger was, in my view, not as obvious as in *Winnipeg Condominium, supra,* where a piece of cladding had already fallen. Nevertheless, trial judges and appeal courts in some of these cases concluded that the test of dangerousness was met. Sharpe, J.A. of the Ontario Court of Appeal in *Mariana, surpa*, specifically addressed the issue of how imminent the danger had to be and concluded that the principle for recovery under *Winnipeg Condominium* was "explicitly preventative". He said the purpose is to avoid "the greater cost of recovery for personal injury <u>should the danger materialize</u>." (my emphasis)

[125] I now turn to the actual wording of the claim made by the plaintiffs. Some of the relevant paragraphs have been quoted above and deal with the Ameron defendants' alleged negligence. The amended statement of claim contains para. 77A. It provides:

> 77A The paint failures have caused and are continuing to cause significant corrosion of the steel that the paint system was intended to protect. Further corrosion would impair the structural integrity of the steel if it were to be left unrepaired. Repairs resulting from the paint failures will be required to protect the safety of the workers on the Sable Project.

It refers to “significant corrosion”; “further corrosion would impair the structural integrity of the steel if it were left to be unrepaired”; repairs “will be required to protect the safety” of workers.

[126] Is it plain and obvious that this is not sufficient wording to bring the plaintiffs within the test in *Winnipeg Condominium*? As I have said, in subsequent cases, the test from *Winnipeg Condominium*, in my view, has been relaxed. Sharpe, J.A. in *Mariani, supra,* stated the purpose of the principles set out in *Winnipeg Condominium* ss preventing the danger from materializing by doing the work and claiming the cost required to prevent the danger from occurring.

[127] In my view, based upon the wording of *Winnipeg Condominium*, it is not plain and obvious that the claim, as presently worded, cannot succeed. If the *Winnipeg Condominium* test has been relaxed, the pleadings as they now stand are not insufficient. As Finch, C.J.B.C. said in *Hasegawa* at para. 50:

> 50 Whether this product was potentially dangerous is a question of fact for the trial judge.

In my view, the same should occur here. The trial judge can assess the "danger" and address the issue of how imminent it must be.

[128] In the event I am wrong on this, I will deal with the following issue.

c) Damage to Property

[129] The plaintiffs say that the failure of the paint has caused its property to be damaged. They say this case then falls within the principles set out in *Donaghue v. Stevenson*, [1932] A.C. 562. The principle in that case was extended in *Dutton*, *supra*, where Lord Denning, M.R. concluded the damage to the house was physical damage. *Anns, supra*, approved this concept and is still the law in Canada.

[130] In this action, Warner, J. ruled in *ING Insurance Company of Canada v. A.M.L. Painting Ltd. et al*, 2006 N.S.S.C. 203 that ING has a duty to defend the

claim against its insured, the respondent in that application, because the claims made could fall within the policy coverage for physical injury to and loss of use of the plaintiffs' property. Warner, J. referred to para. 77A of the statement of claim quoted above. He quoted the definition of "Property Damage" from the insurance policy in para. 16 and in para. 18 the "Exclusions". He referred in para. 20 to *Nichols v. American Home Assurance Co*, [1990] 1 S.C.R. 801 and, in particular, para. 17 where McLachlin, J. (as she then was) said:

> At the same time, it is not necessary to prove that the obligation to indemnify will in fact arise in order to trigger the duty to defend. The mere possibility that a claim within the policy may succeed suffices.

She also said in para. 21:

> ... the widest latitude should be given to the allegations in the pleadings in determining whether they raise a claim within the policy.

[131] Warner, J. also considered decisions using stronger language to require the insurer to defend. He said in para. 49:

> [49] I agree with counsel for AML that (a) the alleged continuing corrosion is property damage to property of someone other than AML, and (b) that allegation is sufficient to trigger the duty to defend. The damage is to tangible property that has been physically injured.

Warner, J. continued, in para. 50, to discuss the claim for general damages and said:

> [50] ...It is not clear what it relates to. It is reasonable to infer that it relates to more than simply the cost of replacing the paint systems. This inference recognizes the generous or liberal approach to pleadings in Nova Scotia.

[132] In his conclusion, Warner, J. said in para. 71:

> [71] The key to this application is the determination of whether a reasonable reading of the allegations in the SoC contain, expressly or by inference, claims for compensatory damages for physical injury or loss of use to property of Sable that exceeds the obligation of AML to restore, repair or replace its work or product.

He then concluded in paragraph 74:

> [74] ... the pleadings could reasonably include ... claims for more than simply the cost of replacing the alleged faulty work or defective product of the insured. [which were policy exclusions]

[133] Warner, J. in that decision had to do what I must do on this application and that is to determine if it is possible a claim for property damage might succeed. He concluded it was possible on a generous and liberal interpretation of the pleadings.

[134] I have my doubts about whether the claim can succeed on this basis. In my view, this is quite a different situation from those such as *Dutton* where the house had been built on a dump; from *Anns* where the foundations were not placed deep enough; from *Losinjska Plovidba v. Transco Overseas Ltd. and others ("The Orjula"),* [1995] Lloyd's Rep. 395 Q.B. where drums containing hydrochloric acid and sodium hypochlorite had leaked on to a ship's deck; from *Hunter v. Canary Wharf Ltd.,* [1997] A.C. 655 (C.A.) where dust from road construction fell on the plaintiff's property; from *Blue Circle Industries v. Ministry of Defence,* [1999] Ch. 289 (C.A.) where radioactive material contaminated property.

[135] In all those cases, the damage was actually caused by the thing complained of. In this case, it is not the paint itself which is alleged to have caused the problem but the failure of the paint to do what it was supposed to do, allowing the elements to cause rust. It was not the paint itself which caused the rust; the analogy to the above cases would be more apt if the paint contained a contaminant

which damaged the surfaces to which it was applied or was spilled on a surface ruining it.

[136] This situation is more akin to *Hughes, supra*, where the smoke detector would not function in the event there was smoke from a fire. In that case, the claim was classified as one of pure economic loss (para. 20). As Laskin, J.A. said in *Hughes, supra,* in para. 28:

> [28] This claim thus shows that in the negligent supply of defective goods cases, the safety rationale for compensation does not always support a clear distinction between dangerous and non dangerous defects. During oral argument, my colleague Doherty,J.A. illustrated this point by another apt example: a defective air bag in a car. If the defect threatens to cause the air bag to malfunction and injure a child riding in the car, under the current law the owner of the car may recover the cost of repairing the air bag. The defect is dangerous. But if the air bag simply does not work and therefore will not protect the child from harm if a collision occurs, under the current law recovery may be denied.. The defect is not dangerous, though reliance on the product is. If safety is the rationale for recovery of economic loss in these kinds of cases, I find it hard to justify recovery in the first scenario but not the second.

[137] To the contrary is *Pacific Lumber & Shipping Co. v. Western Stevedoring Co.*, [1995] B.C.J. No. 866 (S.C.). Although that was a summary judgment decision, the court had to address the issue of whether the claim was one for pure

economic loss or one of product liability. The defendant argued it was the former. Edwards, J. referred to *Winnipeg Condominium* but concluded in para. 25:

> 25 ... what is complained of here should not be characterized as economic loss.

[138] He went on in para. 26 to refer to the nature of the evidence:

> 26 In the case at bar there is adequate proof to be found in the affidavit of Hubbard, the annual report of Napier, and the allegations contained in the Writ, that there was a defect in the dipping agent Timbercote and that it did not prevent mould and stain, the purpose for which it was intended, and there was property damage to the lumber which gave rise to an inference of negligence on behalf of Napier, the manufacturer of Timbercote.

[139] Because of the decision of Warner, J. and the decision in *Pacific Lumber*, it is not plain and obvious that this claim will not be characterized as a property damage claim. As outlined above, I am not certain it will succeed as such but that is not the test. I conclude the claim is not obviously unsustainable. If allegations in the statement of claim are proven to be true, the trial judge might conclude that, since the failure of the paint to prevent rust caused damage, this is damage to property.

[140] In the event I am wrong on all of the above, I will deal with the following issue.

d) Is Junior Books good law in Canada?

[141] The plaintiffs say that J*unior Books*, *supra*, has not been overruled in Canada and, on the basis of it, there is liability for defective goods even where there is no property damage or injury.

[142] In *Junior Books Ltd.*, the House of Lords concluded that a contractor owed a duty of care beyond merely preventing harm caused by his faulty work. Where the proximity between the contractor and the user was sufficiently close, the court concluded the duty extended to a duty to avoid defects in the work or article itself. As a result, the contractor was liable for the cost of remedying the defect or replacing the item and, as well, for any consequential economic loss, even where there was no contractual relationship. As Lord Fraser said at p. 204:

> The proximity between the parties is extremely close, falling only just short of a direct contractual relationship. The injury to the respondents was a direct and foreseeable result of negligence by the appellants.

[143] In that case, the plaintiff company had a factory built for them. The architects they hired nominated the defendant as sub-contractor to lay flooring. The sub-contractor entered into a contract with the general contractor. Within a few years after the floor was laid, it began to crack and had to be relaid or replaced. At p. 215, in his dissent, Lord Brandon set out the damages sustained:

> As a result of the cracking of the flooring, the pursuers suffered the following items of damage or loss: necessary relaying or replacement of the flooring £50,000; storage of books during the carrying out of the work £1,000; removal of machinery to enable the work to be done, £2,000; loss of profits due to disturbance of business £45,000; wages of employees thrown away £90,000; overheads thrown away £16,000; investigation of necessary treatment of flooring £3,000.

[144] Lord Roskill wrote for the majority. He said of the pleadings (at p. 208):

> They seem to me clearly to contain no allegation that the flooring was in a dangerous state or that its condition was such as to cause danger to life or limb or to other property of other persons or that repairs were urgently or imminently required to avoid any such danger, or that any economic or financial loss had been, or would be, suffered save as would be consequential on the ultimate replacement of the flooring ...

[145] He went on at pp. 208 to 211 to trace the history of claims for pure economic loss, beginning with *Donoghue v. Stevenson, supra*, and what he referred to as "its insistence on proximity" (p. 209). He also referred to, among others, *Hedley Byrne and Co. Ltd. v. Heller and Partners Ltd.*, [1962] 2 All ER 575, [1964] A.C. 465; *Home Office v. Dorset Yacht Co. Ltd.*, [1970] 2 All ER, [1970] A.C. 1004; *Anns, supra*; and *Dutton, supra*, as well as Commonwealth decisions including *Rivtow, supra*.

[146] At p. 211, Lord Roskill posed the question:

> Applying those statements of general principle as your Lordships have been enjoined to do both by Lord Reid and by Lord Wilberforce rather than to ask whether the particular situation which has arisen does or does not resemble some earlier and different situation where a duty of care has been held or has not been held to exist, I look for the reasons why, it being conceded that the appellants owed a duty of care to others not to construct the flooring so that those others were in peril of suffering loss or damage to their persons or their property, that duty of care should not be equally owed to the respondents, who, though not in direct contractual relationship with the appellants, were as nominated sub-contractors in almost as close a commercial relationship with the appellants as it is possible to envisage short of privity of contract, so as not to expose the respondents to a possible liability to financial loss for repairing the flooring should it prove that the flooring had been negligently constructed. ...

[147] He then applied the first step of the *Anns* test at pp. 213-214:

> Turning back to the present appeal I therefore ask first whether there was the requisite degree of proximity so as to give rise to the relevant duty of care relied on by the respondents. I regard the following facts as of crucial importance in requiring an affirmative answer to that question: (1) the appellants were nominated sub-contractors; (2) the appellants were specialists in flooring; (3) the appellants knew what products were required by the appellants and their main contractors and specialised in the production of those products; (4) the appellants alone were responsible for the composition and construction of the flooring; (5) the respondents relied on the appellants' skill and experience; (6) the appellants as nominated sub-contractors must have known that the respondents relied on their skill and experience; (7) the relationship between the parties was as close as it could be short of actual privity of contract; (8) the appellants must be taken to have known that if they did the work negligently (as it must be assumed that they did) the resulting defects would at some time require remedying by the respondents expending money on the remedial measures as a consequence of which the respondents would suffer financial or economic loss.

[148] At p. 214, he considered the second part of the *Anns* test and concluded that he saw no reason "to restrict the duty of care arising from the proximity of which I have spoken." He further continued at p. 214:

> ... But in the present case the only suggested reason for limiting the damage (ex hypothesi economic or financial only) recoverable for the breach of the duty of care just enunciated is that hitherto the law has not allowed such recovery and therefore ought not in the future to do so. My Lords, with all respect to those who find this a sufficient answer I do not. I think this is the next logical step forward in the development of this branch of the law. I see no reason why what was called during the argument 'damage to the pocket' simpliciter should be disallowed when 'damage to the pocket' coupled with physical damage has hitherto always been allowed. I do not think that this development, if development it be, will lead to untoward consequences. The concept of proximity must always involve, at least in most cases, some degree of reliance.

[149] Subsequently, in the United Kingdom, *Anns* has been over-ruled but, as noted above, it is still good law in Canada. The Supreme Court of Canada has not expressly over-ruled *Junior Books.* In *Hasegawa, supra*, the British Columbia Court of Appeal declined to follow it.

[150] There was a factual situation in *Junior Books* which was not similar to the factual situation in *Hasegawa*. The proximity between the plaintiff and the defendant was a powerful factor in the *Junior Books* decision. I cannot conclude that, in a similar situation in Canada, the principles in *Junior Books* might not be followed. It was unnecessary for the court to consider that decision in *Winnipeg Condominium* because there was obvious danger.

[151] In the *University of Regina v. Pettick*, [1991] 77 D.L.R. (4th) 615 (Sask. C.A.), [1991] S.J. No. 88, it was Lord Brandon's dissent in *Junior Books* that was referred to as follows at p. 633:

> No better account of the difficulties involved in dealing with an essentially contractual matter in tort has been given than that by Lord Brandon in his widely influential dissent in the case of Junior Books. ...

[152] *Junior Books* has been referred to in a number of other decisions in Canada. In *Kamloops v. Nielsen*, [1984] 2 S.C.R. 2, Wilson, J. commented on it favourably. As Finch, C.J.B.C. pointed out in *Hasegawa*, her comments were *obiter dicta* but it should be noted that such comments have been said by the court to be binding. In *Norsk, supra*, it was mentioned in para. 232 with no further comment except to say it was an example of the court's broadening the exemptions to the rule excluding claims for pure economic loss.

[153] In *London Drugs Ltd. v. Kuehne and Nagel International Ltd.*, [1992] 3 S.C.R. 299, (sub nom *London Drugs Ltd. v. Brassart*), it was mentioned in the context of reliance cases along with *Hedley Byrne, supra*, and other cases. All the court there said, in para. 34, was:

> "When reliance is used in cases such as ... Junior Books ... it is concerned with the relationship between the plaintiff's position and the tortfeasor's conduct, not with the relationship between the plaintiff's position and the tortfeasor's pocketbook.

[154] In *Hofstrand Farms Ltd. v. British Columbia*, [1986] 1 S.C.R. 228, it was referred to, in para. 18, for the comments of Lords Fraser and Roskill on proximity which I have quoted above.

[155] Although Finch, C.J.B.C. declined to follow it in *Hasegawa* in 2002, in 1994, the British Columbia Court of Appeal gave it as an example of an instance where "pure economic loss may be recovered where there is no physical damage." (para. 47 of *British Columbia v. R.B.O. Architectural Inc.*, [1994] CarswellBC 316 (B.C.C.A.).

[156] In *Bondy, supra*, in a passage quoted above, Brockenshire, J. referred in para. 12 to Linden's Canadian Tort Law where Linden, J.A.:

> ... argues that the fact that the court in Winnipeg Condominium did not deal with Junior Books ... could mean that Junior Books, which permitted an economic loss claim for poor workmanship without restriction, is 'alive in Canada'.

[157] Even in *Murphy, supra*, relied upon by the Ameron defendants, it was not specifically over-ruled. At p. 930, Lord Bridge said:

> There may, of course, be situations where, even in the absence of contract, there is a special relationship of proximity between builder and building owner which is sufficiently akin to contract to introduce the element of reliance so that the scope of the duty of care owed by the builder to the owner is wide enough to embrace

> purely economic loss. The decision in J*unior Books Ltd v. Veitchi Co. Ltd* [1982] 3 All ER 201, [1983] 1 AC 520 can, I believe, only be understood on this basis.

[158] *Junior Books* has been referred to with some approval in Canada and the issue has not been squarely raised at the Supreme Court of Canada. The circumstances of the case were somewhat unusual in that the plaintiff was not a subsequent purchaser of the building with the defective floor but the very party for whom it was done, albeit by a sub-contractor with whom the plaintiff had no privity of contract.

[159] In those circumstances, there are obvious analogies to this case. There was no contract between the plaintiffs and the Ameron defendants but there are allegations in the statement of claim with respect to reliance which are similar to the reliance arguments in *Junior Books.* That raises the issue of proximity. It is not impossible that a court might conclude that there was the same degree of proximity, the closest thing to contract, in this case as in *Junior Books*.

[160] For all these reasons, I cannot conclude that an argument based on *Junior Books* is obviously unsustainable.

CONCLUSION

[161] The application is dismissed.

COSTS

[162] Cost shall be in the cause.

Hood, J.