Economic Negligence, Bruce Feldthusen, Toronto: Carswell, 1984. Pp. *xxvi*, 306. $52.00 (cloth).

Under the ambiguous title, *Economic Negligence*, Professor Feldthusen has written a comprehensive and generally readable monograph on the recovery of damages for pure economic loss. The project began as a dissertation toward a doctoral degree, and the manuscript reflects the requirements and traditions of that exercise in academic steeplechasing. Some of the chapters will be familiar to regular readers of the law reviews wherein some of the chapters have already appeared. The volume is amenable to review at two levels: firstly, as a contribution to the writing on theories of obligations; and secondly, as it represents the creative aspirations of the younger generation of legal academics.

The research ground chosen for the inquiry was the judgments of the superior courts of Australia, Canada, New Zealand, the United Kingdom and the United States. The author has segregated these jurisdictions, by approach, into two: the United States, whose attack on the problem of economic loss dates from the 1920's[1], and the Commonwealth, whose story herein dates only from 1963[2]. Despite the disparity in the periods of time in which the two theoretical jurisdictions have addressed the problem, Professor Feldthusen believes that "the principles which govern recovery for pure economic loss in the United States and in the Commonwealth are either identical or so similar that it is possible to speak meaningfully of a single body of common law rules."[3]

In order to understand fully the writer's thesis, it is important to appreciate three of his beliefs or prejudices which underpin his analysis. He feels that the law must admit of a hierarchy or calculus of harms in which physical injury or death must rank above pure economic loss. Accordingly, he is of the opinion that the rules developed for the former can not, and should not, be applied for determining the extent of recovery for economic loss. In addition, the writer is convinced that the costs of operation of our court system demand that it be viewed as a scarce resource to be managed properly and not to be squandered on the undeserving. Thus the victims of pure economic loss should be discouraged from approaching the courts when they might have taken measures, such as insurance, to otherwise protect their interests. In other words, it is preferable for society as a whole that such persons bear the expense of protection rather than use up costly and scarce adjudicatory resources in the pursuit of compensation. And lastly, Feldthusen is disturbed by the intuition that while formerly a plaintiff had to make a compelling case for liability, today there is a contrary and unstated presumption that the defendant must persuade the court of the reasons why he should not be liable for all foreseeable and unforeseeable losses.

To resolve the issue of who should and who should not be compensated

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[1] *Glanzer* v. *Shepard* (1922), 233 N.Y. 236, 135 N.E. 275 (C.A.).

[2] *Hedley Byrne & Co.* v. *Heller & Partners Ltd.*, [1964] A.C. 465; [1963] 2 all E.R. 575 (H.L.).

[3] Bruce Feldthusen, *Economic Negligence* (Toronto: Carswell, 1984) 3.

for pure economic loss, Feldthusen does not favour one single over-arching theory or monolithic principle. Rather, he prefers a fact-based classification of obligations after the manner of the tort texts of mid-19th century;[4] albeit the writer would welcome the final abrogation of the forms of action. Accordingly, he proposes specific rules for four categories of cases: (i) negligent misrepresentation, (ii) negligent misperformance of a service, (iii) negligent manufacture of products, and (iv) relational economic loss consequent on physical harm to a third party.

To begin with, after considering the problems posed by pre-contractual and post-contractual misrepresentations and the policies to be weighed in restricting potentially indeterminate loss, the author concludes: "the best rule is one which restricts the defendant's liability to losses suffered by a foreseeable plaintiff in a transaction in which the defendent intended or knew the recipient intended the advice or information to be employed."[5]

With regard to the negligent misperformance of a service, the writer examines direct and indirect undertakings together with contractually derived duties and the interrelationship of third parties. Feldthusen eschews a single sentence resolution of all of the cases, believing such an attempt to be premature, and instead is content to describe current practice. Thus liability is said to be imposed where (i) the defendant agrees to perform a specific service, (ii) the plaintiff relies on the fact of performance and (iii) the negligent misperformance injures the plaintiff. As before, this conclusion is unexceptionable.

The responsibility of the manufacturer of a defective product is examined in relation to both physical harm and economic loss. The author favours a rule whereby a plaintiff recovers for physical harm caused by a product, but is opposed to granting compensation to the purchaser of shoddy or non-dangerous products. At the same time, he would support recovery in respect of defective, dangerous products along with consequential losses even in the absence of physical harm. But he feels that there are sufficient protections in statutory schemes and other commercial mechanisms for those whose expectations are not met in regard to a particular product.

Lastly, the author reviews the law and theories of recovery of economic losses to third parties consequent on property damage, losses suffered by third parties following personal injury or death of another, and the present rules of both subrogation and exclusion of insurers in the areas of property damage and personal injuries. Feldthusen identifies the exclusionary rule operative in the property damages cases to be: "The recovery of pure economic loss will be precluded in negligence when it is consequent upon an injury to the person or property of a third party."[6] He argues for limited exceptions to be made on a functional analysis comprising the criteria: (i) will liability thereby attract an indefinite class, (ii) could the victims have otherwise protected their interests, and (iii) is the third party's economic claim in essence a claim for property damage and consequential loss?

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[4]C.G. Addison, *A Treatise on the Law of Torts* (London, 1860).

[5]*Supra*, footnote 3, at 136.

[6]*Ibid.*, at 210.

The writing on personal injury, wrongful death and the subrogation and exclusion of insurers is the least satisfactory portion of the text. The brief coverage and the hurried style suggests its addition as an afterthought. Overall, however, Professor Feldthusen's monograph is a valuable contribution to present-day thinking on theories of obligations. His arguments are well-researched and competently presented, although there are occasions when the doctoral thesis threatens to overwhelm the book. This results from a confusion between the differing purposes of an S.J.D. thesis and a monograph. The former is in essence a personal exercise whereby the writer proves to himself and to his peers that he has the capacity for research activity. On the other hand, a text provides the means by which an author communicates his ideas and conclusions to a wider readership free from the clutter of details of the research underpinnings. In this volume, there are parts of the text in which the cases are piled up one upon the other in quilt-like patterns held together by fine analysis of dicta and microscopic review of the facts of cases. This style is reminiscent of a sterile form of doctrinal writing which even the English, the masters of the art, have now left behind.

The writer is at his best when he is applying his functional approach to the trends observable in the decisions emanating from the various jurisdictions. Indeed, had the writer restricted the published volume, but not his thesis presentation, to a theoretical analysis, then it would have been both shorter and more accessible to his readers. As it stands, the text is something of an enigma. It is too informed to be easily digested by the students, it is too theoretical to be of immediate use to the practitioner, and it is not so strikingly original as to command the extended attention of the academic. What we have is a very modern book giving us an up-to-date statement of current wisdom;[7] but it does not take us further -- and that is the disappointment.

If one reads this volume as a contribution by one of our younger and more energetic academics, what does it tell us about the future of legal publishing? This reviewer has some concerns. As mentioned earlier, a considerable part of this book is almost passionately doctrinal and on occasion reads like 3" by 2" cards cleverly assembled. At the same time, many of the ideas pressed into use derive from American forms of analysis which are already dated. It would have been more exciting to have reviewed a book by one of our own scholars who had something original to say about how we should resolve our legal disputes in this jurisdiction in a non-derivative fashion. Nevertheless, this book meets the descriptive and analytical purposes set for it by its author.

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[7]For example, his statements on concurrency of actions are conclusive, *ibid.*, at 142-43.

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