



PURE ECONOMIC LOSS
- a talk for the 2013 IMC Liability
Conference

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- When can C recover pure economic losses from D?
- When might D's liability to pay pure economic losses to C be covered under various types of policy?



Preliminary question (1):
What is 'pure economic loss' ?

2 broad categories:

- Economic losses that arise from property damage, but which reflect more than simply the physical consequences of that damage
- Economic losses that have no physical damage or injury at their heart



Preliminary question (2):
Why make special rules limiting the recovery of
'pure economic loss' ?

To avoid the risk of creating

- an indeterminate liability
- to an indeterminate class
- for an indeterminate time



Legal liability for pure economic loss

Claims in Tort

- Negligence
- Nuisance
- Trespass
- Interference with rights
 - Intentional Torts

Claims in Contract

Claims for breach of statutory duty



Claims in Negligence (Part 1): Where property damage has occurred

The general rule





Two examples:

- Spartan Steel & Alloys Ltd v Martin [1973]
- Network Rail v Conarken Group [2011]



The 4 principles from Network Rail v Conarken:

- (1) Economic loss which flows directly and foreseeably from physical damage may be recoverable. The threshold test for foreseeability does not require D to have any detailed knowledge of C's business affairs or financial circumstances, provided that the general nature of C's loss is foreseeable
- (2) One of the recognised categories of recoverable economic loss is loss of income following physical damage to revenue-generating property
- (3) Loss of future business as a result of physical damage to property is a head of damage which lies on the outer fringe of recoverability. Whether or not C can recover for such economic loss depends on the circumstances of each case and the relationship between the parties
- (4) In choosing the appropriate measure of damages for the purpose of assessing recoverable economic loss, the court should seek to arrive at an assessment which is fair and reasonable as between C and D



Wrinkles to the General Rule:

(1) The Exclusionary Rule - where C does not own the damaged property

- Network Rail v Conarken 'reworked'
- Eller v Foot & Mouth Disease Research Institute [1966]
- D Pride & Partners v Institute for Animal Health [2009]



(1) The Exclusionary Rule - where C does not own the damaged property (cont)

- Ownership of legal title
 - Possessory title
 - Beneficial interest
 - Contractual interest



(2) Where there has been damage to the property itself

- Murphy v Brentwood [1991]
- Linklaters Business Services v McAlpine [2010]
- Bacardi-Martini v Thomas Hardy Packaging [2002]



Claims in Negligence (Part 2):
Where no property damage has occurred

- The general rule
- Development of the 'special relationship' exception to the general rule

Hedley Byrne v Heller [1963] - '... If someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise ...'



Exceptions to the General Rule:

Smith v Bush [1990]

Henderson v Merrett [1994]

Spring v Guardian Assurance [1994]

White v Jones [1995]

Williams v Natural Life Health Foods [1998]

Merrett v Babb [2001]

McKie v Swindon College [2011]



Exceptions to the General Rule (cont):

Distilling the broad principles applied by the Courts:

- the 3 stage test from *Caparo v Dickman* [1990]
 - the assumption of responsibility test



Claims other than in negligence

- Other tortious claims
- Claims for breach of statutory duty
- Claims for breach of contract - but beware claims where there may be concurrent contractual and tortious liability



Cover for pure economic loss under different policies

Key Factors

- the type of policy (e.g. cf PL & PII)
- the wording within the type of policy



Public liability & product liability policies

- 'Normal' interpretation: MJ Gleeson Group v AXA Corporate Solutions [2013]
- How different 'causal link' wording can change the scope of cover:

(1) '*... in respect of ...*' wording:

Tesco v Constable [2008]

AS Screenprint v British Reserve [1999]

(2) '*... on account of ...*' wording

Tioxide Europe v CGU [2004]



Exclusions

Omega Proteins v Aspen [2010]

- the wording: cover for '*damages ... arising out of or in connection with ... accidental loss of or damage to tangible property ... caused by the Product*'
- the Exclusion: no indemnity '*against any liability ... arising under any contract or agreement unless such liability would have attached in the absence of such contract or agreement*'.



Financial Loss Extensions

The Wording can/will

- Define the 'Financial Loss' to be covered
- Often specify whether the loss must result from the sale or supply of a product
 - Define the causal link, if any, that must exist, between the liability and the financial loss (e.g. '*in respect of*')
- Often define how the liability must/must not arise (e.g. in tort, not in contract)
 - May well contain exclusions



Conclusions

- When considering a claim by C against D:
 - + Does the claim involve an element of pure economic loss?
 - + If so, is the claim of a type where one might be able to argue that, as a matter of law, such losses are not recoverable?

- When drafting wording or considering an entitlement to indemnity under a policy in respect of a claim for pure economic loss
 - + Is the policy wording a type that one would expect to provide cover for pure economic loss?
 - + Does the scope of the wording in fact provide cover in respect of pure economic loss?
 - + Is there any explicit exclusion of an entitlement to indemnity in respect of pure economic loss?
 - + Is there any explicit Financial Extension clause - and if so, how wide are its terms?

- The Future?



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