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

Graeme McPherson QC
4 New Square
4th September 2013
• 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
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' working 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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