Economic Losses and Environmental Damage in the Law of Ship-Source Pollution

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Introduction

The treatment of economic loss within the common law system is notoriously difficult even though recent decisions have sought a more predictable judicial approach. This area of the law is not dealt with legislatively, meaning that law reform is left almost entirely to judges. Courts in civil law jurisdictions are generally less concerned with the legal dynamics of economic loss because economic loss is treated in much the same way as other forms of loss or damage suffered by claimants.1

The issue of compensability of economic losses is particularly prominent in the area of ship-source pollution, which remains fraught with contradictions and inconsistencies. This essay examines the issue of economic losses stemming from environmental damage in the context of the international conventions relating to ship-source pollution. It is contended that the imprecise definition of ‘pollution damage’ in the conventions fails to provide guidance on the compensability of economic losses. The absence of clarity has forced courts to resort to their domestic law principles to deal with economic losses, resulting in diverse judicial decisions. This is further compounded by what is referred to as ‘Fund jurisprudence’, which is defined and discussed further below.

This essay first provides a general overview of economic loss compensability. It then examines the implications of this compensability with respect to environmental damage through an analysis of the definition of ‘pollution damage’. The aim of this analysis is to propose changes to clarify under what circumstances economic losses in relation to environmental damage

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1 See infra, text under ‘Civil law jurisdiction’.
may be compensable under the international liability and compensation for ship-source pollution convention regimes, so that less room is available for judicial vagaries. The changes proposed are a refinement of the definition of 'pollution damage' for the purpose of clarifying this aspect of the law of ship-source pollution.

Compensation for Economic Loss

Economic loss as a legal concept resides in a field of conflicting values, particularly when considered within the economic analysis of law. Economic loss is characterized variously as including loss of profit, loss of revenue, loss of income, and loss of future income. From a legal standpoint, the expression 'financial loss' is perhaps a more appropriate term in the context of this essay. The rationale for this submission is that the connotation of 'economic' is more general whereas that of 'financial' is more specific being cast in tangible monetary terms. Indeed, 'economic loss' as a legal concept is, in essence, a financial loss suffered by one as a result of an actionable wrong committed by another whether as a positive act or an omission. In the sphere of economic losses associated with ship-source pollution, these types of losses may be suffered as a result of a pollution incident. The terms are used interchangeably in this essay to depict the same meaning as financial loss.

Recoverability of Economic Loss

The leading English case regarding economic loss is Hadley v. Baxendale in the context of contract law. In that case, the plaintiff lost profits as a result of the defendant’s delay in delivery of a mill shaft. The House of Lords held that the damage by way of lost profits was too remote and thus did not qualify as being consequential to the breach. The House of Lords decision in Hedley Byrne v. Heller and Partners, which considered economic loss caused by negligent misstatement was said by one commentator, Christopher Hill, to be “…precedent for a statement of law that there is no general

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3 (1854), 9 Exch. 341.