RECOVERY IN TORT FOR ECONOMIC LOSS

by Tony Weir

People whose day in the office is spent dealing with other people's money in order to make a pittance of their own must come to think that money is all-important. If so, they will be puzzled by the antipathy shown by our law of tort towards what it calls "mere" economic loss -- the attitude identified by Lord Oliver when he said "The infliction of physical injury to the person or property of another universally requires to be justified. The causing of economic loss does not."[1]

Yet the law's intuition is surely right. When one gets home from the office and finds that one's child has been injured and is in pain, one enters a different sphere of values altogether, and a higher one. It doubtless costs money to mend and tend the injured child, and an action may be brought for that money against the person responsible for injuring the child, but it is not *because* personal injury costs money -- lost income and extra expense -- that the law gives redress so readily. It is because it is a *human* harm, of a different order of seriousness from mere economic loss. It was accordingly a grim perversion of values when the Pearson Commission in 1976 recommended that no damages be recoverable for pain and suffering in the first three months after an injury; a minority, indeed -- economists, presumably -- actually wanted to abolish all recovery for non-economic loss. Did they think it was because pain costs money that their remit covered only personal injury? Again, the mid-Victorian courts got their value-judgments wrong when they perversely construed the Fatal Accidents Act as covering only the survivor's economic loss and not her grief, as if a husband and father was only a source of funds, not an object of love; only recently has this been righted, and grudgingly at that, by the allowance of "bereavement damages", stuck at £7,500.

The *dramatis personae* of the law includes legal as well as natural persons, companies as well as human beings. To companies it must be an irritation that the law of tort is so ready to grant damages for personal injury, which they cannot suffer, and slow to award damages for the loss they *can* suffer, namely economic loss, even when it is due to the disablement or death of a key

employee. Professional advisers, who must do their best for their corporate clients, might well say this: "Let it be agreed that human beings are more important than money; that does not explain (a) why the law of negligence protects *things* better than money, (b) why there is liability for *deliberately* causing economic loss by deceit or conspiracy or inducing breach of contract, but none for causing it *negligently,* or (c) why the law of *contract,* where liability may be strict, gives such generous protection to the money interests which the law of negligence disdains even where the defendant was at fault." Let us consider these points in order.

(a) Things certainly occupy the middle ground between people and wealth, having the physicality of the former and the economic significance of the latter. So the question is "Why give better protection to the things I have bought than to the money I could buy another thing with?" One answer lies in folk wisdom, too often denied by lawyers: a bird in the hand is worth two in the bush, the actual is preferable to the virtual, contrary to Vanbrugh's ironic observation that "The want of a thing is perplexing enough, but the possession of it is intolerable." But there are other answers. The first is that conduct which damages a thing could well have damaged an individual instead: the soft machine driving the car is even more vulnerable than the hard one he is driving. One way, therefore, of deterring people from conduct which could damage their fellow-citizens is to make them liable even though, by good fortune, they damage only property. Laymen have a word specific to conduct which creates a risk of harm *provided that the harm is physical*: that word is "**dangerous**". "Safety first" is a slogan worth pondering; it implies that other things come second, if that. Not all negligent conduct is dangerous: Heller and Partners did not act dangerously, did not imperil safety, when they gave a negligently misleading credit reference on one of the inquirer's customers. The holding that they were (in principle) liable was accordingly a large step for the law of tort, which has hardly regained its balance.[2]

A second reason for privileging physical property over mere wealth is that physical things can have appeal to human beings, themselves

physical. To a company, definitionally insensate, it is a matter of indifference whether property is damaged or a contract frustrated: both are just assets, items in the books. But take a great picture, a marvellous product of the human hand (and soul), designed to gratify the human eye (and soul). Is it not obscene to treat it as an investment? And what, at the other extreme, of the snapshot of Grandma's wedding? Things, being visible and tactile, are capable of appealing to the human senses in a way impossible for a share certificate or money in the bank. Even Shylock was less moved by the theft of his golden ducats than by the loss of the turquoise ring -- "I had it of Leah when I was a bachelor." The common law of tort has shown its good sense here, too: it is *possession* -- the physical relation between a person and a thing -- which it primarily protects, not *ownership,* which is the economic relationship instantiated by the absentee landlord.

It will be seen that only one of these reasons justifies giving the same protection to property whether it is the asset of a company or the possession of an individual. At present the common law makes no distinction. Perhaps it should. A good start has been made by the Directive on Product Liability, whereby the producer of a defective product is strictly liable for damage to property only if it is "(a) ...ordinarily intended for private use, occupation or consumption; and (b) intended by the person suffering the loss or damage mainly for his own private use, occupation or consumption," as our Consumer Protection Act 1987 rather prosaically puts it. Another hopeful straw in the wind is ***The Nicholas H*** , where the House of Lords denied liability for negligently causing the loss of an insured cargo of an especially charmless nature, "worth" over $5 m.[3]

(b) The distinction between the deliberate and the negligent causing of harm is not difficult to justify: wickedness is worse than incompetence. The motto "Bad people pay more" is woven through the tapestry of the law. In the case of economic harm one must be really bad. Under our present law one is quite entitled to cause economic harm to another provided one neither uses *unlawful* means

oneself nor procures another to do so. Unreasonableness is not enough. Competition need not be fair. Quite right, too; vulnerability to economic harm is entailed in freedom of action in the economic sphere. Of course, no one is saying that economic harm is not *harm*, only that it is harm of a lesser variety, not deserving of protection against merely negligent behaviour, especially not now that, in the interests of protecting individuals from personal injury, an increasing range of conduct is held to be negligent.

(c) But then, if wickedness makes all the difference in the law of tort, otherwise so unaccommodating to those complaining of economic harm, why is such harm meat and drink to the law of contract where the defendant need not be at fault in the slightest? Here again there are answers. Contracts involve cooperation and mutuality: both parties are in it for their advantage; the service one renders is paid for (at any rate in the common law, with its happy requirement of consideration); you owe more to a partner than to a stranger, and to a contributor than to a free-rider. Furthermore, the ambit of liability is limited, since only the contractor can sue (thanks to our happy doctrine of privity). There is therefore both an equitable and a practical justification for treating economic loss as compensable when the party you paid to do something for you fails to do it or does it badly.

Contract liability is thus self-contained. When Lord Devlin in ***Hedley Byrne*** decided to "settle the matter so that the presence or absence of consideration makes no difference"[4] he abandoned that containment, since for us "no consideration" means "no contract" and "no contract" means liability, if any, in tort. The question then was how to contain this novel liability in tort for pure economic loss negligently caused. Indeed, most commentators explain judicial hesitancy in this area not on the ground given above, that purely economic loss is less serious in its nature than physical harm, but on the practical ground that liability for causing it is difficult to contain, and that, if not contained, it is apt to escape and do harm like something out of ***Rylands v. Fletcher***. A restrictive device is needed. Foreseeability, so helpful in cases of physical harm, is quite inadequate here. It is perfectly foreseeable that if you carelessly overturn your truck on the motorway, as someone seems to do

every workday morning without exception, those behind you will suffer financially, by missing their meeting in Stockport or their appointment in Samara. Of course they can't sue. What our courts have done hitherto is to insist on a "special relationship" between the parties -- originally direct communication -- and an "assumption of responsibility" on the part of the defendant. Actionable conduct by the defendant has recently been extended from speech to action, and from action to inaction: silence next, one supposes, and liability for negligent non-disclosure! In the upshot, not only has every negligent breach of contract become a tort as well (***Henderson v. Merrett Syndicates***[5] -- so as to give a solatium to names shocked to find that insurance involved risks and not just profits on capital not paid out) but we have even seen a "principle" enunciated that anyone taking on a task is liable to anyone he should have realised might be impoverished if he didn't do it properly (including not doing it at all). This, from Lord Browne-Wilkinson in ***White v. Jones*** (the case where disappointed legatees sued the decedent's negligent solicitor)[6], would, if authoritative, which it is not[7],settle the matter so that the presence or absence of privity makes no difference either. More seriously it would abolish the distinction between physical harm and purely economic harm. This is utterly impractical.

It is also in conflict with established law. There is impregnable authority that the defendant who causes personal injury is liable only to that person, not to the relative who gives up a job to look after the victim, and that the defendant who damages property is liable only to its possessor and owner, not to its insurer, charterer or purchaser at risk. It is established, too, that the careless manufacturer or builder is not liable to the disappointed ultimate purchaser for his economic loss. The device for these holdings is to deny that any "duty to take care" exists, so that there is no liability for carelessly causing that kind of damage. That was done in the case where a shareholder received a misleading annual report from a sloppy auditor and made a disastrously successful take-over bid in reliance on its truth[8]. It must, however, be said, that in the present situation the outcome of cases is difficult to predict. That tends to be the result of abandoning bright lines.

English law has its peculiarities, but its reluctance to award compensation for merely economic loss negligently caused outside relationships akin to contract is not one of them. In Germany damage negligently caused is

compensable only if it results from an invasion of a protected right. Such rights are listed in §823 BGB. They include life, body, health and ownership and other absolute rights, but not contract rights, however valuable, much less one's wealth or expectations. The Reichsgericht did make the mistake of adding to the list of rights the "right to an established and operative business", but not the mistake of expanding it to any extent, so it is trite law in Germany that there is no recovery in tort for pure economic loss.

The German position is all the more striking because when their Code was being drafted their jurists and judges were fully familiar with the French *Code civil,* which had been in force in the Rhineland for most of the century. The French code draws no distinction between the different kinds of damage. Nor do French jurists distinguish physical from intangible harm. Instead they distinguish between *dommage moral* and *dommage matériel.* The former covers pain and suffering, grief, dishonour and other human afflictions incomprehensible to economists, and the latter (which was cunningly used by Lord Wilberforce in *Anns* so as to delude the unwary)[9] all harm of a pecuniary order, whether it be the economic aspects of personal injury or property damage or what over here we call pure economic harm. One might be tempted to say that France proves the irrelevance of the distinction we draw. Not so. First, the French do distinguish between physical harm and other economic harm, but do it in a covert manner. Alongside the basic article which imposes liability for all damage due to faulty conduct there is another article which, as reinterpreted in 1931, imposes liability regardless of fault for damage done by *things* under one's control. Now what kind of damage is done by physical things, one may ask. The answer is: physical damage. So the distinction is there, though it is used to distinguish cases where fault is required from those where it is not, whereas our distinction separates cases where negligence is enough from those where it is not. Secondly, where the harm is purely economic rather than physical, the lower courts in France, which have considerable control over the question of causation, are much more apt to deny that the harm is the "direct" effect of the defendant's conduct. Thirdly, other countries familiar with the French experience are unimpressed by it, and refuse to follow suit. Not just Germany, but also Italy and Switzerland, where, although the codes are silent on the point, the courts hold that the harm must result from the invasion of an absolute right, such as body and ownership. In this matter, as in so many, French law is the odd one out.

Another peculiarity of French law is that contractors cannot sue each other in tort. Elsewhere the rule is otherwise, but throughout the continent liability in contract is more widespread than with us, since nowhere else do the constraints of consideration and privity apply. The French accordingly (who have not yet implemented the Directive) hold the manufacturer of a defective product strictly liable for the economic harm it causes to an ultimate purchaser, and do it in contract, in a way unwelcome to the Luxembourg Court.[10] Germany does not do that, but alongside its text which allows third-party beneficiaries to sue for performance of a contract is a doctrine which allows third-party victims of misperformance to claim damages for breach. This doctrine was originally available only to victims of personal injury and property damage, but it has now, rather hesitantly, been extended to include those who suffer merely economic loss.

The resulting position is actually not very different from our own, now that ***Hedley Byrne***[11] has developed into ***White v. Jones***[12]. The techniques are different -- they expanded their contract law, we our law of tort, in each case in a semi-controlled manner -- but the results are very comparable. In particular, it remains the case that in situations which are not even arguably contractual, liability in tort for pure economic loss caused by negligence is very restricted in most countries; in all of them it is imposed less readily than liability for physical harm due to dangerous conduct.

A final note. Insurers have less reason than anyone else to complain of the law's reluctance to award compensation for economic loss. It is true that they have no tort claim of their own when they have to pay out as a result of the negligent conduct of a third party which triggers the insured event, but thanks to the intervention of "equitable" doctrines, they are actually the **only** persons in England, apart from dependants under the Fatal Accidents Act, who can claim in respect of money loss resulting to them from the conduct of a person which is tortious in relation to some one else. For property insurers this is done by the doctrine of subrogation, for liability insurers that doctrine in conjunction with the doctrine of contribution. There is a good deal to be said for the abolition of both these anomalous rights of recovery. But this is perhaps not the place to say it.

Tony Weir
Trinity College Cambridge

Notes

1. ***Murphy v Brentwood D.C.*** (1990) 2 All E.R. 908, 934.

2. ***Hedley Byrne v Heller and Partners*** (1963) 2 All E.R. 575.

3. (1995) 3 All E.R. 307.

4. (1963) 2 All E.R. 575, 612.

5. (1994) 3 All E.R. 506.

6. (1995) 1 All E.R. 691.

7. As will be seen when the decision of the High Court of Australia in ***Hill v Van Erp*** of 18 March 1997 is published. With one dissent it upholds the result in ***White v Jones*** but, unanimously disavows the supporting reasons of Lord Browne-Wilkinson.

8. ***Caparo Industries v Dickman*** (1990) 1 All E.R. 568.

9. ***Anns v Merton L.B.C.*** (1997) 2 All E.R. 492, 505.

10. ***Jakob Handte v Traitements mecanochiniques*** (Case C 26/91), ***The Times*** 19 Aug. 1992.

11. Above n. 2.

12. Above n. 6.