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NOTES

RECOVERY OF ECONOMIC LOSS ABSENT PHYSICAL DAMAGE TO A PROPRIETARY INTEREST: DOES TESTBANK DIM THE BRIGHT-LINE?

In July of 1980, the M/V Testbank collided with the M/V Seadaniel in the Mississippi River Gulf Outlet. Containers of highly toxic chemicals[1] carried by the Testbank were lost overboard and federal authorities closed off a large area of the outlet and surrounding waterways to navigation and fishing for a period of twenty days. Lawsuits were filed against the vessel owners by shipping interests who lost profits and incurred expenses because of delays, and by various commercial businesses who suffered a loss of trade because of the closure. These businesses included marine and boat rental operators, wholesale and retail seafood enterprises not engaged in fishing, seafood restaurants, tackle and bait shops, and commercial and recreational fishermen. Liability was asserted on various theories of maritime tort, private actions pursuant to the laws of the United States and the laws of the state of Louisiana. Defendants sought summary judgment as to all claims of economic loss unaccompanied by actual physical damage.

The United States District Court for the Eastern District of Louisiana granted the motion against all plaintiffs except commercial fisherman, oystermen, crabbers, and shrimpers who routinely operated in the embargoed waterways. The court based its holding on the favored status traditionally enjoyed by seamen in admiralty and stated that "their economic interests require the fullest possible legal protection."[2] A panel of the Fifth Circuit Court of Appeals affirmed basing its conclusion on the precedent established in *Robins Dry Dock v. Flint*,[3] that a plaintiff could not recover economic losses where no physical injury to a proprietary interest had been sustained.[4] The Fifth Circuit *en banc* re-

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1. The Testbank was carrying twelve tons of pentaclorophenol (PCP), assertedly the largest such spill in United States history. Louisiana ex rel. Guste v. M/V Testbank, 752 F.2d 1019, 1029 (5th Cir. 1985).

2. Louisiana ex rel. Guste v. M/V Testbank, 524 F.Supp 1170, 1173 (E.D. La. 1981). See Carbone v. Ursich, 209 F.2d 178 (9th Cir. 1953) (the right of fishermen to recover their share of the prospective catch is a manifestation of the principle that seamen are the favorites of admiralty).

3. Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303, 48 S. Ct. 134 (1927).

4. Louisiana ex rel. Guste v. M/V Testbank, 728 F.2d 748 (5th Cir. 1984).

examined the prerequisite of physical damage to a proprietary interest and affirmed its commitment to the limitation on recovery as developed by the *Robins* doctrine. It is notable, however, that the court struggled in making its decision to reaffirm the bright-line rule of *Robins*, as evidenced by three separate concurring opinions, two of which suggest that the *Robins* line might not be so bright, and by two strong dissents, one of which pegs *Robins* as the "Tar Baby of tort law."[5] *Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019 (5th Cir. 1985).

While the *Robins* rule relieves a tortfeasor from potentially ruinous, unlimited liability[6] and recognizes limits on the adjudicatory ability of courts, the rule also has the negative aspects of unfairness, arbitrariness, and mechanical application which are associated with any bright-line rule. This casenote will explore the difficulties encountered by courts in developing and applying tests to determine which claims will be satisfied when economic losses are incurred absent physical damage to a proprietary interest in a maritime setting. Additionally, it will suggest some functional inquiries, based on policy issues, which may serve as a guide in making this determination, and which appear to be factors considered by the court regardless of the specific test or rule employed.

In *Robins*, a ship owner placed his vessel in drydock for repairs which were delayed because the drydock negligently damaged the ship's propeller. The owner compromised his claim against the shipyard while the charterer of the ship sued for profits lost as a result of the ship's unavailability on the charter date. The United States Supreme Court denied recovery stating that the time-charterer was without any proprietary interest in the vessel and, as such, it could not recover economic losses sustained based on the drydock's unintentional interference with the charterer's contract. The rule applied by the Court in *Robins* has become a well-established principle of law which limits a plaintiff's recovery of foreseeable damages by precluding recovery for economic loss absent physical damage or personal injury. As explained by one commentator, "The explanation . . . is a pragmatic one: the physical consequences of negligence usually have been limited, but the indirect economic repercussions of negligence may be far wider, indeed virtually open-ended."[8]

In *Testbank*, plaintiffs sought to categorize the tort in *Robins* as a species of interference with contract and to limit its applicability to losses suffered for inability to perform contracts between the party

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5. 752 F.2d at 1035.

6. PPG Indus., Inc. v. Bean Dredging Corp., 419 So. 2d 23 (La. App. 3d Cir. 1982).

7. 275 U.S. 303-04, 48 S. Ct. 134.

8. James, Limitations on Liability For Economic Loss Caused by Negligence: A Pragmatic Appraisal, 25 Vand. L. Rev. 43, 45 (1972).

claiming injury and others.[9] The court, however, found that the scope of *Robins* was much broader and stated: "If a time charterer's relationship to its negligently injured vessel is too remote, other claimants without even the connection of a contract are even more remote."[10] The dissent[11] stated that *Robins* "provides an overly restrictive bar on recovery" and that "[t]hese plaintiffs do not need to rely on a contract to link them to the tort: The collision proximately caused their losses, and those losses were foreseeable."[12]

The majority was supported by several cases in which the Fifth Circuit had denied recovery for economic loss absent physical damage.[13] In *Louisville and Nashville R.R. v. M/V Bayou Lacombe*,[14] the plaintiff had a contractual right to use a bridge which defendant negligently damaged. The court found that the plaintiff's right of use did not constitute a proprietary interest sufficient to support recovery under the *Robins* rule.[15]

The cases which the plaintiffs in *Testbank* relied upon were discussed by the majority in support of its conclusion; however, these cases employed various legal theories and are only arguably compatible with *Testbank*. Plaintiffs argued that *Kinsman Transit Co. v. Buffalo*[16] and *Union Oil Co. v. Oppen*[17] supported a departure from the *Robins* doctrine. *Kinsman* was the outgrowth of a disaster on the Buffalo River which resulted in a two-month disruption of river traffic.[18] Plaintiffs were suppliers of grain who incurred additional expenses in fulfilling their contracts as a result of the mishap. The court dismissed the claims on the basis that these damages were too remote and unforeseeable rather than on the negligent interference with contract theory which automatically classifies this type of economic injury as unforeseeable,[19] thus unrecoverable. The majority in *Testbank* found, despite the *Kinsman*

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9. 752 F.2d at 1023.

10. Id.

11. All references are to Judge Wisdom's dissent, Id. at 1035.

12. Id. at 1040.

13. Kaiser Aluminum & Chem. Corp. v. Marshland Dredging Co., 455 F.2d 957 (5th Cir. 1972); Dick Meyers Towing Serv., Inc. v. United States, 577 F.2d 1023 (5th Cir. 1978), cert denied, 440 U.S. 908 (1979).

14. Louisville & N.R.R. v. M/V Bayou Lacombe, 597 F.2d 469 (5th Cir. 1979).

15. Id. at 473.

16. Kinsman Transit Co. v. Buffalo, 388 F.2d 821 (2d Cir. 1968).

17. Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974).

18. Kinsman Transit owned a ship which was improperly docked at Continental Grain Company's dock. The ship broke loose and crashed into another ship. Together the ships floated down the river and crashed into and collapsed the Michigan Avenue Bridge. The bridge was capable of being raised but the bridge crew failed to do so. The wreckage of the bridge and the two ships formed a dam and ice jam reaching three miles upstream.

19. 388 F.2d at 824.

court's departure from the *Robins* theory, that the limitation placed on foreseeability supported its rationale.[20] The dissent viewed *Kinsman* as contradictory to the majority opinion and concluded that "[t]he import of *Kinsman* was to establish foreseeability as the test for liability instead of the requirement of physical injury."[21] The dissent also argued that the *Kinsman* approach involved a case-by-case analysis rather than the blanket bar of *Robins*.[22]

The majority similarly dispensed with the alternate method of analysis adopted in *Union Oil Co. v. Oppen*. In this case commercial fisherman sued Union Oil for lost profits sustained from a reduction in fishing potential caused by an oil spill. The *Union Oil* court found that the defendants owed a duty to the plaintiffs to refrain from negligent conduct in their drilling operations, which conduct reasonably and forseeably could have been anticipated to cause a diminution of the aquatic life in the area and thus cause injury to the plaintiffs' business.[23] Rather than emphasizing the foreseeability approach taken by the *Union Oil* court, the *Testbank* majority concentrated on the fact that the right of recovery was limited to commercial fisherman and that it was not available to others who may have suffered economic damage as a result of the oil spill.[24] As with *Kinsman*, the *Testbank* dissent viewed *Union Oil* as an exception to the *Robins* rule, and in contrast with the majority opinion, the dissent emphasized the employment of a foreseeability analysis in determining the question of liability.[25]

Both the majority and the dissent cited *PPG Industries Inc. v. Bean Dredging* in support of their conclusions. In *PPG*, a dredging contractor was sued for damaging a natural gas line which supplied plaintiff's plant with fuel. The Louisiana Supreme Court held that the plaintiff could not recover for its increased expense in obtaining fuel since the losses sustained were outside the scope of protection encompassed by the duty of care imposed on the defendant.[26] The *Testbank* majority cited *PPG* for the reason that it did not extend liability,[27] while the dissent emphasized the case because a duty risk analysis was applied

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20. *Testbank*, 752 F.2d at 1026.
21. Id. at 1042.
22. Id.
23. *Union Oil*, 501 F.2d at 568.
24. *Testbank*, 752 F.2d at 1026.
25. Id. at 1043.
26. PPG Indus., Inc. v. Bean Dredging Corp., 447 So. 2d 1058, 1061 (La. 1984). Under the Admiralty Extension Act, 46 U.S.C. § 740 (1983), admiralty law could have been applied in the case. Whether it was intentionally (as an attempt to circumvent the *Robins* doctrine) or accidently overlooked is unknown.
27. *Testbank*, 752 F.2d at 1028.

instead of the *Robins* rule which was rejected as "a mechanical approach to [an] unreasoned conclusion."[28]

The judicial efficiency that the *Robins* bright-line rule provides seems to be the majority's primary reason for maintaining the physical damage requirement. While conceding that the rule "has the virtue of predictability with the vice of creating results in cases at its edge that are said to be 'unjust' or 'unfair'," the court maintained that "[i]t operates as a rule of law and allows a court to adjudicate rather than manage."[29] Judge Gee stated in his concurrence that "the dispute-resolution systems of courts are poorly equipped to manage disasters of such magnitude and that we should be wary of adopting rules of decision which, as would that contended for by the dissent, encourage the drawing of their broader aspects before us."[30] The dissent contended that the *Robins* requirement of physical damage was contrary to traditional tort principles of foreseeability and proximate cause and advocated a case-by-case analysis which would shift the loss from innocent plaintiffs to negligent defendants. The dissent went on to say that its proposed inquiry "would be no different from our daily task of weighing such claims in other tort cases."[31]

Courts are often faced with the question of whether to create exceptions in order to accommodate special situations when a bright-line approach has been adopted as a rule of law. In *Testbank*, this tension is apparent in that the court had difficulty justifying recovery for the commercial fisherman while denying the claims of the other plaintiffs. While the majority subtly noted in footnote ten[32] of its opinion that the issue of liability to the commercial fishermen was not before the court, Judge Williams wrote a separate concurrence for the purpose of pointing out that the fishermen's claim would not have met the requirement of physical damage to a proprietary interest had it been before the court. He suggested that "the rule be stated with enough additional breadth to allow recovery for those who are damaged because they make their living out of a 'resource' of the water."[33] Judge Garwood, in his concurrence, was also cognizant of the problems caused by rigid application of a bright-line rule. In reference to the commercial fishermen's claim, he stated that "the physical harm or invasion requirement may not be inflexible or without exception, and that, in certain unusual instances, a relatively restrictive application of the public nuisance theory

28. PPG, 477 So. 2d at 1060.
29. *Testbank*, 752 F.2d at 1029.
30. Id. at 1032.
31. Id. at 1051-52.
32. Id. at 1027.
33. Id. at 1034.

of damage or invasion different in kind, rather than degree, or something analogous thereto, may be an appropriate substitute."[34]

The plaintiff in *Testbank* asserted public nuisance as an alternate theory of recovery based on defendant's interference with public rights which caused them to suffer "particular damage." However, the majority found that such recovery "is as difficult, if not more so, as determining which foreseeable damages are too remote to justify recovery in negligence."[35] The dissent viewed the public nuisance theory as a tool to limit liability for widely-suffered harm since recovery is restricted to those who are "particularly" damaged and denied to those who suffered more general harm.[36]

Prior to *Testbank*, the Fifth Circuit, in at least two maritime cases, granted recovery to plaintiffs who had not suffered physical damage to a proprietary interest. In *J. Ray McDermott & Co. v. SS Egero*,[37] plaintiff had contracted with Texaco to build a pipeline and had entered into a subcontract for certain excavation work needed to fulfill the primary contract. After defendant dropped anchor "near" the pipeline, it was necessary for McDermott to test the pipeline in order to assure Texaco that it had not been damaged. McDermott sued to recover delay damages including the additional sums it was required to pay the subcontractor for the time that its equipment was idle during the delay. This court stated, "*Robins* does not stand for the proposition that no one may recover damages suffered or liabilities incurred by virtue of a contract when a ship is tortiously detained. Certainly the ship owner may recover all damages proximately caused by another's tortious conduct with respect to his ship."[38] The Court noted that the case was not one where the subcontractor was suing for profits which could have been earned from the use of its equipment had it not been detained, rather, the court classified the case as one brought by the "owner" of the pipeline project for reimbursement of delay expenses.[39] This labeling of McDermott as the "owner" of the project is interesting in that McDermott clearly was not the owner of the detained equipment, and the pipeline, of which McDermott may have been regarded as "owner," was not physically damaged but merely delayed in construction. Under this rationale it seems that the vessels in *Testbank* would be entitled to recover additional demurrage and fuel expenses incurred from the closure of the waterways but would not be able to recover the earnings of a more profitable use foregone as a result of the delay.

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34. Id. at 1035.
35. Id. at 1030.
36. Id. at 1046.
37. J. Ray McDermott & Co. v. SS Egero, 453 F.2d 1202 (5th Cir. 1972).
38. Id. at 1204.
39. Id.

Similar costs were awarded to shippers in *In re Lyra Shipping Co.*,[40] where defendant's vessel blocked a canal. The court granted recovery to Cabot Corporation who had a contract with a shipping company to transport Cabot's cargo. The defendant's blockage of the canal prevented the shipper from making the necessary passage. While noting that the plaintiff corporation was not itself a user of the canal, the court found that it could recover from defendant any additional expenses owed to the shipping company and stated, "as between Cabot and Lyra Shipping it is the latter who should bear the cost of this surcharge."[41]

It is interesting that the first case interpreting *Testbank*'s re-affirmance of the *Robins* rule grants rather than denies recovery. In *Domar Ocean Transportation, Ltd. v. M/V Andrew Martin*,[42] plaintiff had chartered Cenac Towing Company's tug, Cindy Cenac to tow its barge, the Domar 7001. The defendant's tug, Andrew Martin, struck and damaged the Domar 7001 while the chartered tug, Cindy Cenac, sustained no physical damage. The defendant contested the fact that the district court's award to the plaintiff included the loss of the optimal use of the chartered tug which had not been physically damaged, but which earned less than it would have had it not been deprived of its tow, the Domar 7001. The Fifth Circuit concluded that the plaintiff had a sufficient proprietary interest in the barge and the chartered tug as an integrated unit to warrant granting recovery and stated: "*Testbank* is no bar to Domar's recovery for the loss of use of the unit."[43]

It is difficult to distinguish Domar's interest in the tug from the charterer's interest in the ship in *Robins*. One factor which may have influenced the court was the fact that in *Domar* the charter contract was in active operation at the time of the interference. This factor may become more significant when examined in reference to the policies it serves. Contractual relations are variable by their nature and one of the reasons courts may be reluctant to grant recovery for interference with these relations is the difficulty in determining whether the interference has in fact resulted from the negligent conduct.[44] However, where a contractual obligation or right is being actively performed and a negligent act disrupts its performance, the determination of the cause of the

40. In re Lyra Shipping Co., 360 F. Supp. 1188 (E.D. La. 1973).

41. Id. at 1192.

42. Domar Ocean Transp., Ltd. v. M/V Andrew Martin, 754 F.2d 616 (5th Cir. 1985).

43. Id. at 619. Another case interpreting *Testbank* stated that, "*Testbank* stands for the proposition that physical injury to one's own property is ordinarily *a* prerequisite to recovery in tort. *Testbank* does not say or imply that *Robin Dry Dock* is inapplicable to every case in which the plaintiff has suffered a physical injury . . . ." Cargill, Inc. v. Doxford & Sunderland, Ltd., No. 85-3486, slip op. at 2988 (5th Cir. filed Feb. 12, 1986).

44. Restatement (Second) of Tort § 766B Commentary at 20 (1977).

interference is readily apparent. In addition, in this type of situation the amount of damage is finite, not speculative.

For example, in *McDermott*, where the pipeline contractor was permitted to recover its delay expenses, the amount of recovery was limited by a "liquidated damages" clause which provided that McDermott would pay the subcontractor "$4,000 per day . . . for standby time in excess of the seven days."[45] Allowing recovery where the cost of the interference is limited and defined also diminishes the court's fear of imposing liability on a defendant engaged in useful activity which is out of proportion with the defendant's fault. In addition, in these situations involving a single plaintiff, the court is not faced with a class of endless claimants which would require expenditure of judicial resources and increased liability for the defendant. Neither of these factors were present in *Testbank*, where most of the plaintiff's claims were based solely on prospective contractual relations and profits, and where the class of plaintiffs was large.

Louisville & Nashville R.R. Co. v. M/V Bayou Lacombe also involved interference with the plaintiff's active exercise of its contractual right to use the bridge; however, a significant factor in the court's denial of recovery was the fact that the defendant had already paid the bridge owner for the physical damage to the bridge.[46] This decision reflects the underlying policy concern of imposing double liability on the tortfeasor.

This concern was also apparent in *Robins*, as noted by one commentator who suggested the policy issue behind the decision to be:

> [T]he reluctance of the Court to hold the tort-feasor liable, in addition to the physical damage to the vessel, for the value of *two* bargains. Under the contract with the owners, the charterers were excused from paying rent while the ship was laid up for repairs. This loss was included in the settlement between the defendants and the owners. Having made one good bargain, the tortfeasor is now asked to make good the still better bargain of the charterer.[47]

The same fear was addressed by the court in *Lyra*.[48] While the court granted recovery to Cabot Corporation for defendant's interference with its shipping contract, the court noted that had the shipping company sued Lyra, Cabot would not have incurred recoverable damages. But where the shipping company proceeded against plaintiff, it was placed in a position of an "equitable subrogee" to the shippers rights against

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45. *McDermott*, 453 F.2d at 1203.
46. *Bayou Lacombe*, 597 F.2d at 474.
47. F. Harper & F. James, The Law of Torts § 6.10 at 504 (1956).
48. See infra text accompanying note 40.

the defendant.[49] Thus it appears that in situations where the plaintiff is seeking to recover damages for which the defendant has already assumed its liability to another party, courts will dismiss the plaintiff's claim for recovery of the same loss.

In *Kinsman, PPG,* and *Union Oil,* where the courts rejected *Robins* in favor of a foreseeability, duty risk, and public nuisance[50] analysis respectively, the underlying policy issues seemed to be the determining factor in granting or denying the right of recovery. For example, in *Kinsman,* the court stated that it was foreseeable that the accident would cause the river to dam, the transportation of goods to be delayed, and expenses to be incurred; however, the court denied recovery and stated that "somewhere a point will be reached when courts will agree that the link has become too tenuous."[51] The link becomes too tenuous when the societal policies for shifting the risk to the defendant will not be served. While imposing liability on a party has the consequences of deterring negligent behavior and encouraging safety measures in the maritime industry, it is not desirable to deter behavior to the point of placing defendants who are engaged in useful activity out of business. In such cases it may be more economically efficient to leave the risk where it falls as imposing liability on the defendant may have the effect of granting double recovery to the plaintiff where the plaintiff has filtered the cost of the risk of economic losses through his business dealings. Also, as the majority in *Testbank* points out, it is not feasible to suggest that defendants should bear this risk through insurance, in that insurers are unlikely to protect risks that may result in unending "catastrophic" liability.[52]

In contrast, the policy issues behind *Testbank* and *Union Oil* seem to support recognizing the claims of commercial fishermen and imposing liability on the defendants. The public's strong disapproval of injuries to the environment and the desire to place high incentives to take proper care on businesses which pose a threat to the environment lessen the danger of over-deterrence through the imposition of liability.[53] Indeed, in such situations, the tortfeasor is in a better position than the commercial fishermen to know and therefore insure against the risks associated with his activities.

The policies served in *PPG* are less apparent than the previous cases. While Justice Lemmon stated that it was necessary to "consider the

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49. *Lyra,* 360 F. Supp. at 1192.

50. While a forseeability approach was the primary mode of analysis in Union Oil, the court noted that plaintiffs could also recover under a public nuisance approach. 501 F.2d at 570.

51. *Kinsman,* 388 F.2d at 824-25.

52. *Testbank,* 752 F.2d at 1029; James, supra note 8, at 52-55.

53. *Union Oil,* 501 F.2d at 569.

particular case in terms of the moral, social and economic values involved,"[54] he makes no specific reference as to what these values are other than the danger of extending liability "in an indeterminate amount for an indeterminate time to an indeterminate class."[55] The appellate court had discussed the possibility that in this case the plaintiff could have contracted with Texaco for the right to indemnity should the pipeline be damaged.[56] It seems that the court was concerned with imposing double liability on the defendant. This danger, however, could have been counter-balanced with policies in favor of recovery, in that the case involved only a single plaintiff and the amount of damages would have been relatively limited and defined. Justice Calogero criticized the decision and stated, "If PPG is to be denied its added fuel cost I can perceive no instance in which a non-owner of negligently damaged property may recover from a tortfeasor."[57] The primary significance of the case is the court's recognition of the plaintiff's right to have his case heard through the employment of a duty risk analysis rather than dismissed as dictated by *Robins*. However, in light of the decision, the utilization of a different theory does not seem to make a difference.

As the cases represent, the employment of a foreseeability, duty risk, or public nuisance mode of analysis does not necessarily mean that liability will be extended, just as the adoption of the *Robins* bright-line approach does not necessarily mean that a claim will be denied, for recovery has been denied in the former and granted in the latter. Emphasis is misplaced when the inquiry is narrowed to the question of which test properly fits the circumstances. A more functional inquiry would concentrate on which policies would be served by either granting or denying the right to recovery. Such inquiries would include: whether plaintiffs can be segregated from a class which suffered only a general harm from the negligent act, whether the amount of recovery is determinable and finite, the balancing of the desire to discourage negligent conduct with the danger of over-deterrence, whether the imposition of liability would be out of proportion with the defendant's negligence, the desire to avoid imposing double liability on the defendant, and the consideration of which party is in the better position to allocate the loss.

Tamara Dixon

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54. *PPG*, 447 So.2d at 1061.

55. Id. at 1061, citing Ultramares Corp. v. Touche, 255 N.Y. 170, 179, 174 N.E. 441, 444 (1931).

56. *PPG*, 419 So.2d at 24.

57. *PPG*, 447 So.2d at 1062.