Today’s Agenda

- What is pure economic loss and why is it important?
- Why are pure economic losses generally not recoverable?
- When is pure economic loss recoverable?
- The 5 categories of recoverable pure economic loss
- Tips for investigating/defending claims
Overview

- What is pure economic loss?
- Financial loss that is not causally consequent upon physical injury to the plaintiff’s own person or property
- Usually arises in the absence of any physical damage
Overview

- Distinguished from *consequential losses* flowing from physical damage or injury
- An example of consequential economic loss would be loss of income as a result of inability to work due to injuries suffered in an accident
Overview

- Historically, the law of tort did not permit recovery of pure economic loss.
- The general rule: absent a contractual relationship between the parties, economic losses can only be recovered if there has been physical damage to the Plaintiff or the Plaintiff’s property.
The Big Concern

- Tort law is concerned with preventing:

  “liability in an indeterminate amount, for an indeterminate time, to an indeterminate class”

_Ultramares Corporation v. Touche_ (1932)
Per Cardozo C.J.
The Big Concern

- As a result, the law developed a general rule that pure economic losses were not recoverable in tort.
- The concern being that if someone was liable for economic loss suffered by someone with whom they did not have a contractual relationship, this would raise the spectre of indeterminate liability in tort.
Overview

- The general exclusion of damages for pure economic losses has survived
- However, the Courts have carved out certain exceptions where pure economic losses can be recovered
- Canadian law now recognizes five categories of potentially recoverable economic loss
The Five Categories

1. Independent Liability of Public Statutory Authorities
2. Relational Economic Loss
3. Negligent Misrepresentation
4. Negligent Performance of a Service
5. Negligent Supply of Shoddy Goods or Structures
The Five Categories

- The list is not closed and other circumstances could give rise to the development of new categories.
- As a general rule, claimants will have to fit themselves into one of these five categories in order to succeed with their claim for pure economic loss.
Relational Economic Loss

- Relational economic loss is a financial loss caused as a result of the damage to the person or property of a third party.
- The plaintiff suffers economic loss by virtue of some connection with the injured third party or the damaged property.
Relational Economic Loss

- **CN Railway Co. v. Norsk (SCC 1992)**
- Norsk was towing a barge in heavy fog under a railway bridge in New Westminster
- The barge struck the bridge, causing damage and closure for several weeks
- The bridge was owned by Public Works Canada (PWC), but 4 railways used the bridge
Relational Economic Loss

- CN used the bridge pursuant to a contractual agreement with PWC
- CN was forced to divert trains during the repairs
- CN suffered no property damage
- CN sued Norsk to recover for the costs associated with diverting the trains
Relational Economic Loss

- Majority of the Court held Norsk owed a duty to CN, because CN and PWC were in a “joint venture” with respect to the operation of the bridge.

- Majority held CN’s operations were so closely allied to the operations of the bridge that sufficient proximity to find a duty was established.
Relational Economic Loss

- Since *Norsk*, the SCC has established that relational economic loss is only recoverable in certain narrow circumstances
- No successful claim under this category since 1997
Negligent Misrepresentation

- This is by far the most common category for recovery of damages for pure economic loss
- Often the basis of claims in negligence against professionals such as financial advisors, insurance brokers, or design professionals such as architects and engineers
Negligent Misrepresentation

What are the elements of the claim? Set out by the SCC in *Queen v. Cognos* (1993):

1. A duty of care exists based on a “special relationship”;
2. The representation was untrue, inaccurate or misleading;
3. The defendant acted negligently in making the representation;
Negligent Misrepresentation

4. The plaintiff reasonably relied on the representation; and,

5. The plaintiff’s reliance was detrimental in the sense that damages resulted

- Damages are usually calculated on the basis of putting the Plaintiff in the position she or he would have been, but for the negligent misstatement
Negligent Misrepresentation

Some examples:

- A geotechnical engineer makes a statement in a report concerning support of a structure which is not qualified with reference to any assumptions made about pre-loading soils.
- The site is not properly pre-loaded and as a result the foundation of the structure is damaged through settlement.
- The owner sues the engineer.
Negligent Misrepresentation

- An accountant errs in preparing financial accounts for a company
- An investor relies on the accounts to invest in the company, which subsequently goes bankrupt
- If the accounts had been properly prepared, the bankruptcy would have been predictable and the investor would not have invested and lost money
- The investor sues the accountant
Negligent Misrepresentation

- A firm of advertisers relies on statements made by a bank as to the creditworthiness of one of its customers in entering into a contract with that customer.
- After the customer goes bankrupt, the firm sues the bank.
- House of Lords recognized a cause of action for “negligent misstatement” based on an “assumption of responsibility” by Heller – it knew that its statements were going to be relied upon by Hedley Byrne.
- Thus there was a “special relationship” which justified imposing a duty of care.
Negligent Misrepresentation

*Edgeworth Construction v. ND Lea – A Cautionary Tale from the SCC*

- In 1977, ND Lea prepared geotechnical bid specs and drawings for construction of a highway near Revelstoke
- The Province incorporated these into its Invitation to Bid, which had a disclaimer clause that they were furnished for general information and were not warranted or guaranteed by the Province
Negligent Misrepresentation

- Edgeworth was awarded the project on the basis of its bid price of $6,985,000
- One small problem: it cost Edgeworth $21,692,000 to complete
- Overruns were largely caused by errors in ND Lea’s specs and drawings
- After change orders were paid, Edgeworth was still short $2,248,000 for delay costs and sued ND Lea (and the individual engineers who sealed the drawings)
Negligent Misrepresentation

- ND Lea and the engineers sought dismissal of the claim on the basis that Edgeworth was not their client.
- They also sought to shelter behind the disclaimer in the Invitation to Bid.
- ND Lea and the engineers were successful at the trial court and BC Court of Appeal. The SCC upheld the dismissal against the engineers, but not ND Lea.
Negligent Misrepresentation

- The SCC found ND Lea liable for Edgeworth’s economic losses
- ND Lea knew that bidders (a defined small group) would be relying upon its drawings and specs
- The wording of the disclaimer only released the Province from responsibility
Negligent Misrepresentation

- The individual engineers were not liable because the presence of their seals were only representations that they held their professional association’s qualifications.
- The individual engineer would only be liable if the bidders were relying on the individual’s design reputation (as opposed to the firm) and the designer knew of that reliance.
Negligent Performance of a Service

- Similar to negligent misrepresentation, but extends to circumstances where there may not have been actual reliance on the negligent act of the service provider.

- Where a person performs a professional service, in which it is ‘reasonably foreseeable’ that a third party might suffer damage if that service is performed negligently, the professional may owe a duty of care to that third party.
Negligent Performance of a Service

- Where someone engages a professional, the Courts are prepared to impose a duty of care because the defendant has voluntarily undertaken to perform a specific service.

- Defendant may also be liable to a third party (other than the party retaining him or her) where the third party was intended to be the beneficiary of the service.
Negligent Performance of a Service

Some examples:

- A lawyer fails to ensure that a will complies with the *Wills Act* and it is later declared invalid
- As a result, an intended beneficiary is deprived of an inheritance
- The beneficiary sues to recover the lost gift, even though she was not aware of it and had otherwise not relied on it
Negligent Performance of a Service

- A financial advisor acts for a client in purchasing mutual funds
- The consultant negligently fails to ensure that the client’s son is properly named the beneficiary of the fund, and the fund instead goes into the client’s estate
- The son sues the financial advisor for loss of a one-half share of the fund
Negligent Performance of a Service

- This is an area where design professionals, for example, might face exposure since a claim could conceivably succeed even where there is no reliance.
- At least one case in B.C. where a structural engineer was found liable for negligent performance of a service.
- This was despite the fact that the non-contracting party who sued the engineer did not rely on any representations made by him.
Negligent Supply of Shoddy Goods or Structures
Negligent Supply of Shoddy Goods or Structures

- Common law was that the cost of repairs resulting from a defective building were non-recoverable in tort as economic loss.
- The cost of the repairs did not arise from injury to persons or property, apart from the defective building itself.
Negligent Supply of Shoddy Goods or Structures


- Those who design or construct a building owe a duty not only to the person with whom they contract but to subsequent owners if it was reasonably foreseeable that a failure to take reasonable care in constructing the building would create a “real and substantial danger” to the health and safety of the occupants
Negligent Supply of Shoddy Goods or Structures

- Damages sought for repairs to building envelope after a section of cladding had fallen from the nine storey building, putting passersby at risk of injury
- No contractual relationship between defendant general contractor and plaintiff condominium corporation, so plaintiff had to sue in negligence
- Damages claimed were in the nature of pure economic loss because inherent building defects are not “damage to property”
Negligent Supply of Shoddy Goods or Structures

- SCC held that contractors owe a duty of care to subsequent purchasers if it is foreseeable that negligent construction would create defects posing a danger to the health and safety of occupants.

- Damages recoverable are limited to costs of repair to put the building into a non-dangerous state.
Negligent Supply of Shoddy Goods or Structures

- Concerns of indeterminate liability are limited because:
  - Duty only owed to present/future inhabitants
  - Duty only owed for the useful life of the building
  - Duty only extends to dangerous defects, not poor workmanship
  - Damages restricted to cost to return building to a non-dangerous state
Negligent Supply of Shoddy Goods or Structures

- What have the Courts recognized as “dangerous defects”?
  - Gas pipelines liable to fracture due to manufacture from defective resin
  - Improperly built septic system that polluted a water source when it failed
  - Structurally inadequate steel joists
  - Leaks that would lead to the structural failure of the building
Negligent Supply of Shoddy Goods or Structures

- Some defects that the Courts have found to be insufficiently “dangerous” include:
  - A fireproofing material containing a quantity of asbestos that had not been shown to pose risk to people
  - A cedar roof requiring replacement earlier than it should
  - Electrical transformers that had a propensity to overheat
Negligent Supply of Shoddy Goods or Structures

M. Hasegawa & Co. Ltd. v. Pepsi Bottling Group (Canada), Co. (2002 BCCA)

- Case involving shoddy goods
- Hasegawa purchased 1.2 million bottles of water from Aqua 1 for sale in Japan (contractual relationship)
- The water contained mould flocs and it sought to recover damages from the bottler of the water, Pepsi (no contractual relationship)
Negligent Supply of Shoddy Goods or Structures

- Mould was caused due to Pepsi’s failure to sterilize the bottle caps.
- Japanese authorities prohibited the sale of the water to consumers.
- Hasegawa suffered a loss of $1.5 million after it destroyed the bottled water.
- What was Hasegawa to do? There was no proof that the water posed a health risk and in fact, Hasegawa tried to sell the water to consumers outside of Japan.
Negligent Supply of Shoddy Goods or Structures

- Hasegawa argued that the "real and substantial" danger test from *Winnipeg Condo* should be less strict in pure economic loss cases involving food products.

- It argued the social merit in a legal policy that encourages "the condemnation of any contaminated food product which is perceived to threaten health."

- The Court disagreed and held that the law of contract and sale of goods already allocated risk for goods of poor quality and that tort law should not interfere.
Tips for Investigating/Defending Claims for Pure Economic Loss

- Courts remain reluctant to find claims that open up new categories of potential recovery.
- Review the 5 categories to see if the claim fits squarely within same.
- Information regarding the relationship between the parties will be key, as an analysis of foreseeability and proximity will be necessary.
Tips for Investigating/Defending Claims for Pure Economic Loss

- Review terms of contracts between the defendant and other parties as this may be relevant to the question of proximity.

- Many engineering documents will have clauses stating that the work is not intended to be relied upon by anyone other than the client.
Conclusion

- Claims that seem significant on their face may in fact be unrecoverable by the claimant.
- It is important to determine early in the life of the claim whether there is a pure economic loss defence.
- Defendants (and their insurers) can still take heart from the fact that, apart from negligent misrepresentation, it will likely be very difficult to recover pure economic losses.
Thank you!

These materials are necessarily of a general nature and do not take into consideration any specific matter, client or fact pattern.

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