

No. 27376 -- Richard Aikens and Motel 81, Inc., d/b/a Martinsburg Econo-Lodge v. Robert Debow and Craig Paving, Inc.

FILED

Starcher, J., concurring:

January 16, 2001
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RELEASED

January 17, 2001
RORY L. PERRY II, CLERK
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The majority opinion demonstrates a classic struggle in the development of the common law: the battle between crafting remedies for people or businesses that are injured -- even people or businesses injured in a purely economic sense -- as a direct and proximate cause of a tortfeasor's carelessness, and protecting litigants from random, unpredictable liability without limit.

I applaud the majority opinion's bold step forward, and its recognition that a tortfeasor may owe a certain, clearly foreseeable party a duty of due care to avoid causing "an interruption in commerce" which results in purely economic loss. I write separately to emphasize that this Court is not in a position to predict every situation where a tortfeasor's actions may have an adverse effect on a party's economic interests, a party with a "sufficiently close nexus or relationship" to the tortfeasor such that the tortfeasor's actions may form the basis for liability. In applying the Court's ruling to such situations in the future, circuit courts must use the existing concepts of legal duty, breach of that duty, and proximate causation to allow plaintiffs a remedy for their economic losses, while protecting defendants from tort liability almost without limit.

In the common law, it is widely recognized that the concept of "duty" is a flexible principle that is dependent upon circumstances. As we stated over a century ago, "[n]egligence is the violation of the duty of taking care under the given circumstances. It is not absolute, but is always relative to some

circumstances of time, place, manner or person.” Syllabus Point 1, *Dicken v. Liverpool Salt & Coal Co.*, 41 W.Va. 511, 23 S.E. 582 (1895). We established a broad test for circuit courts to use in determining whether a defendant owed a plaintiff a duty in Syllabus Point 3 of *Sewell v. Gregory*, 179 W.Va. 585, 371 S.E.2d 82 (1988) where we stated:

The ultimate test of the existence of a duty to use care is found in the foreseeability that harm may result if it is not exercised. The test is, would the ordinary man in the defendant’s position, knowing what he knew or should have known, anticipate that harm of the general nature of that suffered was likely to result?

The fundamental reasoning behind this test is that a defendant’s “liability to make reparation for an injury, by negligence, is founded upon an original moral duty, enjoined upon every person, so to conduct himself, or exercise his own rights, as not to injure another.” Syllabus Point 8, *Blaine v. Chesapeake & O.R.R. Co.*, 9 W.Va. 252 (1876).

The defendants in the instant case argued that *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927) and its progeny form the basis for a black-letter rule of law regarding a defendant’s duty that is absolute: no plaintiff may recover for purely economic losses caused by the defendant in the absence of proof of a physical injury or property damage. Phrased another way, a defendant can arbitrarily wreak economic havoc and impose severe economic losses upon another party with impunity, so long as that other party isn’t physically injured or doesn’t sustain property damage. The defendants insist that we are bound to apply this unchangeable common law “rule” in this case. As the majority opinion makes clear, this Court disagrees with this proposition.

Commentators¹ point to the numerous instances where plaintiffs have -- contrary to *Robins Dry Dock* and its progeny -- been allowed to recover for purely economic losses in the absence of proof of a physical injury or property damage. The majority opinion lists numerous exceptions to the “absolute” rule suggested by the defendants, where courts have permitted plaintiffs to recover economic losses proximately caused by a tortfeasor’s carelessness, all in the absence of physical injury or property damage. *See supra*, ___ W.Va. at ___ fn. 8-15, ___ S.E.2d at ___ fn. 8-15 (Slip Op. at 30-32 fn. 8-15). As one court pointedly stated in rejecting notions of the existence of an unchanging, absolute common law rule, “[t]hese exceptions expose the hopeless artificiality of the per se rule against recovery for purely economic losses.” *People Express Airlines, Inc. v. Consolidated Rail Corp.*, 100 N.J. 246, 261, 495 A.2d 107, 115 (1985).

¹*See, e.g.*, Eileen Silverstein, “On Recovery In Tort for Pure Economic Loss,” 32 U.Mich.J.L.Ref. 403 (1999); Herbert Bernstein, “Civil Liability for Pure Economic Loss Under American Tort Law,” 46 Am.J.Comp.L. 111 (1998); Matthew S. Steffey, “Negligence, Contract, and Architects’ Liability for Economic Loss,” 82 Ky.L.J. 659 (1994); Michael D. Lieder, “Constructing a New Action for Negligent Infliction of Economic Loss: Building on Cardozo and Coase,” 66 Wash.L.Rev. 937 (1991); Pegeen Mulhern, “Marine Pollution, Fishers, and the Pillars of the Land: A Tort Recovery Standard for Pure Economic Losses,” 18 B.C.Env.Aff.L.Rev. 85 (1990); Ann O’Brien, “Limited Recovery Rule as a Dam: Preventing a Flood of Litigation for Negligent Infliction of Pure Economic Loss,” 31 Ariz.L.Rev. 959 (1989); Kelly M. Hnatt, “Purely Economic Loss: A Standard for Recovery,” 73 Iowa L.Rev. 1181 (1988); Robert L. Rabin, “Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment,” 37 Stan.L.Rev. 1513 (1985); Comment, “Negligent Interference with Contract: Knowledge As a Standard for Recovery,” 63 Va.L.Rev. 813 (1977); Case Note, “Torts -- Interference with Business or Occupation -- Commercial Fishermen Can Recover Profits Lost as a Result of Negligently Caused Oil Spill,” 88 Harv.L.Rev. 444 (1974); Harvey, “Economic Losses and Negligence, the Search for a Just Solution,” 50 Can.Bar.Rev. 580 (1972); Roger B. Godwin, “Negligent Interference with Economic Expectancy: The Case for Recovery,” 16 Stan.L.Rev. 664 (1964); Comment, “Foreseeability of Third Party Economic Injuries -- A Problem in Analysis,” 20 U.Chi.L.Rev. 283 (1953). For an early article suggesting the need for reassessing the “no-liability” approach, *see* Charles E. Carpenter, “Interference with Contractual Relations,” 41 Harv.L.Rev. 728 (1928).

When courts have resisted allowing plaintiffs to recover for negligently caused, but purely economic, losses, the courts have expressed concern about the judicial system being subjected to “administrative overload – the opening of the ubiquitous ‘floodgates’ to massive litigation.” Ann O’Brien, “Limited Recovery Rule as a Dam: Preventing a Flood of Litigation for Negligent Infliction of Pure Economic Loss,” 31 Ariz.L.Rev. 959, 966 (1989).

Commentators, however, point out that courts have allowed the grounds of liability to expand in every other area of tort law “despite the now commonplace awards of huge, unknowable sums in claims involving physical injuries.” Eileen Silverstein, “On Recovery in Tort for Pure Economic Loss,” 32 U.Mich.J.L.Ref. 403, 409 (1999). “As compared to awards for pain and suffering, the loss from economic injury is provable, not subjective or speculative.” *Id* at 423.² As one court stated in holding that

²One commentator states:

A favorite illustration of the need to limit liability by not compensating pure economic injury is Judge Kaufman’s 1968 hypothetical [from *Kinsman Transit Co. v. City of Buffalo*, 388 F.2d 821, 825 n.8 (2d Cir. 1968)] of the unlucky motorist whose inadvertence causes an accident that shuts down the Brooklyn Battery Tunnel during rush hour:

A driver who negligently caused such an accident would certainly be held accountable to those physically injured in the crash. But we doubt that damages would be recoverable against the negligent driver in favor of truckers or contract carriers who suffered provable losses because of the delay or to the wage earner who was forced to “clock in” an hour late. And yet it was surely foreseeable that among the many [thousands] who would be delayed would be truckers and wage earners.

Many readers may find themselves mentally nodding in agreement with Judge Kaufman. As described, liability to thousands, none of whom suffered physical injury, for mere inadvertence may look disproportionate, perhaps ruinous. But let us investigate this intuitive response. First, as

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compared to awards for pain and suffering, the loss from economic injury is provable, not subjective or speculative. And even if delay costs 3000 motorists an average of \$500 each (a generous assumption), the negligent driver's liability looks to be about \$1.5 million, a significant sum, but hardly pauperizing in a world of multi-million dollar awards to one or two parties seriously injured in traffic accidents. Also noteworthy is the grouping of truckers and contract carriers with wage earners as equally undeserving claimants. The truckers and contract carriers are likely to be insured against losses occasioned by delays, whereas wage earners will not be. Perhaps eligibility for economic loss should exclude professional drivers and carriers in the course of their business, just as public safety officials cannot recover for negligently caused physical harm incurred while performing their jobs. But why exempt the wage-earners? Even more curious is the absence of any specific reference in the hypothetical to liability for property damage occasioned by the accident, the appropriately compensated being "those physically injured." Certainly the car owner whose automobile, though not involved in the primary accident, suffers \$5000 damages attributable to the negligently caused crash will receive compensation for repairs and consequent economic harm. Similarly, if the negligent motorist caused minor physical damage to 3000 vehicles, delaying each driver an hour, in principle all drivers could recover for their proven economic losses as consequential damages from injury to their property. Why should the fortuity of minor harm to property entitle these drivers to recover for economic loss? And what if two tennis stars on their way to compete in the United States Open are involved in this auto accident, one athlete suffering a minor wrist sprain while the other endures only a delay that results in a forfeited match? For both tennis players, the consequences that matter are identical; athletes with a chance at titles are denied a singular opportunity to prove themselves, losing rankings, prize money, and endorsements. But only the athlete with the sprained wrist has a compensable injury and the opportunity to claim consequential economic damages.

On the other hand, viewed through the lens of pragmatism, how likely is it that many wage earners docked one hour's pay (or a class of wage earners) will engage lawyers to recover the lost earnings from the negligent driver? When the unusual claim for pure economic loss occurs, ought not the courts face the question of when "the link has become too tenuous --

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a plaintiff should be allowed to recover for economic losses in the absence of personal injury or property damage:

The answer to the allegation of unchecked liability is not the judicial obstruction of a fairly grounded claim for redress. Rather, it must be a more sedulous application of traditional concepts of duty and proximate causation to the facts of each case.

It is understandable that courts, fearing that if even one deserving plaintiff suffering purely economic loss were allowed to recover, all such plaintiffs could recover, have anchored their rulings to the physical harm requirement. While the rationale is understandable, it supports only a limitation on, not a denial of, liability. The physical harm requirement capriciously showers compensation along the path of physical destruction, regardless of the status or circumstances of individual claimants. Purely economic losses are borne by innocent victims, who may not be able to absorb their losses. In the end, the challenge is to fashion a rule that limits liability but permits adjudication of meritorious claims. The asserted inability to fix crystalline formulae for recovery on the differing facts of future cases simply does not justify the wholesale rejection of recovery in all cases.

People Express Airlines, Inc. v. Consolidated Rail Corp., 100 N.J. at 254, 495 A.2d at 111.

Our law exists to provide remedies to those persons or entities who are injured, even in a purely economic sense, as a direct and proximate cause of a tortfeasor's carelessness. Courts should

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that what is claimed to be consequence is only fortuity"? And the hypothetical ignores third-party insurance and the benefit of spreading the risk among motorists, any one of whom could be the careless injurer or the unlucky injured. Thus, on close analysis the intuitive appeal of categorical denial of recovery for pure economic loss in order to forestall unacceptably widespread liability disappears. There may be instances of potentially ruinous liability but those instances do not serve as the foundation for the general rule prohibiting recovery for economic loss.

Eileen Silverstein, "On Recovery in Tort for Pure Economic Loss," 32 U.Mich.J.L.Ref. 403, 422-425 (1999) (footnotes omitted).

not obstruct fairly grounded claims seeking to redress an economic wrong, and should only shield tortfeasors from infinite liability through the “sedulous application of traditional concepts of duty and proximate causation to the facts of each case.” *People Express*, 100 N.J. at 254, 495 A.2d at 111. Where an individual can show he has suffered an economic loss proximately caused by the carelessness of another, and can show a narrow, clearly foreseeable “special” relationship between himself and the alleged tortfeasor, then the tortfeasor should be held responsible for the results of his actions.

I do not, and cannot, endeavor to predict every situation where a tortfeasor’s actions may have an adverse effect on a party’s economic interests, and when under the Court’s opinion those actions may form the basis for liability. I trust to the circuit courts the discretion to use the existing rule of “legal duty, the breach of that duty, and damage as a proximate result,” *Sewell v. Gregory*, 179 W.Va. at 587, 371 S.E.2d at 84, to allow the plaintiffs a remedy while protecting the defendants from “tort liability almost without limit.” *Harris v. R.A. Martin, Inc.*, 204 W.Va. 397, 403, 513 S.E.2d 170, 176 (Maynard, J., dissenting).

The majority opinion deftly sets forth a basis for holding defendants responsible for their actions, while simultaneously emphasizing the need for a finite boundary on liability. But the majority opinion is based upon a limited record and a certified question. Because the existence of a defendant’s duty is relative to the “circumstances of time, place, manner or person,” Syllabus Point 1, *Dicken v. Liverpool Salt & Coal Co., supra*, the evaluation of whether a defendant in a particular case had such a duty of care is a question for the circuit courts to consider on a case-by-case basis.

I therefore respectfully concur. I am authorized to state that Justice McGraw joins in this concurrence.