Marine Pollution, Fishers, and the Pillars of the Land: A Tort Recovery Standard for Pure Economic Losses

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MARINE POLLUTION, FISHERS, AND THE PILLARS OF THE LAND: A TORT RECOVERY STANDARD FOR PURE ECONOMIC LOSSES

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The fishers will mourn and lament . . . and they will languish who spread nets upon the water. The workers in combed flax will be in despair. . . . Those who are the pillars of the land will be crushed, and all who work for hire will be grieved.
Isaiah, 19:8–9.

I. INTRODUCTION

Careless disposal of hazardous substances,1 dumping of chemicals, groundwater contamination, offshore drilling, and accidental spillage in the transportation of hazardous substances are only examples of the many causes of marine pollution,2 nevertheless, the American legal system lacks an adequate method for allocating damage awards between pollution victims. The catastrophic effects of a single marine pollution incident can include contamination of large expanses of waterways and beaches.3 Damages may include the deaths of thousands of animals and plants, as well as the destruction of habitats,
resulting in severe economic losses. These losses may in turn cause sociological and psychological injuries to the nearby residents.

When marine pollution does cause extensive damage, many people will mourn and lament along with the fishers. Other potential loss claimants may include boat owners and operators; marina, resort, and other beach-front business owners; tour operators; seafood processors, distributors, and wholesalers; marine suppliers; fish farmers; and employees in all of these businesses. Losses sustained are often pure economic losses, unaccompanied by physical injury or property damage. Seafood processors, for example, could suffer huge financial losses even though they may not suffer any property damage. Or, a resort that depends upon water-related activities might suffer a severe decline in bookings without damage to its property.

In determining liability for marine pollution, the losses may be divided into four broad categories based upon the legal remedies available. These categories consist of cleanup and containment expenses, injuries to natural resources, physical injury or property damage, and pure economic losses. Recovery is available for

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5 See Hansen & Ray, Alaskan Oil Spill: Legal Fallout, Trial, Oct. 1989, at 30; Alaska Oil Spill Comm'n, supra note 3, at iii; see also Shutler, supra note 2, at 418-19.


7 In common law proceedings, economic losses accompanied by physical injury or property damage are legally cognizable, while pure economic losses often are not. See, e.g., Union Oil Co. v. Oppen, 501 F.2d 568, 563, 569 (9th Cir. 1974); Pruitt v. Allied Chem. Corp., 523 F. Supp. 975, 977 (E.D. Va. 1981); see also Restatement (Second) of Torts § 766C (1979); W. Prosser, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on the Law of Torts § 130 (5th ed. 1984) [hereinafter Law of Torts]; see infra notes 16-17 and accompanying text.

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cleanup and containment costs, natural resource damages, and economic losses with accompanying physical injuries or property damage.

Pure economic losses, unlike the other three categories of pollution damage, often go uncompensated because of a general rule barring recovery for losses without physical injury. Pure economic losses typically include such things as business interruption damages, lost profits, lost earnings, and loss of prospective economic advantage. These losses might also include business overhead, travel expenses made necessary by plaintiff’s condition after the accident, or expenses incurred in efforts to limit the damage. Historically, plaintiffs who suffered economic losses sought relief for damage caused by pollution through common law causes of action under nuisance or

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16 Cases and texts use different terms to refer to interference with a business’s loss of prospective economic gain. The protected interest is the reasonable expectation of economic advantage. 45 AM. JUR. 2d Interference § 50 (1969). Even when the physical harm is quite small and the economic losses enormous, the claims will be legally cognizable. But if there is no showing of physical harm, recovery is much less certain. See Union Oil Co. v. Oppen, 501 F.2d 558, 568 (9th Cir. 1974).


18 See, e.g., New York v. New Jersey, 256 U.S. 296, 298 (1921) (interstate pollution claimed to be public nuisance); Maier v. Publicker Commercial Alcohol Co., 62 F. Supp. 161, 164–65 (E.D. Pa. 1945) (river pollution that injured the plaintiff’s property and not the general public claimed to be public nuisance), aff’d per curiam, 154 F.2d 1020 (3d Cir. 1946); Hampton v. North Carolina Pulp Co., 223 N.C. 535, 547, 27 S.E.2d 538, 543–46 (1943) (pollution causing interference with fishing rights held to be a public nuisance); Columbia River Fishermen's
negligence. Pure economic loss claims have been disallowed unless a plaintiff could establish a nuisance cause of action by showing special damages, or could make a case for compensation based upon one of the several exceptions to the "physical injury" rule.

The extent to which courts will compensate pure economic losses remains an open question. Although courts have created numerous exceptions to the physical injury rule, they have not identified any specific standards for these exceptions. In a widespread pollution incident where damages are extensive, courts can use the physical injury rule to limit a polluter's liability.

Despite the comprehensive nature of the federal statutes regulating water pollution, many of the statutes fail to provide a remedy for private damages. In some specific instances a plaintiff can over-

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20 One court posited that adherence to the physical injury rule was due to the lack of an existing alternative rule or principle for guidance. Testbank, 752 F.2d at 1028. Another court noted that the tests that have been developed for prospective economic advantage are presently inadequate to guide trial courts to consistent, predictable, and fair results. Local Joint Executive Bd. v. Stern, 98 Nev. 409, 411, 651 P.2d 637 (1982); see infra note 126 and accompanying text.


22 See, e.g., Askew v. American Waterways Operators, Inc., 411 U.S. 325, 334 (1973). At least one court, however, has read a federal statute broadly enough to include a remedy for economic injury. In an order on a pretrial motion, Judge H. Russell Holland of the District Court for the District of Alaska ruled that economic loss claims would be permitted in an action brought following a 1987 oil spill in Cook Inlet, Alaska. In re the Glacier Bay, Civ. No. A88–115 (D. Alaska Sept. 28, 1990) (LEXIS, Genfed library, Dist file). The court ruled that, in an action brought under the Trans-Alaska Pipeline Authorization Act (TAPAA), 43 U.S.C. §§ 1651–1655, economic loss claims are compensable and are not limited by established maritime law. Id. The court held that in drafting TAPAA, in order to provide adequate compensation to all victims of an oil spill, Congress intended to depart from the limits of maritime law. Id. This order opens the suit to the claims of fish processors, traders, tenders, and
come the lack of a common law remedy for pure economic loss by relying on the federal and state statutes that have provisions for the compensation of economic losses. There are also provisions in federal statutes that preserve the state law remedies by way of savings clauses.

If federal or state statutory remedies are not available, then the common law must create standards to recognize claims for pure economic losses in marine pollution. This Comment proposes a uniform threshold standard to consider pure economic losses in marine pollution cases. This new standard could be used to evaluate claims brought in either state or federal maritime jurisdictions. It should replace the physical injury rule as a threshold measure prior to the application of existing tort law analyses.

In Section II, this Comment looks briefly at the historical development of the physical injury rule and the impact that the rule has had on marine pollution cases in the past. Section II then presents a survey of the court-created exceptions to the physical injury rule. Building on the foundations lain by the existing exceptions to the physical injury rule, Section III describes a proposed standard for review of pure economic loss claims in marine pollution cases. Finally, Section III explores the economic, social, and policy considerations dictating the replacement of the physical injury rule.

II. CAUSES OF ACTION TO RECOVER PURE ECONOMIC LOSSES

A. The Physical Injury Rule

The physical injury rule springs in large part from the United States Supreme Court's decision in Robins Dry Dock & Repair Co.
In *Robins*, the defendant dry dock company negligently damaged a ship’s propeller in the course of repairs. The plaintiff, who had chartered the vessel, sued for loss of profits suffered because of the extra delay in the dry dock.

The Court held that the defendant had caused damages only to the persons owning the ship, not to the charterers. The Court also found that, because the defendant had no knowledge of the contract between the plaintiff and the shipowner, the injury complained of was not foreseeable. Justice Holmes, writing for the majority, explained that the claims did not spring from any legally protected interest because the plaintiff charterer had neither a contract with the defendant dry dock company nor a proprietary interest in the vessel. Holmes’ opinion further held that the law did not extend so far as to impose liability beyond the claim for property damage that was owed to the ship owner.

Subsequent cases holding that a plaintiff cannot recover for economic losses unaccompanied by physical injury or property damage are numerous. The physical injury rule has been used to deny claims arising from activities varying from negligent excavation, and the negligent destruction of a bridge, to the negligent preparation of a balance sheet. The physical injury rule serves as a convenient measure by which a court can restrict a defendant’s

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32 *Id.*

33 *See id.* at 309.

34 *See id.* at 307–09.

35 *Id.* at 307–08.

36 *Id.* at 309.


40 *Ultramares Corp. v. Touche*, 255 N.Y. 170, 183, 174 N.E. 441, 446 (1931).
liability and exposure to litigation. Fear of fraudulent claims, the possibility of burdening courts with unnecessary litigation, and an unwillingness to impose liability out of proportion to a defendant’s fault are among the other considerations underlying the physical injury rule.

B. The Physical Injury Rule in Maritime Cases

Because Robins was a maritime law case, courts hearing maritime claims are apt to find the physical injury rule to be controlling. In Louisiana ex rel. Guste v. M/V Testbank, for example, the Court of Appeals for the Fifth Circuit, sitting en banc, addressed the applicability of the physical injury rule to maritime tort claims. The case arose following a ship collision that resulted in a spill of approximately twelve tons of pentachlorophenol in the Mississippi River and surrounding waterways. The area was temporarily closed to navigation and fishing. Several businesses including shipping interests, marinas, boat rentals, restaurants, tackle shops, fish-

41 "The spectre of runaway recovery lies at the heart of the Robins Dry Dock rubric." Amoco Transp. Co. v. S/S Mason Lykes, 768 F.2d 659, 668 (5th Cir. 1985); see Byrd, 117 Ga. at 193–95, 43 S.E. at 420–21 (1903) (liability limited to avoid collusive claims and excessive litigation); Local Joint Executive Bd. v. Stern, 98 Nev. 409, 411, 651 P.2d 637, 638 (1982) (physical injury rule is primarily to shield defendant against unlimited liability); see also Ultramares, 255 N.Y. at 179–80, 174 N.E. at 444–45 (1931) (third-party plaintiff denied recovery for reliance on defendant’s negligently prepared financial statements). Judge Cardozo noted in Ultramares that liability for pure economic losses in negligence would be “liability in an indeterminate amount for an indeterminate time to an indeterminate class.” Id. at 179, 174 N.E. at 444.


44 Kinsman Transit Co. v. City of Buffalo, 338 F.2d 821, 823 (2d Cir. 1963); see also Local Joint Executive Bd. v. Stern, 98 Nev. 409, 411, 651 P.2d 637, 638 (1982).

45 See, e.g., Cargill, Inc. v. Doxford and Sunderland, Ltd., 782 F.2d 496, 499 (5th Cir. 1986) (recovery of pure economic losses resulting from negligent engine repair denied); Louisiana ex rel. Guste v. M/V Testbank, 752 F.2d 1019, 1021 (5th Cir. 1985) (en banc) (recovery of pure economic losses incurred after a ship collision denied), cert. denied, 477 U.S. 903 (1986); Akron Corp. v. M/T Cantigny, 706 F.2d 151, 153 (5th Cir. 1983) (recovery for economic losses without physical damages following grounding of vessel denied); Dick Meyers Towing Serv., Inc. v. United States, 577 F.2d 1023, 1025 (5th Cir. 1978) (recovery for interference with business expectations as result of negligent construction and maintenance of lock denied), cert. denied, 440 U.S. 908 (1979); cf. Consolidated Aluminum Corp. v. C.F. Bean Corp., 772 F.2d 1217, 1221–22 (5th Cir. 1985) (recovery allowed for economic losses accompanied by some property damage).

46 752 F.2d 1019 (5th Cir. 1985) (en banc), cert. denied, 477 U.S. 903 (1986).

47 Id. at 1021.

48 Id. at 1020.
ers, seafood processors, suppliers, and distributors sued to recover for economic losses that resulted from this closure. The trial court granted the defendant’s motion for summary judgment as to all the pure economic loss claims except those of the commercial fishers.

The court of appeals barred the plaintiffs’ claims for pure economic losses in the *Testbank* appeal. The majority and dissenters disagreed on whether the *Robins* holding applied to all economic loss claims and on whether it would be feasible to substitute an alternative rule. The *Testbank* majority held that the *Robins* physical injury rule should extend to all maritime tort claims because it provided a necessary, identifiable, and predictable rule for determining a defendant’s liability. The court held that, although the losses and delays from the spill were foreseeable, the pure economic losses should be barred by application of the physical injury rule because foreseeability alone was insufficient to limit a defendant’s liability fairly.

The *Testbank* dissent, on the contrary, advocated for the abandonment of the physical injury rule, and preferred instead reliance upon the conventional tort principles of negligence, nuisance, foreseeability, and proximate cause. The dissent argued that the application of the *Robins* holding should be limited to preventing plaintiffs who were neither proximately nor foreseeably injured by the defendant from recovering solely by claiming a contractual relationship with an injured party. The dissent further argued that the physical injury rule should not be extended to bar the claims of plaintiffs who would be able to recover under conventional principles of foreseeability and proximate cause. The dissenting opinion examines some of the rule’s exceptions, such as recovery in husband-wife claims, recovery of fishers for lost earnings, and certain negli-

49 Id. at 1020–21.

50 *Louisiana ex rel. Guste v. Testbank*, 524 F. Supp. 1170, 1174 (E.D. La. 1981). The district court noted that seamen are the favorites of admiralty, and that their economic interests require the greatest legal protection available. *Id.* at 1173 (citing *Carbone v. Ursich*, 209 F.2d 178, 182 (9th Cir. 1953)). In keeping with this notion, courts have protected commercial fishers when there has been a tortious invasion of their fishing grounds. *Id.* at 1173.


52 Compare *id.* at 1022 with *id.* at 1039 (Wisdom, J., dissenting).

53 *Id.* at 1029.

54 *Id.* at 1026.

55 *Id.* at 1046 (Wisdom, J., dissenting).

56 *Id.* at 1038–39 (Wisdom, J., dissenting).

57 *Id.* at 1039 (Wisdom, J., dissenting).
gent interference with contract claims, all of which courts have developed to avoid the overly restrictive physical injury rule. 58

Some courts considering maritime claims for economic losses, nevertheless, have distinguished Robins and relied on the traditional negligence elements of duty, breach, and causation to evaluate the compensability of pure economic loss claims. 59 The Court of Appeals for the Second Circuit reexamined the physical injury rule and its applicability to tort claims in a case arising from a bizarre chain of events, Kinsman Transit Co. v. City of Buffalo. 60 The court considered pure economic loss claims that the plaintiffs brought after a ship broke its moorings, collided with a bridge, and dammed a river. 61 The district court had found that the damages to the defendants were caused by negligent interference with contractual relations and concluded that Robins precluded recovery. 62 The court of appeals, on the other hand, found no reason to differentiate between contract rights and other rights that the law protects and therefore viewed the actions as claims in tort. 63 The court held that all of the plaintiffs had been properly designated as members of the class to whom the defendant owed a duty. 64 The court held, however, that, even though the injuries were foreseeable, the connection between the negligence and the injury was too remote and tenuous to allow recovery for pure economic losses. 65

As it rejected the physical injury rule in Kinsman, the Second Circuit Court of Appeals stated that the fear of unlimited collusive or fraudulent claims is without basis because courts distinguish honest claims from fraudulent ones almost daily. 66 The opinion emphasized that the proper role of the courts in considering claims for pure economic losses is to avoid the overly restrictive physical injury rule and to distinguish between contract rights and other rights that the law protects.

58 Id. at 1040–41 (Wisdom, J., dissenting).
59 See, e.g., Marine Navigation Sulphur Carriers, Inc. v. Lone Star Indus., 638 F.2d 700, 702 (4th Cir. 1981) (court dismissed plaintiff’s economic loss claims, relying on standards set forth in Kinsman); In re Bethlehem Steel Corp., 631 F.2d 441, 448–49 (6th Cir. 1980) (recovery of pure economic losses limited to direct injuries that are not found to be merely remote consequences of the defendant’s action), cert. denied, 450 U.S. 921 (1981); Venore Transp. Co. v. M/V Struma, 583 F.2d 708, 711 (4th Cir. 1978) (recovery granted to charterers of ship for lost profits not found to be too remote); Kinsman Transit Co. v. City of Buffalo, 388 F.2d 821, 825 (2d Cir. 1968) (recovery denied where pure economic loss claims found too remote from the defendant’s negligent act).
60 388 F.2d 821, 823–25 (1968).
61 Id. at 822.
62 Id. at 823.
63 Id. at 824.
64 Id. at 824 n.6.
65 Id. at 825.
66 Id. at 823.
economic losses is to rule on a case-by-case basis rather than to adhere to a rigid, artificial doctrine.\(^{67}\)

Ruling on another three-party charter case, the Court of Appeals for the Fourth Circuit distinguished \textit{Robins} in \textit{Venore Transportation Co. v. M/V Struma}.\(^{68}\) The court held that a ship charterer could recover funds lost while the ship that it chartered was delayed during repairs.\(^{69}\) In \textit{Venore}, the charterer recovered from a third-party defendant those funds that it had paid to the owner of the ship for the period of time the ship was disabled due to the defendant's negligence.\(^{70}\)

The \textit{Venore} court held that the claims in \textit{Robins} were disallowed because of their remoteness from the injury, and because the court was concerned about the number of claims that could arise from a single event.\(^{71}\) Thus, the court held that although the physical injury rule is appropriate in some circumstances requiring a pragmatic limitation of liability, it is not required as a limit to all economic losses.\(^{72}\) Restricting its holding to cases involving contractual shifting of losses, the \textit{Venore} court created a narrow exception to the potentially broad sweep of \textit{Robins}. The \textit{Venore} exception has received approval in other courts.\(^{73}\)

In \textit{Pruitt v. Allied Chemical Corp.},\(^{74}\) the District Court for the Eastern District of Virginia considered the pure economic loss claims of several classes of individuals following a widespread pollution incident.\(^{75}\) Although the \textit{Pruitt} court found neither \textit{Robins} nor \textit{Venore} dispositive, it held that the \textit{Venore} opinion was sufficient to restrict the reach of \textit{Robins} to cases dealing specifically with claims arising from interference with contract.\(^{76}\)

Even though a plaintiff may base a claim for marine pollution damages either in negligence or in nuisance,\(^{77}\) the physical injury

\(^{67}\) See id. at 823–25.

\(^{68}\) 583 F.2d 708 (1978).

\(^{69}\) Id. at 711.

\(^{70}\) Id.

\(^{71}\) Id. at 710.

\(^{72}\) Id. at 710–11.


\(^{75}\) Id. at 976.

\(^{76}\) Id. at 981.

\(^{77}\) Pollution victims often rely on common law remedies because, although United States waterways are highly regulated, provisions for private actions for pollution damages in the statutes are scarce. The most comprehensive statute, the FWPCA, does preserve those state
rule may bar recovery. To avoid such a harsh result, some courts endeavor to fashion a more flexible rule that limits liability and at the same time allows for the adjudication of meritorious claims. In order to increase the scope of legally cognizable claims, courts have distinguished Robins on the facts and carved out exceptions to the physical injury rule for the pure economic loss claims of specific plaintiffs, notably sailors and commercial fishers.

C. Exceptions to the Physical Injury Rule

1. Special Relationships

The result of courts’ dissatisfaction with the physical injury rule, in several different contexts, has been the creation of qualifications and exceptions to the rule to permit adjudication of pure economic loss claims. One of the largest groups of exceptions to the physical injury rule includes those cases involving a “special relationship” between the tortfeasor and the person claiming economic loss. In several instances, courts have held providers of professional services liable for pure economic losses that resulted from negligent perfor-

- 78 Even though the decisions from which the physical injury rule arose did not mandate an absolute bar to recovery of pure economic losses, the development of subsequent case law has led to a general rule barring recovery for such losses. For discussions of the history and arguments surrounding the absolute bar to recovery for pure economic losses, see, e.g., Union Oil Co. v. Oppen, 501 F.2d 558, 566 (9th Cir. 1974); People Express Airlines v. Consolidated Rail Corp., 100 N.J. 246, 495 A.2d 107 (1985). See also Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 300 (1927); Cattle v. Stockton Waterworks Co., 10 L.R.-Q.B. 453 (1875).
- 79 See Union Oil, 501 F.2d at 566-66 (opinion tracing history of exceptions to physical injury rule in California courts); People Express, 100 N.J. at 256–61, 495 A.2d at 112–14 (rejecting physical injury rule, based upon precedents in several states).
- 80 See Union Oil, 501 F.2d at 566; People Express, 100 N.J. at 256–58, 495 A.2d at 112–13.
mance of their work.83 Decisions of the California state courts in such cases provide substantial guidance for consideration of pure economic loss claims.84

The foundational case for pure economic loss recovery via the special relationship exception is *Biakanja v. Irving.*85 In *Biakanja*, the California Supreme Court held that the plaintiff’s pure economic loss, which was the result of the defendant's negligent failure to obtain proper attestation of a will, was a legally cognizable injury.86 The *Biakanja* decision sets out a test that balances several factors to determine the duty of due care.87 The court weighed the following:

the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm.88

Relying heavily on the principles of duty and foreseeability to limit liability, the California Supreme Court found that pure economic loss claims arising from negligence may be considered similarly to claims

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83 Biakanja v. Irving, 49 Cal. 2d 647, 651, 320 P.2d 16, 19 (1958) (notary held liable for negligence that caused intended beneficiaries of will to be deprived of bequest); see also Lucas v. Hamm, 56 Cal. 2d 583, 588–89, 364 P.2d 685, 687–88, 15 Cal. Rptr. 821, 823–24 (1961) (attorney held liable to intended beneficiary of will where negligence caused deprivation of bequest), cert. denied, 368 U.S. 987 (1962); People Express, 100 N.J. at 267, 495 A.2d at 118 (railway transporting explosive chemicals had duty to avoid causing economic loss to neighboring businesses); see generally LAW OF TORTS, supra note 7, § 130 at 1008–09.


86 Id. at 648, 651, 320 P.2d at 17, 19.

87 Id. at 650, 320 P.2d at 19.

88 Id.; see also LAW OF TORTS, supra note 7, § 4 (discussing factors influencing tort liability). The *Biakanja* criteria have been applied to subsequent cases in California and adopted by other states. See, e.g., Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974) (oil company had duty of due care to avoid injury to resources that it shared with fishers); Mattingly v. Sheldon Jackson College, 743 P.2d 356, 360 (Alaska 1987) (college had duty to take reasonable precautions to avoid harm to contractor working on campus); Lucas v. Hamm, 56 Cal. 2d 583, 589, 364 P.2d 685, 688, 15 Cal. Rptr. 821, 823 (1961); People Express Airlines v. Consolidated Rail Corp., 100 N.J. 246, 262–64, 495 A.2d 107, 115–16 (1985) (railway had duty to avoid causing economic injury to neighboring businesses).
accompanied by injury to property or persons. In place of the physical injury bar to recovery, some courts determine the extent of a defendant's liability for pure economic losses through a careful analysis of the concepts of foreseeability and duty.

Courts across the country have expanded the exception to the physical injury rule for parties in a special relationship to include a wide range of actors, from attorneys to termite inspectors. In each case the deciding court permitted pure economic loss claims because it found that the defendant had a duty of due care, that the losses were proximately caused by the defendant's actions, and that the injury to the particular plaintiff was foreseeable to the defendant.

Courts also have created a related exception to provide recovery for the pure economic losses of plaintiffs who are members of a particular group to which the courts extend special protection. This exception to the physical injury rule is based upon the foreseeability to the defendant of the particular class of plaintiffs, as well as a duty of due care. Such plaintiffs are not merely members of the general public; rather, certain circumstances put them in a unique position that defines them as a foreseeable group. The duty of due care has been held to include within the group of foreseeable plaintiffs a business neighbor abutting a railroad yard.

Most notable among the groups traditionally granted compensation for pure economic losses in tort actions are sailors. In Carbone v. Ursich, seamen were allowed to recover from a negligent third party for wages lost while the ship on which they worked was being

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90 Id.
91 See Union Oil, 501 F.2d at 570.
94 Id. at 263–64, 495 A.2d at 116.
95 Id. at 265, 495 A.2d at 118; see infra notes 122–32 and accompanying text.
96 Carbone v. Ursich (The Del Rio), 209 F.2d 178, 182 (9th Cir. 1953).
97 209 F.2d 178 (9th Cir. 1953).
Commercial fishers, in particular, almost always have been able to recover for pure economic losses.

2. Particular Knowledge of the Harm

When a defendant has knowledge of the potential economic consequences of a particular activity that it undertook, the courts have created another exception to the physical injury rule. In *J'Aire Corp. v. Gregory*, a contractor working for the owner of a building was held to owe a duty of due care to the owner. The contractor also was found to owe a duty to the tenants of the building to complete construction on schedule to avoid resulting economic losses. Similarly, in *Henry Clay v. City of Jersey City*, the court found the defendant city liable to a lessee for pure economic losses that resulted from the city's negligent failure to maintain its sewer lines. The city had notice of the sewer leak for several years, and the court held that it should have known about the leak even sooner than it did. Courts have created these exceptions to the physical injury rule when the defendants have failed to adhere to a duty of due care to prevent a foreseeable injury.
D. Other Judicial Efforts to Impose Limits to Liability

1. Negligence

The need to define some limit to a defendant's liability and the need to limit the amount of litigation stemming from a single negligent act are not unique to claims for pure economic losses. Accordingly, courts have denied compensation for physical injury in cases where an injury is held not to be foreseeable. The seminal case imposing duty and proximate cause limitations to negligence liability is *Palsgraf v. Long Island Railroad*. In helping a passenger board a train, one of the defendant's employees negligently dislodged a package the passenger was carrying. The package contained fireworks, exploded when it fell, and knocked over a scale some distance down the platform. The scales injured plaintiff Palsgraf. The New York Court of Appeals held that, in general, a defendant is liable for all proximate consequences of an act that breaches a duty, even if these consequences might seem novel or extraordinary. Even though Palsgraf did suffer physical injury, the court limited the defendant's liability by strictly construing the elements of duty and foreseeability.

In a case that established an often-cited standard in the field of negligence, *United States v. Carroll Towing Co.*, Judge Learned Hand set out a balancing test: when the cost of accidents exceeds the cost of preventing them, the courts should impose liability. Stated differently, a person's duty to prevent injuries is a function of three variables: the probability that an accident will occur, the gravity of the result if it does occur, and the burden of sufficient precautions to prevent the accident. The case arose when a barge broke loose from its tug, collided with another vessel and eventually sank. The court held that the failure of the owner to have a crew member aboard the barge was negligence that reduced the owner's recovery.

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109 *Id.* at 340–41, 162 N. E. at 99.
110 *Id.*
111 *Id.*
112 *Id.* at 346–47, 162 N. E. at 101.
113 See *id.*
114 159 F. 2d 169 (2d Cir. 1947).
115 See *id.* at 173.
116 *Id.*
117 *Id.* at 170–71.
118 *Id.*
Subsequent courts have read Carroll Towing to represent the principle that a fundamental purpose of tort law is to maximize social utility.119 It may be difficult for a court to measure the probability that an event might occur, the burden of preventing the resultant injury, and the sum of all damages from the act.120 In a widespread pollution case the imposition of liability using this formula could depend upon whether a court looks at the damage to each plaintiff individually or at the cumulative effect of the defendant's actions.121

Recently, in People Express Airlines v. Consolidated Rail Corp.,122 the New Jersey Supreme Court explained that the same strict application of duty and proximate cause principles that formed the basis for the Palsgraf decision could serve as limits to a defendant's liability and the amount of litigation arising from pure economic loss claims.123 In People Express, the plaintiff airline was forced to evacuate its business premises when the defendant's negligence caused a chemical leak and a fire in a nearby freight yard.124 Despite the lack of any physical injury suffered by the neighboring airline company, the court found the defendant railroad liable for economic damages.125

In granting compensation for pure economic losses, the People Express court displayed its dissatisfaction with the rule of non-recovery for pure economic losses.126 Following an explanation of the myriad exceptions to the physical injury rule, the court applied the same principles of duty, breach, causation, and injury that it would have used to evaluate a claim accompanied by physical injury or property damage.127

The People Express court based its decision to allow recovery for pure economic loss claims on the foreseeability of both the risk of this type of harm and the foreseeability of the injury to this plain-

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120 For example, courts have struggled with the issue of how many pure economic harms should be included in assessing the sum of damages from a pollution incident. See, e.g., id. A further difficulty arises when not all injured parties choose to sue at the same time.
121 See id. at 978–79; see infra notes 237–41 and accompanying text.
122 100 N.J. 246, 495 A.2d 107 (1985).
123 Id. at 253, 495 A.2d at 110. "[W]e proceed from the premise that principles of duty and proximate cause are instrumental in limiting the amount of litigation and the extent of liability in cases in which no physical harm occurs just as they are in cases involving physical injury."
124 Id. at 249, 495 A.2d at 108.
125 Id. at 267, 495 A.2d at 118.
126 Id. at 261, 495 A.2d at 114. "These exceptions expose the hopeless artificiality of the per se rule against recovery for purely economic losses." Id.
127 See id. at 263–65, 495 A.2d at 116–17.
tiff. It held that the defendant railway possessed knowledge of the risk of harm in its activities sufficient to impose a duty of due care to avoid causing economic damages to those it knew might be injured. The court noted that general or simple foreseeability of some harm from the defendant’s act would be insufficient to create liability. Both the specific risk of harm and the specific plaintiff or class of plaintiffs had to be foreseeable. The court determined that limiting compensation to “particularly foreseeable” plaintiffs was an adequate method to limit liability in place of the artificial physical injury rule.

2. Nuisance

A court will permit a private action for damages under the public nuisance rubric only if a plaintiff can show special damages to the plaintiff’s person or property that are different in kind from those suffered by the general public. These special damages may be based upon the exercise of a public right in the course of earning a living, or they may be based upon financial losses resulting from a plaintiff’s special proximity to the nuisance. If a claim involves interference with a public right, an individual must show how the individual’s exercise of this right is distinct from that of the general public.

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128 Id. at 267–68, 495 A.2d at 117–18. The court found the existence of an emergency evacuation plan to be evidence of the rail company’s knowledge of the potential risk. Id.

129 Further defining the foreseeability of the harm that it deemed to be recoverable, the court included those economic losses that were “the natural and probable consequence[s] of a defendant’s negligence.” Id. at 267, 495 A.2d at 118.

130 See id. at 268, 495 A.2d at 118.

131 See id. The court recognized the need to consider each case upon its own facts. Id. The Court of Appeals for the Second Circuit also recognized the need for looking at pure economic loss claims on a case-by-case basis. See, e.g., Kinsman Transit Co. v. City of Buffalo, 388 F.2d 821, 823–25 (2d Cir. 1968).

132 People Express, 100 N.J. at 262–63, 495 A.2d at 114–15 (quoting W. PROSSER, THE LAW OF TORTS § 129, at 941 (5th ed. 1984)).

133 See Burgess v. Tamano, 370 F. Supp. 247, 250 (D. Me. 1973) (commercial fishers’ and shellfish harvesters’ exercise of public right found to be distinct from general public’s; beachfront business’ exercise of rights not found to be distinct), aff’d, 559 F.2d 1200 (1st Cir. 1977).

134 Id. The Restatement (Second) of Torts uses examples of economic damages to log rafters unable to float logs past a dam, boat owners unable to pass under a new bridge, and commercial fishers unable to fish after pollution of a waterway. RESTATEMENT (SECOND) OF TORTS § 821C, comment h, illustrations 9–11 (1979).

135 See Karpisek v. Cather & Sons Constr., Inc., 174 Neb. 234, 240–41, 117 N.W.2d 322, 326–27 (1962). Despite a potential for expansive liability, the Karpisek court viewed the evidence of the plaintiff’s financial loss without regard to the number of people who might be in the same category. Id. at 241, 117 N.W.2d at 327 (quoting 66 C.J.S. NUISANCES § 79).

If a plaintiff's business losses are based upon the exercise of a public right, or a riparian right, courts have found that pure economic losses are compensable under the public nuisance theory. Courts have recognized the interference with the rights of commercial fishers as a special injury in public nuisance actions. When plaintiffs depend upon the right to use a resource such as the water, the economic losses suffered by the direct users become particularly foreseeable because the losses are so closely connected, through the use of the resource, to the defendant's acts.

Although courts primarily address ongoing conditions as nuisances, even a single negligent act can rise to the level of public nuisance. For example, the negligent operation of a ship resulting in its collision with a bridge might create a nuisance in the obstruction of a public way. Similarly, an oil spill or accidental discharge of chemicals into a waterway can rise to the level of public nuisance.

If whole communities suffer the same type of harm, the injury is a public wrong and individual plaintiffs cannot recover. In Karpisek v. Cather & Sons Construction, Inc., however, the Nebraska Supreme Court rejected an argument that the number of persons

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137 See, e.g., Burgess, 370 F. Supp. at 250; Louisiana ex rel. Guste v. M/V Testbank, 524 F. Supp. 1170, 1173-74 (E.D. La. 1981) (fishers' commercial use of public right), aff'd and reh'g en banc granted, 728 F.2d 748 (5th Cir. 1984), aff'd on rehearing, 752 F.2d 1019 (5th Cir. 1985) (en banc), cert. denied, 477 U.S. 903 (1986). Cases involving riparian rights are arguably of a different nature than cases involving the exercise of a public right. In the riparian rights cases there is no question of ownership, and there also may be some property damage involved. These cases represent, nevertheless, a large class of economic loss claims that long have been allowed by the courts. See, e.g., Masonite Corp. v. Steede, 198 Miss. 530, 23 So. 2d 756, 757-58 (1946) (en banc) (operator of fishing camp exercising riparian right to provide access to river); Hampton v. North Carolina Pulp Co., 223 N.C. 535, 548, 27 S.E.2d 538, 546-47 (1943) (downstream riparian landowners exercising right to fish).


140 Stop & Shop Co. v. Fisher, 387 Mass. 889, 890, 894, 444 N.E.2d 368, 369, 371 (1983). The dissent in Testbank noted, "It is well settled that a public nuisance can arise out of conduct that is merely negligent." 752 F.2d at 1046 n.27 (Wisdom, J., dissenting).

141 See, e.g., Burgess, 370 F. Supp. at 248, 250.

142 See, e.g., Burgess, 370 F. Supp. at 251; Stop & Shop, 387 Mass. at 897, 444 N.E.2d at 373 (citing RESTATEMENT (SECOND) OF TORTS § 821C comment h).

143 174 Neb. 234, 117 N.W.2d 322 (1962).
with special injuries could be so large as to remove a plaintiff’s right to compensation in a public nuisance action. In an action to enjoin the operation of an asphalt plant and recover damages under the public nuisance doctrine, the court required that the private plaintiff’s injury be different in kind from the injury suffered by the public at large. The fact that in this case several plaintiffs joined in the action, however, did not refute the argument that each plaintiff had suffered a special injury. The court held that, because “more than one, or in fact a considerable number” of individuals suffered, “does not mean that each of them have not received injury which differed in kind and not merely degree from the community generally.”

In Stop & Shop Companies v. Fisher, the Massachusetts Supreme Judicial Court held that the plaintiff’s pure economic loss claims were legally cognizable. Access to the plaintiff’s store was cut off following a ship collision with a bridge that caused a two-month road closing. The plaintiff sought lost business revenues under both negligence and nuisance theories. On appeal, the Supreme Judicial Court disallowed the claims for economic loss in negligence because there was no physical damage to the store. The court opined, however, that the defendant’s action might give rise to a public nuisance if the plaintiff could show special pecuniary harm. The court stated that the same claims that were barred in negligence because of the physical injury rule were legally cognizable under a public nuisance cause of action.

The Massachusetts court found that special damages must be evaluated on a case-by-case basis, looking at both the severity of the financial harm to a plaintiff and the losses suffered by the rest of the community. Although the court recognized that a physical injury requirement had provided a clear, convenient line between compensable and noncompensable damages, the court stated that clarity

145 Id. at 241, 117 N.W.2d at 326–27.
146 Id. at 236, 240–41, 117 N.W.2d at 324, 326.
147 Id. at 241, 117 N.W.2d at 326–27 (quoting 66 C.J.S. Nuisances § 79).
148 Id. at 241, 117 N.W.2d at 326.
150 Id. at 899, 444 N.E.2d at 374.
151 Id. at 890, 444 N.E.2d at 369–70.
152 Id.
153 Id. at 894, 899, 444 N.E.2d at 371, 374.
154 Id. at 897, 444 N.E.2d at 373.
155 Id. at 894, 897, 444 N.E.2d at 371, 373.
156 See id.
was not sufficient to outweigh the unfairness to businesses suffering huge economic losses.\textsuperscript{157} As a limit to the defendant’s liability, the court held that, absent physical injury, relief in public nuisance would be warranted if the plaintiff had suffered “special pecuniary harm” and impairment of access.\textsuperscript{158}

\textbf{E. Applications of the Physical Injury Rule in Marine Pollution Cases}

In marine pollution cases courts may rely on the exceptions and qualifications to the physical injury rule to grant compensation for certain pure economic losses. Based upon the duty to, and the particular foreseeability of, commercial fishers, courts will grant compensation awards for their pure economic losses.

\textit{Burgess v. M/V Tamano}\textsuperscript{159} arose following the grounding of an oil tanker off the coast of Maine.\textsuperscript{160} Commercial fishers and other businesses brought suit to recover economic damages that were the result of a spill of approximately 100,000 gallons of oil into the coastal waters.\textsuperscript{161} The court found that the claims of commercial fishers and seafood harvesters were legally cognizable, but the claims of other businesses including motels, trailer parks, restaurants, campgrounds, and shops dependent on the tourist trade were not.\textsuperscript{162} The court, considering the claims under a nuisance theory, found that losses to waterfront businesses from the oil spill were merely derivative of those of the general public and held them to be noncompensable.\textsuperscript{163}

A leading case concerning pure economic loss claims in marine pollution is \textit{Union Oil Co. v. Oppen}.\textsuperscript{164} \textit{Union Oil} arose following a 1969 oil spill in the Santa Barbara channel in California.\textsuperscript{165} Huge quantities of crude oil were released from an offshore drilling rig, causing damage to the marine environment.\textsuperscript{166} Commercial fishers brought suit against the defendant oil company to recover lost profits that resulted from the spill.\textsuperscript{167}

\begin{footnotesize}
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\item \textsuperscript{157} \textit{Id.} at 895–96, 444 N.E.2d at 372.
\item \textsuperscript{158} \textit{Id.} at 899, 444 N.E.2d at 374.
\item \textsuperscript{159} 370 F. Supp. 247 (D. Me. 1973), \textit{aff’d}, 559 F.2d 1200 (1st Cir. 1977).
\item \textsuperscript{160} \textit{Id.} at 248.
\item \textsuperscript{161} \textit{Id.} at 248–49.
\item \textsuperscript{162} \textit{Id.} at 250–51.
\item \textsuperscript{163} \textit{Id.} at 251.
\item \textsuperscript{164} 501 F.2d 558, 559 (9th Cir. 1974).
\item \textsuperscript{165} \textit{Id.} at 559.
\item \textsuperscript{166} \textit{Id.}
\item \textsuperscript{167} \textit{See id.}
\end{itemize}
\end{footnotesize}
In *Union Oil*, the court found that the defendant owed a duty of
due care to the plaintiffs to refrain from negligent conduct in its
operations. The court also stated that the negligent conduct of the
oil company foreseeably would cause a diminution of aquatic life in
the area. The court based its imposition of a duty on the fact that
the commercial fishers were a foreseeable group that might suffer
injuries. The court distinguished the losses of the commercial fish­
ers from those of other potential plaintiffs based upon the fishers' 
exercise of the public right to fish to make a living. Further, the
*Union Oil* court found that the close connection between the oil
company's activities and those of the fishers, evidenced by their
shared use of the water, created a sphere within which liability could
be circumscribed.

Seafood processors, wholesalers, retailers and distributors; res­
taurateurs; commercial fishers; marina, boat, tackle shop, and bait
shop owners; and employees of all these groups brought suit against
Allied Chemical in *Pruitt v. Allied Chemical Corporation*. The
case arose after it was discovered that the defendant chemical com­
pany had been dumping hazardous chemicals into the James River
and Chesapeake Bay. Plaintiffs in the seafood industry filed claims
for their lost profits associated with their inability to sell seafood
contaminated by the chemicals, and from a drop in price resulting
from a decline in demand for the seafood.

In *Pruitt*, the federal district court rejected the *Union Oil* dictum
that limited recovery to commercial fishers. The court also rejected
the idea posited in earlier cases that commercial fishers had a con­
structive property right to the fish. In addition to the claims of
commercial fishers, the *Pruitt* court considered the pure economic

168 Id. at 570.
169 Id. at 569. Pointing out the fact that even school children are aware of the dangers of
pollution, the court refused to accept, on the part of the defendants, “a degree of general
ignorance of the effects of oil pollution not in accord with good sense.” Id.
170 Id.
171 Id. at 570.
172 Id. The court noted that it left adjudication of the existence of proximate cause for the
proceedings on remand. The plaintiffs would have to establish proximate cause by showing
that the spill did in fact diminish aquatic life, and that the diminution caused the plaintiffs' 
economic losses. See id.
174 Id. at 976.
175 Id.
176 Id. at 978–79 & n.15.
177 Id. at 978.
losses of businesses inland from the water's edge. The court sought a method to compensate those most severely injured by the pollution. The court, however, felt compelled to limit liability for reasons of equity if the defendant's negligence caused all the losses. The court limited compensation to those businesses that it found were "directly" using the resource, in an effort to avoid double-counting.

F. Maritime Jurisdiction over Marine Pollution Claims

In addition to applying state common law, courts also have looked at pure economic loss claims under the rules of maritime law. Federal maritime law exists as a distinct body of federal law that Congress has preserved specifically to provide a forum dedicated to maritime activities. Maritime law now extends beyond maritime commerce to include the use and exploitation of the resources of the sea.

Federal courts derive jurisdiction over maritime matters from article III, section 2 of the Constitution and through implementing legislation. Maritime jurisdiction historically was determined by a "maritime locality" test that limited jurisdiction to those injuries occurring on navigable waters. The Admiralty Extension Act of

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178 See id. at 979.
179 Id. at 978–79.
180 Id. at 980.
181 Id. at 979–80. The court reasoned that, although pollution should not be a costless activity, the defendant nonetheless should not have to pay more than once for the same injury. To avoid this result, double-counting, the court chose to view the damage claim in terms of each plaintiff's investment in material and labor in their businesses, as opposed to the replacement value of the resource itself. In Pruitt, the court considered the investments of seafood wholesalers, processors, retailers, distributors, and restaurateurs. The court noted that the use of each investment as a measure would avoid making a defendant pay for an excessive stream of profits extrapolated into the future. Id. at 979.
184 Id. The words "admiralty" and "maritime" have become interchangeable in common usage. See BLACK'S LAW DICTIONARY 43 (5th ed. 1979).
185 U.S. Const. art. III, § 2.
186 28 U.S.C. § 1333 (1982). The statute provides in relevant part: "The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." Id.
1948 extends maritime jurisdiction to those injuries that arise on the water and are consummated on the shore. Courts have construed this act to include torts arising from vessel pollution of navigable waters within maritime jurisdiction. Courts also have included pollution damage from a fixed platform drilling operation within maritime jurisdiction.

The Supreme Court limited maritime jurisdiction beyond a strict locality test in *Executive Jet Aviation, Inc. v. City of Cleveland*. In *Executive Jet*, the Supreme Court set out more restrictive criteria for evaluating maritime jurisdiction: a two-pronged test requiring both a maritime locality and a maritime nexus to establish jurisdiction. If an act damages the water and marine wildlife, then the locality test is satisfied. The maritime nexus test requires that the tortious conduct or the injury bear a significant relationship to a traditional maritime activity.

In the past, maritime law limited this activity to maritime service, navigation, or commerce on navigable waters. Early cases typically involved activities such as shipping, fishing, or carrying passengers for hire on a vessel. Modern case law, however, has held that maritime activity extends to pleasure boating and other activities that may interfere with maritime commerce.

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188 46 U.S.C. § 740 (Supp. V 1987). The Act provides in relevant part: “[t]he admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.” *Id.*


190 *Union Oil Co. v. Oppen*, 501 F.2d 559, 561 (9th Cir. 1974) (citing *Oppen v. Aetna Ins. Co.*, 485 F.2d 252, 255–57 (9th Cir. 1973)).


192 See id. at 268.


196 2 BENEDICT ON ADMIRALTY § 7, at 1.48 (7th ed. 1989) (discussing the varied definitions of traditional maritime activity).

197 *Sisson v. Ruby*, 110 S. Ct. 2892, 2895 (1990) (extending maritime jurisdiction to noncommercial vessel at a marina); see also *Foremost Insurance*, 457 U.S. at 674–75. In an earlier case a district court went so far as to say, “A surfboard, by its very nature, operates almost exclusively on the high seas and navigable waters, and, just like a small canoe or raft,
held that marine pollution is a maritime tort. The maritime nexus test can be satisfied whether the maritime activity is the source of the injury, such as in a cargo ship collision, or the maritime activity suffers the injury, for example, in the destruction of an oyster bed by pollution.

The Supreme Court specifically addressed the proper treatment of marine pollution claims under maritime law in *Askew v. American Waterways*. The Court found that, absent state regulation, there would be no remedy for private damages in water pollution under federal statutory law. The Court recognized that tort claims arising from marine pollution might be brought under either state or maritime common law. The *Askew* Court further held that Congress did not intend the Admiralty Extension Act to be exclusive. Instead, the Court contemplated concurrent jurisdiction where state law does not interfere with the uniformity and simplicity of maritime law.

If pollution claims arise on ocean waters or on inland navigable bodies of water that border on several states, or involve parties who are beyond any state's jurisdiction, then maritime tort law may seem the appropriate choice. But, because the Supreme Court has held that the federal water pollution statutes preempt federal common law, the status of maritime common law is uncertain. Where there is a gap in the law, or state law fails to provide for fair uniform treatment of claims, a general maritime rule can be fashioned to fill the gap.


*Askew*, 411 U.S. at 338.

*Askew*, id. at 341.


*Conner v. Aerovox, Inc.*, 730 F.2d 835, 842 (1st Cir. 1984).

Despite the Supreme Court's acknowledgment of the "liberal and humane nature of maritime law," judgments for pure economic losses in maritime tort have been miserly in comparison with state law. Whether a maritime tort claim is brought in federal court under maritime jurisdiction, in state court under the saving-to-suitors clause, or in federal court under diversity jurisdiction, the case will be governed by maritime law. When there is no statutorily or judicially established federal maritime rule, the court either will look to the applicable law of the states, which to date has been more liberal, or will fashion a maritime rule, which, if liberally designed, could provide uniform treatment of these economic losses.

III. MARINE POLLUTION BEYOND THE PHYSICAL INJURY RULE

A. Problems with the Current Common Law Treatment of Pure Economic Loss Claims

Adhering to the physical injury rule allows compensation for individuals suffering economic losses as long as they are accompanied by even small property damages. At the same time, the rule denies claims for huge losses of a plaintiff who is unable to show property damage or physical injury. To prevent this inequity and the preclusion of legitimate claims, courts have carved out exceptions to the physical injury rule that grant recovery for pure economic losses.


209 See Louisiana ex rel. Guste v. M/V Testbank, 752 F.2d 1019, 1021 (5th Cir. 1985) (en banc) (compensation for commercial fishers only), cert. denied, 477 U.S. 903 (1986); Union Oil Co. v. Oppen, 501 F.2d 558, 570 (9th Cir. 1974) (compensation for commercial fishers only); Pruitt v. Allied Chem. Corp., 523 F. Supp. 975, 980, 982 (E.D. Va. 1981) (court found most economic loss claims would not be compensable under maritime law, relying upon state law to provide relief); Burgess v. M/V Tamano, 370 F. Supp. 247, 250–51 (D. Me. 1973) (compensation only to commercial fishers and seafood harvesters), aff'd, 559 F.2d 1200 (1st Cir. 1977).

210 Like the federal water pollution statutes, the grant of maritime jurisdiction saves all state law remedies concurrently with the federal jurisdiction. 28 U.S.C. § 1333 (Supp. V 1987); see also FWPCA, 33 U.S.C. §§ 1321, 1370 (1982).


213 See supra note 81 and accompanying text.
The disparate treatment of claims for pure economic losses reflects the need for a more satisfactory standard than the physical injury rule for the limitation of tort liability. Although the exceptions and qualifications to the physical injury rule are numerous, the requirement of physical injury or property damage remains the threshold requirement for most legally cognizable claims. Concerns about unlimited, collusive, fraudulent, or speculative claims illustrate a need for some limit to liability. The solution, however, is not necessarily the present bright-line rule requiring physical injury or property damage. As one commentator has noted, the physical injury rule is simply a pragmatic limitation, but not necessarily the appropriate tool for administering justice.

The many exceptions to the bar of claims for economic losses unaccompanied by physical injury or property damage serve as a foundation for the expansion of compensable claims. It is merely a logical step from the existing exceptions to the recognition of more economic loss claims in marine pollution cases. Read broadly, the *Union Oil Co. v. Oppen* and *Pruitt v. Allied Chemical Corporation* decisions could provide compensation to all of those businesses that rely primarily upon the use of the marine resources damaged by pollution. The potential exists to compensate fish processors, fish farmers, tourist businesses, vessel operators, the pillars of the land, and even some who work for hire.

The *Union Oil* court's language, allowing compensation to commercial fishers because they make lawful and direct use of the sea as a natural resource, was broad enough to include many other kinds of losses beyond those suffered by the commercial fishers. Nothing

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214 Among the cases holding that a plaintiff cannot recover economic losses unaccompanied by physical injury or property damage are: *Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp.*, 626 F.2d 280, 289 (3d Cir. 1980) (no recovery for pure economic loss in tort actions); *Seely v. White Motor Co.*, 63 Cal. 2d 9, 18, 403 P.2d 145, 151, 45 Cal. Rptr. 17, 23 (1965) (no recovery for losses without physical damages); *Superwood Corp. v. Siempelkamp Corp.*, 311 N.W.2d 159, 162 (Minn. 1981) (economic loss without personal injury or property damage not recoverable in tort); and *Local Joint Executive Bd. v. Stern*, 98 Nev. 409, 410–11, 651 P.2d 637, 638 (1982) (recovery denied for economic losses without physical injury or property damage).

216 See James, *Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal*, 25 VAND. L. REV. 43, 45, 55–58 (1972). Professor James believes that "the prevailing distinction between indirect economic loss and physical damage is probably a crude and unreliable one that may need reexamination if a limitation on liability for pragmatic reasons is to be retained." *Id.* at 50–51.

217 *501 F.2d 558* (9th Cir. 1974).


See *Union Oil*, 501 F.2d at 570. To support imposing a duty of care, the court granted
in the legal, economic, or social policy considerations underlying the *Union Oil* decision required a more restrictive holding. The operative term seems to have been "direct," which refers to the use of the resource.\textsuperscript{219} In fact, the decision, stated another way, denied claims beyond those of the commercial fishers because the court reasoned that they were too remote, or that the other plaintiffs did not prove a sufficiently close connection between the act of the defendant and their injuries.\textsuperscript{220} The court asked the same questions asked in traditional tort liability cases that do not involve the physical injury rule.

Reviewing the *Union Oil* decision, the *Pruitt* court found that potentially there were many other parties, in addition to the commercial fishers, making direct and lawful use of the sea’s resources.\textsuperscript{221} For example, nature photographers, vessel operators, and those who process, purchase, and distribute seafood, all make lawful use of the sea and its resources. The *Pruitt* court’s effort to define the sphere of liability presents a foundation that is much broader than that set forth in the earlier pure economic loss decisions. Finding that the destruction of marine life should not be a costless activity, the court looked for a method to compensate more of the pure economic loss claims than maritime law might have allowed. The court did not focus on the commercial fishers' exclusive right to the use of the resource, but focused instead on the relationship between the parties' claims and the damaged resources.\textsuperscript{222}

The *Pruitt* court was in a difficult position as it attempted to expand compensation to a broader group of plaintiffs and at the same time to limit the defendant’s liability. In its efforts to prevent requiring the defendant to pay repeatedly for the same injury, the *Pruitt* court chose to view the claims as they related to each plaintiff’s investment.\textsuperscript{223} This investment-based analysis created the potential to compensate many more of the claims than those for which the court actually awarded damages. In order to limit the defendant’s liability, however, the *Pruitt* court, like the *Union Oil* court, denied damages to the other seafood businesses besides the fishers because

\textsuperscript{219} See id.

\textsuperscript{220} The adjudication of whether the defendant had proximately caused the fishers' pure economic losses was left for the proceedings on remand. See id.

\textsuperscript{221} See *Pruitt*, 523 F. Supp. at 979.

\textsuperscript{222} See id. at 979.

\textsuperscript{223} Id.
it found the injuries suffered by those businesses to be insufficiently direct. Although the compensation of claims to representatives for sport fishers signalled a move in the direction of more complete compensation for marine pollution losses, the Pruitt court fell back on the "direct" and "indirect" language that is little more than another arbitrary limitation to liability that fails adequately to compensate large numbers of innocent victims. The Pruitt court started out against the tide but was forced back by the lack of any other standard to propel it into a new wave of review.

In a concurring opinion in Louisiana ex rel. Guste v. M/V Testbank, Judge Williams wrote separately to give greater emphasis to, and advocate for, greater expansion of the Union Oil dicta. Recovery for commercial fishers was granted properly, based not on a proprietary interest, but upon the exercise of a right to make a livelihood from a resource of the polluted waters. Judge Williams wrote that the rule of the case should be stated broadly to allow recovery for those who are damaged because their livelihoods depend upon a marine resource.

If courts were to abandon the physical injury rule, they could then control the scope of liability through the application of a uniform standard of review for marine pollution claims. A marine pollution standard, to be used as a threshold test in tort actions, can be synthesized from the policies expressed in the decided cases as designed specifically to address the injuries characteristic of marine pollution. A threshold standard of review for pure economic losses in marine pollution must be broad enough to cover a wide range of harms, yet be restrictive enough to prohibit speculative, fraudulent, or unlimited claims. Application of such a standard would be preliminary to a traditional tort analysis by the court.

A specific pollution standard would balance the competing goals of compensating a wider range of injured parties and defining limits to a defendant's liability. The availability of such a standard would provide all parties with an added level of certainty for predicting potential recovery and liability in pollution cases.

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224 See id. at 979–80. The claims of the commercial fishers were allowed, as were those of the classes that the court designated as surrogates for the sport fishers who were not represented at trial. The court held that the claims of the other seafood businesses were not compensable. Id. at 980.

225 752 F.2d 1019 (5th Cir. 1985) (en banc), cert. denied, 477 U.S. 903 (1986).

226 Id. at 1034 (Williams, J., concurring).

227 Id.

228 Id.
As the supply of natural resources dwindles and the demand for these resources continues to increase, the need to protect wildlife and unspoiled regions will grow as well. Increasing liability for pollution damage will force industry to internalize the costs of damaging resources. Such an expansion of liability for marine pollution damages also will encourage industry to adopt better safety procedures and planning. The marketplace, as a result, will reflect more accurately the true costs of potentially hazardous activities, such as the transportation of oil by water, or the use of hazardous chemicals. The imposition of liability that truly reflects the degree of a defendant's fault should help prevent future harms by creating incentives to cut down risks.229

B. Proposed Standard for Recovery of Pure Economic Losses in Marine Pollution

1. The Three Elements of a Marine Pollution Standard

Rather than judicially creating exceptions to the physical injury rule on a case-by-case basis, courts should adopt a uniform marine pollution standard of review for the adjudication of pure economic loss claims. The marine pollution standard should contain three elements, to be weighed together, as a precursor to the application of the existing elements of tort law.

The first element is a test for a nexus between the defendant's activity, the injury, and maritime activities. The second element is a test for whether the plaintiff has a substantial investment in the use or exploitation of the marine resources. The third element is a test for whether the plaintiff has neglected a substantial opportunity to mitigate the plaintiff's own damages.

A court should consider first the nexus between the losses suffered and maritime activity. Rather than relying on the test for a nexus between the losses suffered and maritime activity to ascertain jurisdiction, as maritime courts use a similar inquiry, the courts would be using this test to define a class of foreseeable plaintiffs. Maritime activity should be defined, according to current usage, to include all those businesses making use of the sea or one of its resources. This could include, for example, fish processors, transporters, distributors, marine suppliers,
The second part of the test considers the plaintiffs’ investment in the activity utilizing the marine resource. Plaintiffs who derive a substantial portion of their income from, or have a significant investment of finances or labor in, the use of the polluted resource should be considered to have claims worthy of review by the courts. This part of the test serves as a method to define the foreseeable harms.

Finally, courts should consider the potential for plaintiffs to mitigate their damages. Businesses not wholly dependent upon a resource might be able to concentrate on a different aspect of their endeavor, or substitute alternative suppliers or products.

2. Implementation of the Marine Pollution Standard

This three-part test could be used by state courts and federal courts hearing maritime claims to serve as a threshold test to replace the physical injury rule. The standards would be used as part of an otherwise customary tort case.

Borrowing from admiralty law, the nexus portion of the test will establish the requisite connection between the losses suffered and maritime activity. To present a claim that is cognizable in maritime law, the injury resulting from marine pollution must be found to be within the maritime jurisdiction of our courts.\(^2\)\(^{3}\)\(^{1}\) The classification of marine pollution as a maritime tort has both jurisdictional and substantive relevance. If the claims are cognizable in maritime courts, plaintiffs are able to bring their action in federal court absent diversity or a federal statutory cause of action.\(^2\)\(^{3}\)\(^{2}\)

If maritime law is found controlling, however, recovery may be limited to commercial fishers. Because courts applying maritime law tend to adhere to the physical injury rule, claims for economic losses generally have been denied.\(^2\)\(^{3}\)\(^{3}\) The *Burgess, Union Oil, and Pruitt* tour operators, and related businesses that would be injured in a widespread pollution incident. Although the list at this stage of the test seems extensive, the subsequent application of the investment and mitigation factors of the test will ensure that only legitimate claims would be cognizable.


\(^{2}\)\(^{3}\)\(^{3}\) See, e.g., Cargill, Inc. v. Doxford and Sunderland, Ltd., 782 F.2d 496, 499 (5th Cir. 1986) (recovery of pure economic losses resulting from negligent engine repair denied); Louisiana ex rel. Guste v. M/V Testbank, 752 F.2d 1019, 1021 (5th Cir. 1985) (en banc) (recovery of pure economic losses incurred after a ship collision denied), cert. denied, 477 U.S. 903.
courts have begun the move away from the physical injury rule. Other courts might follow suit, relying in part on the Supreme Court's statement that "the liberal and humane nature of maritime proceedings suggests the court provide rather than withhold a remedy."\footnote{American Export Lines v. Alvez, 446 U.S. 274, 281-82 (1980) (quoting Moragne v. States Marine Lines, 398 U.S. 375, 387 (1970)).} In the future, courts might create a general maritime rule, devise a uniform marine pollution standard for maritime and common law, or continue to rely on state common law.

The investment element of the proposed test is a way to establish the requisite close connection between the defendant's act of polluting the water, and the plaintiff's injury in loss of revenues resulting from the decreased availability of the resource. Essentially, a court will measure the foreseeability of the \textit{possibility} of damaging the resource, and evaluate the injury that would result.

The mitigation part of the test should follow from courts' requirements of reasonable efforts to mitigate.\footnote{Henry Clay Corp. v. City of Jersey City, 74 N.J. Super. 490, 498, 181 A.2d 545, 550 (Ch. Div. 1962), aff'd, 84 N.J. Super. 9, 200 A.2d 787 (App. Div. 1964).} The \textit{Restatement (Second) of Torts} dictates that an injured party cannot recover damages for negligent harms that could have been avoided by taking some action.\footnote{\textit{Restatement (Second) of Torts} § 918 (1977).} With this limitation in mind, courts should consider a plaintiff's effort to substitute products or suppliers, or to change the emphasis of a business when possible. A court could reduce or eliminate claims entirely when mitigation is successful.

3. Class Actions

Because courts may rely on the factors set out in \textit{United States v. Carroll Towing} and, therefore, may not impose liability unless the cost of the damage is greater than the cost of preventing that damage,\footnote{See United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947); Pruitt v. Allied Chem. Corp., 523 F. Supp. 975, 978 (E.D. Va. 1981).} individual plaintiffs' opportunities for recovery in a pollution case may be severely restricted.\footnote{See R. Posner, \textit{The Economic Analysis of Law} 536 (3d ed. 1986).} A court can overcome this restriction of individual recovery by certifying a class action. In a class action the liability potentially will be much greater than the cost of

(1986); Akron Corp. v. M/T Cantigny, 706 F.2d 151, 153 (6th Cir. 1983) (recovery for economic losses without physical damages following grounding of vessel denied); Dick Meyers Towing Serv., Inc. v. United States, 577 F.2d 1023, 1025 (5th Cir. 1978) (recovery for interference with business expectations as result of negligent construction and maintenance of lock denied), cert. denied, 440 U.S. 908 (1979).
preventing the harm. The marine pollution standard can be applied as a threshold test for individuals or plaintiffs as a group. Major pollution incidents may also require class action suits in order to manage fairly and efficiently the volume of potential claims.\textsuperscript{239}

The success of a class action depends upon the care with which the classes are divided.\textsuperscript{240} A positive economic result, imposing liability on the actor and compensating the victims, can be achieved in a class action only if the injuries suffered and the recovery sought by each member of the class correspond precisely. An accurate class division at the outset will make for a more expeditious trial in the long run.

In defining classes in a case applying the proposed marine pollution standard, a court will consider the commonality of the claims with regard to the nexus, investment, and mitigation tests. This review will supplement the court's analysis of the common questions of law and fact that is mandated by the Federal Rules of Civil Procedure.\textsuperscript{241} Although courts are not free to investigate the merits of plaintiffs' claims in determining the division of classes, some investigation is required in order to determine the common issues of law and fact. Given the extra layer of scrutiny that the proposed standard will provide, the likelihood of an accurate class division will be increased significantly in marine pollution cases using this threshold test.

\textsuperscript{239} The Federal Rules of Civil Procedure set out standards for the certification of class actions. See Fed. R. Civ. P. 23. The requirements include: (1) a class so numerous that joinder of all members is impracticable; (2) that there be common questions of law or fact between all members; (3) that the claims of the class representatives are typical of the claims and defenses of the members; and (4) that the representatives will fairly and adequately protect the interests of the class. In addition to satisfying these prerequisites, subsection (b) requires the court to consider: (1) whether separate actions would create a risk of inconsistent results or severely impact the results of other adjudications of the issue; (2) whether final injunctive or declaratory relief is appropriate to the class as a whole; and (3) whether a class action is superior to other methods of adjudicating the issue. Id.

\textsuperscript{240} An estimated 150 lawsuits were filed within the six months following the March 24, 1989, Exxon Valdez oil spill in Alaska's Prince William Sound. The court consolidated the cases, ordered the creation of a management committee of the plaintiffs' attorneys, and requested a proposal for class designations. The damage claimants were divided tentatively into eight classes: fishers, fish processors and distributors, union workers laid off by processors after the spill, Alaska natives, area businesses that supplied equipment or services to the fishing industry, tour operators, recreational users, and municipalities. The class action proposal has drawn criticism from the direct action attorneys who believe that each plaintiff should have an individual opportunity to present damage claims. Environmental groups also are criticizing the plan because they feel that those who will suffer from the injury to the bequest value of the area are inadequately represented. The adequacy of these class certifications will be reflected in the litigation. See Feder, supra note 6, at 1, col. 4; Sturgis, supra note 6, at 104.

C. Foundations of the Elements of the Marine Pollution Standard

The proposed rule for the recovery of pure economic loss claims in marine pollution is designed to protect the interests of all those who rely upon the marine resource. It is meant to protect the interests of the innocent victims and at the same time circumscribe the universe of potential claims closely enough to assist businesses in general planning and predicting liability.

The requirement that a plaintiff's injury have a maritime nexus would preclude some of the remote claims. An airline seeking compensation for lost profits resulting from a decline in tourist traffic to the affected area, for example, would not have the necessary connection to maritime activity to establish a compensable claim. If the same airline sought lost revenues from transporting fish for processors, assuming it satisfied the other criteria, it might recover losses. Similarly, a hotel suffering losses due to a decline in reservations would have a cognizable claim if they could show the nexus between their losses and a maritime activity. Such a showing could be made, with equal force, by a resort built around fishing boat rentals or one that could show a sharp decline in bookings because a pollution incident prevented their clientele from participating in some other water-related activities.

Utilizing the current interpretations of maritime activity and legally protected interests, courts could protect the interests of marina operators, tour companies, hotels, fishing suppliers, sport fishing guides, fish processors, and any others who rely upon the marine environment to make a living. A defendant's greater burden of liability in an area heavily dependent on the waters is in keeping with the existence of a greater risk of harm in conducting business there.

The investment test will reflect the pre-injury market balance of resource use. Thus, the investment test serves as a standard for courts to measure the extent to which a plaintiff's rights have been interfered with. Recognizing that everyone has a right to use the resources, but only insofar as there is no unreasonable interference with the rights of another, courts will be able to use this balance to weigh the claims. For example, if a fishing community consists of a fish processing plant, a restaurant serving exclusively seafood from the bay, and several independent fish boat operators, each will have concurrent rights to use the resources. If the restaurant negligently dumps chemicals into the water killing the fish, then it would be

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liable to both the fishing interests and the processing plant. The interference could be roughly measured in relation to the pre-injury investment each enterprise had in that market. Similarly, if a third party negligently pollutes the waters, it would be liable to the fishers, restaurant owners, and the processing plant in a measure roughly equivalent to each enterprise's pre-injury investment.\textsuperscript{243}

American courts generally adhere to the "universally accepted principle that a plaintiff must mitigate damages."\textsuperscript{244} Although courts have looked at mitigation only in apportioning damages,\textsuperscript{245} the marine pollution standard mandates a preliminary look at mitigation efforts as a method to eliminate frivolous claims.\textsuperscript{246} Under the marine pollution standard, mitigation would not be required for a cause of action to lie, but conversely, a plaintiff's refusal to make any attempt to mitigate could bar a claim. The traditional elements of mitigation for damage claims, which include a showing both that the efforts were reasonable and that no action was taken to aggravate the economic harm,\textsuperscript{247} would be applied as a threshold test in marine pollution cases.

\textbf{D. Economic and Social Policy Support for the Marine Pollution Standard}

1. Social Policy

Fairness, public policy, and social considerations may all contribute to a court's decision to recognize pure economic loss claims. Those concerns are tempered by a court's objective not to impose liability out of proportion with the defendant's fault. A court using the physical injury rule to limit liability, however, may preclude redress of a

\textsuperscript{243} The \textit{Pruitt} decision describes this type of investment test to avoid the possibility of double-counting of damages. Even though the injuries of the wholesalers, retailers, processors, distributors, and restaurateurs were all foreseeable and investment-backed, the court was unable to formulate a restriction on liability that could at the same time permit compensation of these legitimate claims. \textit{Pruitt v. Allied Chem. Corp.}, 523 F. Supp. 975, 980 (E.D. Va. 1981); see \textit{supra} note 181.

\textsuperscript{244} \textit{Air et Chaleur, S.A. v. Janeway}, 757 F.2d 489, 494 (2d Cir. 1985).

\textsuperscript{245} \textit{Tennessee Valley Sand & Gravel Co. v. M/V Delta}, 598 F.2d 930, 932 (5th Cir. 1979) (barge owner's efforts to raise vessel held to be reasonable attempts to mitigate damages).

\textsuperscript{246} Like mitigation, the rule of "avoidable consequences" applies to a court's consideration of the diminution of damages. See, e.g., \textit{Federal Ins. Co. v. Sabine Towing & Transp. Co.}, 783 F.2d 347, 350 (2d Cir. 1986).

\textsuperscript{247} See, e.g., \textit{Tennessee Valley Sand & Gravel}, 598 F.2d at 932; \textit{Federal Ins. Co.}, 783 F.2d at 350.
plaintiff's valid claim. Courts that have abandoned the physical injury rule have done so because the fundamental fairness of allowing a plaintiff the opportunity to present a legitimate claim for damages requires closer scrutiny than the rule permits. Among the six factors set forth by the Biakanja v. Irving court for evaluating a defendant's duty of due care was the moral blame attached to the defendant's conduct. Moral blame and public sentiment against harm to the environment heavily favor greater recovery for losses in all pollution actions. In Union Oil, duty was imposed, in part because of the public's deep disapproval of polluting activities. The damage award also was intended to prevent future negligent conduct especially when, as in offshore oil drilling, the risk of harm is common knowledge.

In People Express, the defendant's knowledge of the volatility of the chemicals transported, and the existence of their emergency plans, demanded a higher standard of due care than otherwise would have been required. Recognizing the risks involved with hazardous wastes, Congress has expanded liability to include everyone participating in its transportation, handling, manufacture, or disposal. The justification for courts to grant compensation for economic losses in pollution cases is expanding with that duty.

From the corrective justice standpoint, common law decisions are a means of achieving an equitable settlement between individuals. In many instances a corrective justice view may be in conflict with an economic view. When the physical injury rule might restrict recovery, corrective justice tips the balance back toward compensation for innocent victims. From an economic perspective, tort law is a method of maximizing social wealth and deterring inefficient conduct that may run counter to the corrective justice goal of making the plaintiff whole again.

The Pruitt opinion, for example, emphasizes the corrective justice balance of punishing the defendant and compensating the injured.

249 See id.
250 49 Cal. 2d 647, 650, 320 P.2d 16, 19 (1958); see supra note 88 and accompanying text.
251 See, e.g., Union Oil Co. v. Oppen, 501 F.2d 558, 569 (9th Cir. 1974).
252 Id.
253 People Express, 100 N.J. at 246, 267–68, 495 A.2d at 118.
255 R. POSNER, supra note 238, at 243.
In that case the court did not create an economic inefficiency because the liability imposed was not out of proportion with the fault of the defendant. If a court takes corrective justice too far, however, the result could be double-counting, or compensation of fraudulent claims, which would create an economic inefficiency.

2. Economic Policy

The enormous financial impact of a widespread pollution incident demands that courts must use careful scrutiny before contemplating full compensation for all injuries. Nevertheless, even though compensation for commercial fishers alone is more fair than allowing no recovery for economic losses at all, in many cases the recovery should be much broader than that to reach a correct economic result. Further, limiting recovery to commercial fishers often fails to compensate all injured parties.257

Under a theory of cost internalization, potential liability for marine pollution should be built into the market structure that supports a potentially polluting enterprise.258 Rather than treating losses as externalities to be borne by the public or by victims, the free market system should require industry to include such losses as part of the cost of doing business. Such a marketplace model for analysis can only be accurate if a court includes all costs. Thus, if there are pollution incidents resulting in uncompensated losses, not all of the costs will be included in the market pricing structure.259 From an environmental protection standpoint, all costs of manufacturing, production, and distribution should be internalized.

Imposing liability for losses to commercial fishers and other parties whose livelihoods rely upon the use of the damaged resource yields a correct result in terms of economic efficiency. A decision that leaves the burden of the loss on groups such as fishers is unlikely to distribute losses as efficiently as one that transfers that burden to parties such as oil companies or those dumping hazardous wastes. Such industrial and business entities can take cost-efficient measures

257 See id. at 980. The court held that “plaintiffs who purchased and marketed seafood from commercial fishermen suffered damages that are not legally cognizable. . . . This does not mean that the Court finds that defendant's alleged acts were not the cause of the plaintiffs' losses, or that the plaintiffs' losses were in any sense unforeseeable.” Id.


to prevent or limit diminution of marine life.\textsuperscript{260} Imposing liability will create greater incentives to take measures to prevent pollution accidents.\textsuperscript{261}

The \textit{Union Oil} court’s restriction of compensation to commercial fishers may stem, in part, from the belief that excessive liability will force a business to collapse. The limited compensation in \textit{Union Oil} also reflects a lack of understanding of the need for genuine protection of resources. The increasing need for the protection of the environment, which parallels the increasing demand for natural resources, outweighs the need to limit a defendant’s liability in marine pollution incidents.\textsuperscript{262} Given the current societal concerns, the arbitrary physical injury rule is of limited use to modern courts.

In \textit{The Cost of Accidents}, Guido Calabresi suggests that liability for tort losses should be apportioned in a way that will achieve an optimal allocation of resources.\textsuperscript{263} Under a resource allocation theory it is necessary to identify the party that can avoid the costs at the least expense—the cheapest cost-avoider.\textsuperscript{264} Also, if one party is in a superior financial position such that it is better able to correct an error in allocation, the loss should be shifted to that party as the best cost-avoider.\textsuperscript{265}

Calabresi’s economic theories of resource allocation and risk-spreading\textsuperscript{266} were among the bases for imposing liability in \textit{Union Oil}.\textsuperscript{268} Even though the end result appears scarcely more than a decision to impose liability on the party in the best financial position to bear the loss, the court also found support for its position in these economic theories.\textsuperscript{269} The court found that the oil company had the capacity to “buy out” the plaintiffs if the burden of liability was too great to pay the losses.\textsuperscript{270} The notion of oil companies buying out commercial fishers, seafood processors, vessel owners, and fish tenders, as the \textit{Union Oil} court suggests, may in some cases carry

\begin{itemize}
  \item \textsuperscript{260}See Union Oil Co. v. Oppen, 501 F.2d 558, 570 (9th Cir. 1974).
  \item \textsuperscript{261}Cf. R. Posner, \textit{supra} note 238, at 187.
  \item \textsuperscript{262}See People \textit{ex rel.} Younger v. Superior Ct., 16 Cal. 3d 30, 37-38 n.5, 544 P.2d 1322, 1326 n.5, 127 Cal. Rptr. 122, 126 n.5 (1976) (discussing increase in world fish catch and importance of seafood resources).
  \item \textsuperscript{263}G. CALABRESI, \textit{supra} note 258, at 69-73.
  \item \textsuperscript{264}See id.; see also Coase, \textit{The Problem of Social Cost}, 3 J. LAW \& ECON. 1, 5 (1960).
  \item \textsuperscript{265}G. CALABRESI, \textit{supra} note 258, at 140-44.
  \item \textsuperscript{266}G. CALABRESI, \textit{supra} note 258, at 150-52; see also Union Oil Co. v. Oppen, 501 F.2d 558, 569-70 (9th Cir. 1974).
  \item \textsuperscript{267}G. CALABRESI, \textit{supra} note 258, at 69-73.
  \item \textsuperscript{268}See 501 F.2d at 569-70.
  \item \textsuperscript{269}Id.
  \item \textsuperscript{270}Id. at 570.
\end{itemize}
the economic theory to an extreme. In other cases, this may be both economically efficient and logical. Regardless, the premise supports finding greater liability for economic losses in marine pollution actions.

The Pruitt court dismissed out of hand the Union Oil distinction between direct exploiters of marine resources and other users. The court's attempt to find a substitute for that standard, however, created another distinction between slightly less direct and much less direct users of the resources. The court sought some method to limit liability and avoid making the defendant pay twice for a single negligent act. Instead of considering the losses to the fishers, restaurateurs, retailers, processors, distributors, and wholesalers based upon the value of the resource itself, the Pruitt court viewed the lost profits in terms of the loss of the return on the investment of each of the plaintiffs in material and labor in their businesses. Thus, the independent loss to each business did not amount to double-counting of damages.

A predictable system of compensation is critical to the financial stability of many coastal communities. In a remote area, or one dedicated almost exclusively to the use of the waters, damages and subsequent claims for losses due to marine pollution will be particularly great because of the highly integrated economy and the inability of the plaintiffs to mitigate their losses. If fishing or reliance on marine resources were merely an incidental part of an economy, however, the ripple effect through its economy would not be as great as it would be in an integrated economy.

A highly integrated economy will be damaged less severely if an expeditious and guaranteed system of compensation is established. Businesses and individuals could maintain levels of expenditures if they could borrow against predicted recovery. If expenditures were not cut drastically after a pollution incident, fewer downstream losses would be incurred by suppliers and other businesses. The system as it exists denies many claims and, at the same time, subjects many other claims to long delays before compensation. The combination of denied claims and delays substantially increases the total losses from a pollution incident. When courts put the marine

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271 Id.
273 Id. at 979.
274 Id. at 979–80.
275 Id. at 979.
276 Id.
pollution standard to use, communities will be able to predict more accurately recovery for economic losses, and can continue to do business, even in a limited manner, thereby maintaining economic stability.

IV. CONCLUSION

Using the physical injury rule as a threshold requirement for pure economic loss claims in marine pollution results in a system of compensation that is intrinsically inequitable. Although the physical injury rule is grounded on the important notion of limiting and making predictable a defendant’s liability, its application in marine pollution is inappropriate.

Absence of a marine pollution standard denies many plaintiffs with legitimate claims an opportunity to be heard in court. A plaintiff with a minor property damage claim accompanied by huge economic losses may be fully compensated for all losses. Another plaintiff affected by the same pollution, suffering similar economic losses but with no property damage or physical injury, may have no legal remedy. In a marine pollution case, the majority of the claims for economic losses will meet several of the guidelines that courts have used to create exceptions to the physical injury rule. The courts should join the guidelines from the existing exceptions into a marine pollution standard.

Shared uses of waterways elevates the standard of care with which all businesses must perform operations that have the potential to cause damage to the resources. The shared use also increases the foreseeability of the potential harms, and accurately defines the group of particularly foreseeable plaintiffs. The increasing need to protect our resources requires closer scrutiny of economic loss claims in marine pollution cases than the threshold physical injury rule permits.

Courts should adopt the proposed three-part standard to review pure economic loss claims in pollution cases. This standard synthesizes the elements existing in the common law exceptions to the physical injury rule. Using maritime nexus, investment, and feasibility of mitigation as criteria for compensation will result in a system for courts to apply consistently in order to achieve the tort law goals of fair compensation and social utility.