New Approaches to Economic Loss’

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The traditional approach to economic loss has been to treat it as a question of policy. Litigants have frequently invoked policy factors in arguing that it would be ‘fair, just and reasonable’ to allow recovery of economic loss in negligence. However, under the ‘rights based’ approach to tort law (as expounded, for instance, by Stevens in Torts and Rights (Oxford 2007)), there is no room for such arguments. According to the ‘rights based’ view, tort law protects rights, primarily (but not exclusively) property rights and personality rights; economic loss is not recoverable for the simple reason that economic rights are not recognised.

If the ‘rights based’ view represents the correct approach to tort law, litigants who have suffered economic losses will need to adopt new arguments – which focus on ‘rights’ – when seeking to recover their losses. This paper will consider two such arguments that have been made in various common law jurisdictions.

1. Re-characterising economic interests as property rights

If tort law protects property rights, then a litigant may attempt to recover his economic loss by re-characterising his economic interest as a ‘property right’. This tactic has had mixed success in different common law jurisdictions.

In OBG v Allan, where the claimant suffered economic loss because the defendant had mismanaged his contractual claims, the claimant sought to recover his losses by arguing that his contractual rights could accurately be characterised as ‘property rights’. Although the argument was unsuccessful, it represents a clear attempt to avoid the rule against recovery of economic loss by re-characterising the claim as one for the infringement of a property right. Such a tactic has been successful in other jurisdictions, particularly the United States, where the courts are more open to calling contractual rights ‘property’ (e.g. FMC Corp v Capital Cities 915 F 2d 300 (1990)). This liberal approach to ‘property’ has meant that losses – that would be characterised as ‘economic’ in other jurisdictions – are frequently recoverable in the United States.

2. Exploiting the boundary between economic interests and property rights

A litigant’s economic loss frequently results from an inability to use their property. For instance, in Perre v Apand (1999) 198 CLR 180 a quarantine zone imposed on the claimant’s land (as a result of the defendant negligently allowing bacterial wilt to escape nearby) caused the claimant to suffer economic loss as he could not export his produce. We would not normally consider this to be an example of an infringement of a property right, as there was no physical interference with the claimant’s land, but mere impairment of its use. Yet it is open for litigants to argue for a wider conception of ‘property rights’, under which merely impairing one’s ability to use their land or goods would constitute an infringement of their property right. If accepted, this would encompass a large proportion of claims that we currently consider to be claims for economic loss (e.g. Perre v Apand itself, as well as Caltex Oil v The Dredge ‘Willemstad’ (1976) 136 CLR 529)).
Again, there is a divergence in jurisdictions here. Whilst this argument has not been successful in recent English cases (it was rejected in Club Cruise Entertainment v Department for Transport [2008] EWHC 2794 and D Pride v Institute for Animal Health [2009] EWHC 685), it has been successful in some Australian decisions (particularly in Caltex).

What these two arguments show is that a move to a ‘rights based’ approach to tort law will not stifle the debate about economic loss. Rather it encourages a new approach to this question: litigants will attempt to expand the boundary of property rights, so as to afford protection to interests that may formerly have been thought of as purely economic. This paper will consider how this new approach has been received in different jurisdictions.