

The logo for Weightmans, featuring the name in white text on a dark teal, wavy rectangular background.

Weightmans

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**Product Liability: when damage is not “damage”**

The pure economic loss policy coverage conundrum following the *Bacardi* decision

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A series of overlapping, wavy lines in shades of red, orange, and purple that flow across the bottom of the slide.

## Alcohol and the law – what's the connection?!



## Products Liability Cover

Typical Products Liability insuring clause:

*“... indemnity against legal liability for damages in respect of ... personal injury or accidental loss of or damage to property ... in the course of the business...caused by Products”*

## Tortious cover only

- *Tesco Stores Limited v Constable and Others [2008]*
  - Tesco built supermarket over tunnel at Gerrards Cross. Tunnel collapsed.



## *Tesco Stores Limited v Constable and Others [2008]*

- Line owned by Network Rail.
- Chiltern Railways used line under a licence from NR.
- Tesco liable under contractual deed to CR.
- Tesco sought an indemnity under its PL policy
  
- Insurers declined indemnity. Valid declination:
  - Tesco not liable in tort as no property damage suffered by CR.
  - Tesco's only liability to CR was in contract.
  - PL/Products cover limited to liability in tort.

## Cover for Tortious Liability

- For coverage purposes, the key is to identify the type of damage for which a supplier of products is said to be liable in tort.
- Distinct from purely contractual liabilities.
- **English law does not generally permit recovery in tort for pure economic loss**
- In the context of property damage, has there been damage to 'other property' for the purposes of the law of tort or has damage only occurred to the 'thing itself'?
- Confusingly, a defect may manifest itself in physical damage and yet such damage may not be considered tortious damage...

## Pure Economic Loss

Damage to “other” property

### *Murphy v Brentwood District Council [1991]*

- Claim in negligence against a surveyor following damage to a building caused by defective foundations.
- Superstructure and foundations treated as a single entity such that damage from one to the other was in fact damage to the thing itself i.e. pure economic loss.

## Complex structures

*“if a defective central heating boiler explodes and damages a house or a defective electrical installation malfunctions and sets the house on fire, I see no reason to doubt that the owner of the house, if he can prove that the damage was due to the negligence of the boiler manufacturer in the one case or the electrical contractor on the other, can recover damages in tort...”. (per Lord Bridge)*



## Considerations when seeking to identify damage to “other property”

### *Jacobs v Morton & Partners (1994)*

- Whether the item in question was constructed by someone other than the main contractor responsible for the main building works.
- Whether the item in question has retained its separate identity – for example, a central heating boiler – or whether it has merged with the remainder of the building – for example, a wall.

## Pure Economic Loss

- Whether the item positively inflicts damage on the building – for example, faulty electrical wiring which causes a fire – or whether it simply fails to perform its function and thus permits damage to occur.
- Whether the item in question was constructed at a different time from the rest of the building.
- Whether the item in question was purchased as part of the same transaction.

## Pure Economic Loss – Beverages

### *Bacardi–Martini Beverages v Thomas Hardy Packaging (2002)*

- Defendant supplied carbon dioxide to Bacardi, who then mixed it into a pre-existing alcohol/water concentrate to produce a finished product, the Bacardi Breezer.
- Batch of carbon dioxide was contaminated with the carcinogenic chemical, benzene.
- The pre-existing concentrate was never intended to have a life of its own – the finished product did not come into existence until the moment of admixture of carbon dioxide with concentrate.
- The product (the Breezer) was defective because of the presence of the benzene, but had it (for the purposes of the contractual exclusion clause) sustained “*direct physical damage*” (as opposed to “*losses of a purely financial or economic nature*”)?

- No damage to property because until the moment of admixture the property said to have been damaged (the Breezer) did not exist.
- *“... the more natural view is that the mix of concentrate and water itself ceased (as always intended) to exist and the finished product came into existence at the moment of such admixture. What resulted was not damaged concentrate and water, but a defective new product.”*
- Subject to heavy criticism – a step too far?
- Several subsequent inconsistent decisions.

## Pure Economic Loss – Food

### *James Budgett Sugars v Norwich Union [2002]*

- Contaminated sugar was used in the manufacture of mincemeat.
- Parties agreed that “*damage to material property*” had occurred – the relevant damage was the “*damage to the mincemeat caused by the incorporation of the contaminated sugar*”, and not the contamination of the sugar itself.
- For there to be damage (rather than the creation of a new defective product) there must be contamination of property which continued to exist in a contaminated, albeit separately identifiable, form.
- Solids may be more capable of surviving and being damaged with contaminants by admixture than liquids.

## Pure Economic Loss – Chilled Water Pipes

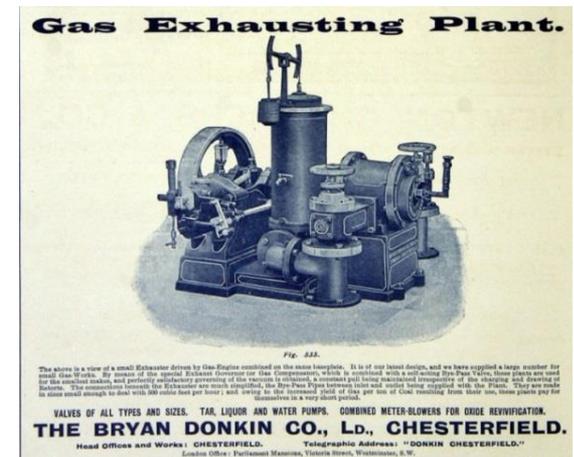
### *Linklaters Business Services v Sir Robert McAlpine Ltd [2010]*

- Corrosion to insulated steel chilled water pipes which served the air conditioning system installed within the claimant's building.
- The corrosion arose because of defects in the insulation which had been fitted by a sub-sub-contractor.
- Could the subbie be sued in tort for the corrosion?
- *“The insulated chilled water pipe work was essentially one 'thing' for the purposes of tort. One would simply never have chilled water pipe work without insulation because the chilled water would not remain chilled and it would corrode. The insulation is a key component but a component nonetheless.”* (per Akenhead J )

## Pure Economic Loss – Compressor

### *Tunnel Refineries v Bryan Donkin (1998)*

- The first defendant was a supplier and manufacturer of a large compressor.
- The compressor incorporated a fan manufactured by another defendant.
- The fan shattered while in use, wrecking the compressor, but causing no damage to anything else and no personal injury.



- The question to be decided was *“whether the Compressor was a chattel of which the Fan was part, making the Compressor defective and precluding recovery when it was itself damaged; or whether the Fan or some section of the Compressor of which the Fan was part (such as the Rotating Assembly) was defective, so that recovery is possible in relation to the damage suffered by the other property comprising the rest of the Compressor.”*
- Damage was pure economic loss.
  - One transaction/supplier.
  - Fan was integral.

## The approach adopted in other jurisdictions



### Australia

- As in English law, where there is no physical damage to person or property, there is no recovery in tort:  
*Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 (2014) 313 ALR 408*
- Follows English line of authority starting with *Murphy v Brentwood*



## Canada

- More receptive to claims for economic loss than Eng/Aus
- In *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, Norsk negligently damaged a railway bridge owned by Public Works Canada and used by Canadian National Railway. CNR incurred pure economic loss in re-routing its traffic while the bridge was being repaired. Held that CNR could recover from Norsk.
- In relation to complex structures, Supreme Court developed a “dangerous defects” approach: where defects resulting from negligence pose a real and substantial danger to the occupants of the building, the reasonable cost of repairing the defects and putting the building back in a non-dangerous state are recoverable in tort: *Rivtow Marine Ltd v Washington Iron Works*



## New Zealand

*CHH v Minister for Education* [2015] NZCA 321

- NZ courts have rejected a clear delineation between economic loss and physical damage in terms of recoverable loss.
- Recoverable loss could extend to:
  - damage caused to other parts of a building to which a defective chattel is attached may be recoverable;
  - measures taken to prevent future damage and adverse health effects to those who occupy or visit the premises in which defective products have been installed;
  - costs of repairs to damaged parts of the building resulting from the defective goods;
  - costs of repairing or replacing the damaged goods;
  - costs of taking measures to prevent potential harm or damage before it actually occurs.



## United States

- Approach differs between states
- Illinois: *“physical injury” unambiguously connotes damage to tangible property causing an alteration in appearance, shape, color or in other material dimension [but] does not include intangible damage to property such as economic loss ...”*  
*Travelers Insurance Co v Eljer Manufacturing Inc* 757 NE 2d 481 (Ill 2001)
- Alaska: if an unreasonably dangerous product causes a *“sudden and calamitous”* event that threatens bodily harm and also happens to damage the product, the loss generally is found to be property loss recoverable in tort actions
- New York: recovery for damage to the product itself only when the product is unreasonably dangerous to persons or property

Worth noting comments of Stuart-Smith LJ in *Yorkshire Water Services Ltd v Sun Alliance & London Insurance plc* [1997] CLC:

*'... the American courts adopt a much more benign attitude towards the insured ... giving rise to the principle "that doubts as to the existence or extent of coverage must generally be resolved in favour of the insured", or because the courts have "adopted the principle of giving effect to the objectively reasonable expectations of the insured for the purpose of rendering a fair interpretation of the boundaries of insurance cover"...For the most part these notions which reflect a substantial element of public policy are not part of the principles of construction of contracts under English law'.*

## What does the future hold?

- Position in English law in relation to property damage is now fairly well-established:

*“generally speaking, damage requires some altered state, the relevant alteration being harmful in the commercial context. This plainly covers a situation where there is a poisoning or contaminating effect upon the property of a third party as a result of the introduction or intermixture of the product supplied”.*

*per* Potter LJ in *Pilkington UK Ltd v CGU Insurance plc* [2004] 1 CLC 1059

- *Bacardi* case is likely to represent furthest limits of the law in England in this area for the foreseeable future.
- Scope for Courts to reconcile / refine conflicting decisions.

## Summary

- Products Liability (and Public Liability) cover is for tortious liability and is inherently restrictive.
- Factual questions will arise: is this a defective product or damage to other property?
- All but the simplest structures and products have component parts: whether a structure is to be viewed as an indivisible entity or a collection of individual parts is highly fact sensitive.
- The nature of the transaction by which the relevant structure or product has been provided and its function may help with deciding whether damage to “other property”.
- Food and drink – new product or separately identifiable damaged material?
- Caution should be exercised in applying cases too literally: they are highly fact dependent and should be approached on a case-by-case basis.

## Product Liability: when damage is not “damage”

- Any questions?

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