

The Limits of Liability: Can Alaska Oil Spill Victims Recover Pure Economic Loss?

I. INTRODUCTION

On July 1, 1987, the *Glacier Bay*, an American flag tanker, sailed from Valdez, Alaska, bound for Nikiski, Alaska, carrying a cargo of trans-Alaska pipeline crude oil. The next day the tanker unexpectedly grounded while attempting to anchor in the Cook Inlet. Sustaining severe damage to its hull, the *Glacier Bay* discharged an estimated 150,000 gallons of crude oil into the surrounding water.¹ On March 24, 1989, the *Exxon Valdez* ran aground in Prince William Sound after taking on a load of trans-Alaska pipeline oil, spilling more than eleven million gallons of crude oil into the water.² In January 1990, the supertanker *Keystone Canyon* loaded a cargo of Alaska oil at the trans-Alaska pipeline terminal at Valdez. Off the coast of California it transferred twenty-four million gallons to the tanker *American Trader*. On February 7, while attempting to moor at its destination terminal, the *American Trader* ruptured its hull by running over its anchor, causing 400,000 gallons of crude oil to spill into the ocean.³

In addition to state and federal government actions against the responsible parties, these incidents have sparked a complex series of lawsuits by individual citizens seeking recovery for damages arising from the spills.⁴ These plaintiffs include: commercial fishermen;

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1. *In re the Glacier Bay*, 944 F.2d 577 (9th Cir. 1991).

2. Michele Straube, *Is Full Compensation Possible for the Damages Resulting from the Exxon Valdez Oil Spill?*, 19 *Envtl. L. Rep.* 10,338, 10,338 (1989).

3. *Slaven v. BP America, Inc.*, 973 F.2d 1468 (9th Cir. 1992).

4. Approximately 150 civil suits are currently pending as a result of the *Exxon Valdez* spill. See Order No. 83 at 1, *In re the Exxon Valdez*, No. A89-095 Civil (D.

owners of bait and tackle shops, marinas, and seafood restaurants; and recreational users of the ocean. Recovery is sought for direct physical damage to real and personal property caused by the oil, as well as for pure economic loss in the form of lost business profits resulting from the loss of use of the water resources.

Spills involving Alaska oil trigger competing state and federal laws, making their resolution particularly complex. Oil spills are maritime torts and are subject to the rights and remedies of federal maritime law.⁵ Alaska oil is also governed by a comprehensive federal statute drafted specifically to regulate oil transported through the trans-Alaska pipeline system.⁶ Additionally, in the exercise of its police power, the State of Alaska has enacted a statute intended to punish those responsible for the discharge of hazardous substances into state waters.⁷

Each legal scheme differs in its provisions regarding the type and/or extent of recoverable damages. The general maritime law prohibits recovery for pure economic loss — loss without any connection to a physical injury to person or property.⁸ The federal Trans-Alaska Pipeline Authorization Act (“TAPAA”)⁹ enables plaintiffs to recover in strict liability, up to a set limit, for “all damages”¹⁰ arising from discharges of oil; yet in a glaring omission, the statute does not specify whether the “all damages” phrase includes pure economic loss. The Alaska statute provides for unlimited strict liability for all damages, including pure economic loss.¹¹ Thus, the litigation over the recent spills of Alaska oil implicates issues of federal statutory and maritime law, state statutory law preemption, and statutory construction. In resolving these cases, therefore, courts must determine: (1) whether and to what extent Congress intended TAPAA to cover the field and preempt the rights and remedies available under federal maritime law and state statutory law; (2) if TAPAA does preempt the other

Alaska July 31, 1992) (order denying plaintiffs’ motion to remand).

5. See *infra* part II.A.

6. The Trans-Alaska Pipeline Authorization Act of 1973, 43 U.S.C. §§ 1651-56 (1973) (amended 1990).

7. ALASKA STAT. § 46.03.822-24 (1991 & Supp. 1992).

8. See, e.g., *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927).

9. 43 U.S.C. §§ 1651-56 (1986 & Supp. 1992).

10. *Id.* § 1653(c)(1). The statute contains no definition of the term “all damages.” The proper scope of that term is an issue of contention in the current litigation and is the subject of this paper.

11. ALASKA STAT. § 46.03.824 (1991).

legal schemes, how the term "all damages" in the statute should be construed; and (3) whether state or general maritime law controls in spills involving Alaska oil which exceed TAPAA's \$100 million strict liability limit. Although the Ninth Circuit and federal district courts in Alaska and California have attempted to clarify these issues, to date they have been unsuccessful.¹²

This note seeks to clarify the proper role of these three bodies of law in litigation over Alaska oil spills. As a comprehensive federal statute, TAPAA should preempt state law and federal maritime law. However, because TAPAA was formulated against the backdrop of established maritime law, it should be read to incorporate within its "all damages" clause the general maritime rule barring recovery for pure economic loss. Furthermore, for claims exceeding TAPAA's \$100 million strict liability limit, the general maritime law should preempt state law and hence bar recovery for economic loss unrelated to a physical injury to person or property. Under these interpretations, therefore, all claims in the current litigation seeking recovery for pure economic loss should be denied.

II. THE THREE BODIES OF LAW IMPLICATED

A. Federal Maritime Law — Maritime Jurisdiction and the Rule of *Robins Dry Dock*

The jurisdiction of the federal courts over admiralty cases is founded upon Article III, Section 2 of the United States Constitution, which provides that "[t]he judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction."¹³ The modern statute governing admiralty jurisdiction grants original jurisdiction to the federal courts over all civil cases cognizable in admiralty.¹⁴

12. See *infra* part II.A.2., notes 118-137 and accompanying text.

13. U.S. Const. art. III, § 2. The terms "admiralty" and "maritime law" are used synonymously to describe "the set of legal rules, concepts, and processes that relate to navigation and commerce by water." THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 1-1 (1987).

14. 28 U.S.C. § 1333 (1966). The statute provides that "the district courts shall have original jurisdiction, exclusive of the courts of the States, of . . . [a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." *Id.* The "saving to suitors" clause does not affect the application of maritime law:

[T]he "saving to suitors" clause allows state courts to entertain *in personam* maritime causes of action, but in such cases the extent to which state law may be used to remedy maritime injuries is constrained by a so-called "reverse-*Erie*" doctrine which requires that the substantive remedies

In the absence of any prevailing federal statutory scheme, the substantive law applicable to a maritime tort is the general maritime law:

[W]hen a common law action is brought, whether in a state court or in federal court, to enforce a cause of action cognizable in admiralty, the substantive law to be applied is the same as would be applied by an admiralty court — that is, the general maritime law, as developed and declared, in the last analysis, by the Supreme Court of the United States, or as modified from time to time by act of Congress.¹⁵

Therefore, whether a claimant files a suit in state court, federal court, or a federal court sitting in diversity, the same principles will govern the outcome of the dispute.

To gain access to the maritime jurisdiction of the federal courts, the plaintiff's claim must first meet several threshold requirements designed to ensure that the tortious act in question has some connection to a traditional maritime activity. Historically, courts determined the applicability of maritime jurisdiction through a "locality" test that predicated maritime jurisdiction upon the situs of the injury,¹⁶ thereby limiting jurisdiction to cases where the wrong occurred on navigable waters.¹⁷ This test proved inadequate, however, in determining proper jurisdiction in cases where it was difficult to ascertain the precise situs of the injury.¹⁸ In an attempt to alleviate some of the confusion, Congress passed the Admiralty

afforded by the States conform to governing federal maritime standards. *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222-223 (1986).

15. *Jansson v. Swedish Am. Line*, 185 F.2d 212, 216 (1st Cir. 1950); *see also Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318, 1320 (11th Cir. 1989); *In re the Glacier Bay*, 746 F. Supp. 1379, 1383 (D. Alaska 1990).

16. SCHOENBAUM, *supra* note 13, § 3-4, at 69.

17. *Askew v. Am. Waterways Operators, Inc.*, 411 U.S. 325, 340-41 (1973). The threshold requirement for navigability is the existence of an "interstate nexus: the waterbody in question must be available as a continuous highway for commerce between ports and places in different states (or between a state and a foreign country)." SCHOENBAUM, *supra* note 13, § 3-3, at 66.

18. *See, e.g., T. Smith & Son, Inc. v. Taylor*, 276 U.S. 179 (1928) (in a case where the victim was hit and knocked into the water by the ship's sling while standing on the dock, the court refused admiralty jurisdiction as the place of injury was deemed the dock); *The Admiral Peoples*, 295 U.S. 649 (1935) (where the victim was injured while disembarking from ship by falling from the gangplank onto the dock, admiralty jurisdiction upheld as the place where the breach of duty occurred was the gangplank and not the dock).

Extension Act of 1948,¹⁹ extending federal admiralty jurisdiction to all cases in which injuries or damages were caused by a vessel on navigable water, including instances where the injuries were consummated on land.²⁰ Ambiguous situations arose even under this Act, and the courts were left to fashion the proper principles by which they would accept or deny maritime jurisdiction.²¹

After some years, the Supreme Court grew weary of the imprecision of the locality test and the way in which parties manipulated it in order to be heard in admiralty. In *Executive Jet Aviation, Inc. v. City of Cleveland*,²² the Court rejected the pure locality requirement in favor of a standard that looked to the locality of the injury as well as to the existence of a "maritime nexus."²³ As asserted in *Executive Jet*, this two-part test requires that the wrong must (1) "have occurred on the high seas or

19. 46 U.S.C. § 740 (1975).

20. The Act provides that "[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.* See *Nat'l Sea Clammers Ass'n v. City of New York*, 616 F.2d 1222, 1235 (3d Cir. 1980) (the locality test is satisfied if the alleged tortious activity caused damage to the water or marine wildlife), *vacated on other grounds sub nom.*, *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981).

21. See, e.g., *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206 (1963) (admiralty jurisdiction upheld where a longshoreman working on a dock unloading a ship slipped on beans from cargo that had been negligently stored and had spilled during loading process); *Victory Carriers, Inc. v. Law*, 404 U.S. 202 (1971) (admiralty jurisdiction denied where a longshoreman working on a dock was injured by equipment owned and operated by the stevedore). The distinction between these two cases was not related to the function the longshoremen were performing at the time, but to the fact that, in *Gutierrez*, the "injury was caused by an appurtenance of the ship, the defective cargo containers." *Id.* at 210-11. This distinction remains an important determinant, as "a ship or its appurtenances must proximately cause an injury on shore to invoke the Admiralty Extension Act and the application of maritime law." *Pryor v. Am. President Lines*, 520 F.2d 974, 979 (4th Cir. 1975), *cert. denied*, 423 U.S. 1055 (1976).

22. 409 U.S. 249 (1972). This case involved the crash of an airplane into Lake Erie shortly after taking off from the Cleveland airport. The court found no relationship to traditional maritime activity and held that "there is no federal admiralty jurisdiction over aviation tort claims arising from flights by land-based aircraft between points within the continental United States." *Id.* at 274.

23. SCHOENBAUM, *supra* note 13, § 3-5, at 75.

navigable waters"²⁴ and (2) bear a "significant relationship to traditional maritime activity."²⁵ While the *Executive Jet* test in practice "has not significantly reduced the scope of admiralty tort jurisdiction or replaced the emphasis on locality and navigable waters," it effectively serves as a "policy-based filter that allows the courts flexibility in screening out unusual fact situations that are not maritime in nature, but happen to occur in navigable waters."²⁶

The shipment of oil on tankers is an enterprise that bears a significant relationship to traditional maritime activity. Therefore, oil spills that occur on navigable waters meet the *Executive Jet* test and are maritime torts subject to the substantive maritime law.²⁷ Through operation of the Admiralty Extension Act,²⁸ injuries or damages to land caused by oil spills that occur on navigable waters are also governed by maritime law.²⁹

One of the most significant features of maritime tort law is its limitation on the types of loss for which plaintiffs can be compensated. Under prevailing maritime law, "a plaintiff may not recover

24. See also *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 863-64 (1986). Whether a particular body of water is navigable or not is a question of fact, and the burden of proof rests with the party invoking admiralty jurisdiction. *Quick v. Hansen*, 1975 Am. Mar. Cases 791, 792 (9th Cir. 1974), *cert. denied*, 420 U.S. 976 (1975).

25. *Executive Jet*, 409 U.S. at 268.

26. SCHOENBAUM, *supra* note 13, § 3-5, at 80.

27. See *In re Oil Spill by Amoco Cadiz*, 699 F.2d 909, 913 (7th Cir.), *cert. denied*, 464 U.S. 864 (1983) (holding that a shipwreck on the high seas causing an extensive oil spill is "quintessentially the kind of incident for which the distinctive doctrines and remedies of admiralty law were designed"); *United States v. M/V Big Sam*, 681 F.2d 432, 440 (5th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983) (holding that an oil spill resulting from collision between ships on navigable waters is a maritime tort); *In re Oswego Barge Corp.*, 664 F.2d 327, 334 (2d Cir. 1981) (holding that negligent conduct, such as the discharge of oil into navigable waters, which causes loss to others, "constitutes a traditional maritime tort"); *Puerto Rico v. S.S. Zoe Colocotroni*, 628 F.2d 652, 672 (1st Cir. 1980), *cert. denied*, 450 U.S. 912 (1981) ("An oil spill on the navigable waters is a breach of federal maritime law.").

28. See *supra* note 19 and accompanying text.

29. See *Amoco Cadiz*, 699 F.2d at 913 (Admiralty Jurisdiction Extension Act covers damage to land caused by an oil spill); *Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1031 (5th Cir. 1985) (en banc), *cert. denied*, 477 U.S. 903 (1986) (under the Admiralty Extension Act, admiralty jurisdiction extends to claims for shoreside damages resulting from a chemical spill caused by the collision of ships on a navigable waterway).

for his economic loss resulting from bodily harm to another or from physical damage to property in which he has no proprietary interest."³⁰ Established in the 1927 case of *Robins Dry Dock & Repair Co. v. Flint*,³¹ this bright-line rule is a judicially-imposed limitation on the legal duty of care owed by maritime tortfeasors.³² The rule seeks to limit liability in situations that have wide-reaching and potentially endless economic repercussions, such as oil spills; it should not be viewed as "saying that the injury . . . was unforeseeable but, rather, as drawing a legal line, based on considerations of policy."³³ Because it deviates from principles of proximate cause, the rule is a fertile source of controversy.³⁴ Nevertheless, at least five United States Circuit Courts of Appeal, including the Ninth Circuit, recognize the *Robins* doctrine as an enduring aspect of maritime law.³⁵

30. Fleming James, Jr., *Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal*, 25 VAND. L. REV. 43, 43 (1972).

31. 275 U.S. 303 (1927).

32. See *Testbank*, 752 F.2d at 1019. In this 10-5 decision, the majority applied the *Robins* rule to deny recovery to marina and boat rental operators, wholesale and retail seafood enterprises not actually engaged in fishing, seafood restaurants, tackle and bait shops, and recreational fishermen, all of whom had filed claims for economic loss unaccompanied by physical damage to property resulting from a boat collision and subsequent chemical spill in the lower Mississippi River. *Id.* at 1020-21. The *Testbank* court appeared to adopt the following explanation of *Robins* offered by the Supreme Court of Louisiana in *PPG Industries, Inc. v. Bean Dredging, Inc.*, 447 So. 2d 1058 (La. 1984): "the [Supreme Court of Louisiana] explained *Robins* as based on . . . policy considerations [and concluded] that under a risk-duty analysis the 'moral, social and economic values involved' did not warrant extending a duty, and hence liability, to those who might suffer indirect economic loss[] from an act of negligence." *Testbank*, 752 F.2d at 1028 (quoting *PPG Industries*, 447 So. 2d at 1060-61); see also *infra* note 178.

33. *Barber Lines A/S v. M/V Donau Maru*, 764 F.2d 50, 52 (1st Cir. 1985).

34. See, e.g., *Testbank*, 752 F.2d at 1035 (Wisdom, J., dissenting). Labeling the *Robins* rule the "Tar Baby of tort law," Judge Wisdom rejected the necessity of the physical injury rule and urged that recovery in such cases be determined through analysis and application of the traditional tort principles of proximate cause and foreseeability. *Id.*

35. Recovery for pure economic loss is barred in the First, Third, Fifth, and Eleventh Circuits. See, e.g., *Barber Lines A/S v. M/V Donau Maru*, 764 F.2d 50 (1st Cir. 1985); *Getty Ref. and Mktg. Co. v. MT Fadi B*, 766 F.2d 829 (3d Cir. 1985); *Testbank*, 752 F.2d at 1032; *In re Hercules Carriers, Inc. v. Florida*, 720 F.2d 1201 (11th Cir. 1983), *cert. denied*, 469 U.S. 835 (1984). For a discussion of the

1. *The Origin of the Physical Injury Requirement in Maritime Law.* In *Robins Dry Dock & Repair Co. v. Flint*,³⁶ Flint had chartered a boat pursuant to an agreement which required the boat to be docked at least once every six months for repairs. During the period of repair, the payment of the hire was to be suspended. Flint delivered the vessel at the proper time, but while in dry dock, the dry dock company negligently damaged the boat's propeller, necessitating a two-week delay. The company settled with the owners of the boat, receiving from them a release of all their claims. Flint brought suit against the dry dock company to recover damages for the loss of use occasioned by the delay, including the hire he had been required to pay while unable to use the boat.

The district court held for Flint on the theory that the negligence of the dry dock company violated Flint's proprietary interest in the vessel.³⁷ On appeal, the Second Circuit rejected this proposition, but affirmed Flint's right to recover on the ground that the dry dock company as tortfeasor was liable for the total market value of the loss of use resulting from the delay. The court reasoned that "if . . . the total damages would be divisible," Flint would receive a proportionate share of "the market value of the use of the vessel for the period of the delay."³⁸ Since the company had settled with the owner for the owner's portion of the loss, Flint, according to the

Ninth Circuit's handling of claims for pure economic loss in maritime tort cases, see *infra* pp. 13-21.

In addition, the United States Supreme Court, in a recent case concerning malfunctioning engines on oil-transporting supertankers, held that no strict products-liability claim "lies in admiralty when the only injury claimed is economic loss." *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 875 (1986). While this case is not dispositive on the issue of recovery for economic loss in the context of other maritime torts, the Court did give a slight indication of where its sympathies might lie. In stating that "[w]e do not reach the issue whether a tort cause of action can ever be stated in admiralty when the only damages sought are economic," the Court inserted a "*but see*" citation to *Robins Dry Dock*, indicating its likely agreement with the rule. *Id.* at 871 n.6.

36. 275 U.S. 303 (1927).

37. *Flint v. Robins Dry Dock & Repair Co.*, 1924 Am. Mar. Cases 740, 744-45 (S.D.N.Y. 1924).

38. *Flint v. Robins Dry Dock & Repair Co.*, 13 F.2d 3, 5 (2d Cir. 1926).

Second Circuit, could then sue the dry dock company directly and recover for his share.³⁹

The Supreme Court reversed the holdings of the lower courts and denied recovery, holding that Flint contracted with the owner, not the dry dock company and, thus, had no “interest protected by the law against unintended injuries inflicted upon the vessel by third persons who know nothing of the charter.”⁴⁰ The charterer could not recover against the dry dock because the “injury to the propeller was no wrong to [him] but only to those to whom it belonged.”⁴¹ In the most famous passage of the three-page opinion, Justice Holmes declared:

[W]hile intentionally to bring about a breach of contract may give rise to a cause of action, no authority need be cited to show that, as a general rule, at least, a tort to the person or property of one man does not make the tortfeasor liable to another merely because the injured person was under a contract with that other unknown to the doer of the wrong. The law does not spread its protection so far.⁴²

39. Justice Holmes characterized the Second Circuit’s opinion as follows: “It seems to have been thought [by the Circuit Court] that perhaps the whole might have been recovered by the owners, that in that event the owners would have been trustees for the respondents to the extent of the respondents’ share, and that no injustice would be done to allow the respondents to recover their share by direct suit.” *Robins Dry Dock*, 275 U.S. at 309.

40. *Id.* at 308. The interests of charterers, if any, “must be worked out through their contract relations with the owners” and not on “the postulate that they have a right *in rem* against the ship.” *Id.* Justice, therefore, “does not permit that the petitioner be charged with the full value of the loss of use unless there is some one who has a claim to it as against the petitioner.” *Id.* at 309. “The respondents have no claim either in contract or in tort, and they cannot get a standing by the suggestion that if some one else had recovered it he would have been bound to pay over a part by reason of his personal relations with the respondents.” *Id.*

41. *Id.* at 308.

42. *Id.* at 308-09 (citations omitted). Though claiming that no authority was necessary, Justice Holmes did cite to three other cases as “good statement[s]” of this principle. See *Elliott Steam Tug Co., Ltd. v. The Shipping Controller*, 1 K.B. 127, 139-40 (1922) (“The charterer in collision cases does not recover profits, not because the loss of profits during repairs is not the direct consequence of the wrong, but because the common law rightly or wrongly does not recognise him as able to sue for such an injury to his contractual right.”); *Byrd v. English*, 43 S.E. 419 (Ga. 1903) (recovery of lost profits denied where the defendant negligently damaged a utility’s electrical conduits, cutting off power to plaintiff’s plant); *The Federal No. 2*, 21 F.2d 313, 314 (2d Cir. 1927) (recovery to plaintiff for sums spent

Thus, while the owner of the boat could maintain an action against the dry dock company, the third-party charterers could seek recovery only from the owners on the charter contract.

The decision in *Robins* reaffirmed settled common law doctrine. Justice Holmes' opinion "broke no new ground, but instead applied a principle, then settled both in the United States and England, which refused recovery for negligent interference with contractual rights."⁴³ While the facts of the case dealt with a *contract* between an owner and a boat charterer, Justice Holmes wrote in such broad terms that, over time, the rule he articulated has been interpreted to bar recovery of economic loss resulting from *torts* unconnected to any contractual relationship.⁴⁴ At present, the *Robins Dry Dock* rule represents the principle that "a plaintiff may not recover [in tort] for his economic loss resulting from bodily harm to another or

in maintenance and cure denied where the defendant tug negligently injured the plaintiff's employee while he was working on a barge, the court holding that "[i]t is too indirect to insist that this may be recovered, where there is neither the natural right nor legal relationship between the appellant and the tug").

43. *Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1022 (5th Cir. 1985) (en banc), cert. denied, 477 U.S. 903 (1986). Professor James, discussing the history of this rule, has noted the "remarkable parallel between the American decisions on this point and those in the British Commonwealth." James, *supra* note 30, at 45. He goes on to state that:

[t]hese developments were largely independent of each other; the courts in our country rarely have cited British authority, and British courts rarely cite our decisions. Nevertheless, the developments have been similar even to details in drawing the line on recovery. Thus, British decisions, which have allowed recovery for economic consequences to one whose property was physically injured, but denied recovery for similar loss to one whose property suffered no physical impairment, have an almost exact American analogue.

Id. at 45-46 (footnotes omitted).

44. This development was noted by the court in *Testbank*, where the court stated:

Plaintiffs would confine *Robins* to loss[] suffered for inability to perform contracts between a plaintiff and others, categorizing the tort as a species of interference with contract. When seen in the historical context . . . however, it is apparent that *Robins Dry Dock* represents more than a limit on recovery for interference with contractual rights. Apart from what it represented and certainly apart from what it became, its literal holding was not so restricted. If a time charterer's relationship to its negligently injured vessel is too remote, other claimants without even the connection of a contract are even more remote.

752 F.2d at 1023.

from physical damage to property in which he has no proprietary interest."⁴⁵ Put another way, a person may not recover damages for pure economic loss in the absence of physical injury to one's person or property.

The *Robins* decision is a confusing opinion, leaving many issues unresolved.⁴⁶ In the years since Justice Holmes authored the opinion, however, the Supreme Court has been "virtually . . . silen[t]"⁴⁷ on the issue of maritime recovery for pure economic loss and has failed to clarify the proper extent of the *Robins* rule.⁴⁸ Federal circuit and district courts have attempted to fill this void. The Ninth Circuit's handling of the *Robins* doctrine must, therefore, be analyzed in order to gauge both the applicability of the doctrine to Alaska oil spill litigation and the potential effect that that doctrine may have.

2. *The Development of the Robins Rule in the Ninth Circuit.*

In the sixty-six years since the *Robins Dry Dock* decision, the Ninth Circuit has faced the issue of the recoverability of pure economic loss in the maritime context on several occasions. While adhering in principle to the *Robins* rule, these decisions recognize an exception to the rule's application for commercial fishermen who suffer economic injury caused by maritime torts. This exception, however, does not undermine the legitimacy of the *Robins* rule.

45. James, *supra* note 30, at 43.

46. See *Louisiana ex rel. Guste v. M/V Testbank*, 728 F.2d 748, 750 (5th Cir. 1984) (per curiam) ("In *Robins* a great judge, Oliver Wendell Holmes, had an off-day."), *aff'd on reh'g*, 752 F.2d 1019 (1985) (en banc), *cert. denied*, 477 U.S. 903 (1986); *Venore Transp. Co. v. M/V Struma*, 583 F.2d 708, 711 (4th Cir. 1978) ("Justice Holmes wrote broadly, as he customarily did."); *Cargill, Inc. v. Doxford and Sunderland, Ltd.*, 782 F.2d 496, 498 (5th Cir. 1986) ("Justice Holmes' formulation was delivered in different language than we ordinarily use today, but his meaning has not become outdated. There can be no recovery in tort unless the defendant has breached a legal duty owed to the plaintiff."); 2 FOWLER HARPER & FLEMING JAMES, *THE LAW OF TORTS* § 6.10, at 330 (2d ed. 1986) ("Much of the confusion derives from the opinion of Justice Holmes . . .").

47. David R. Owen, *Recovery for Economic Loss Under U.S. Maritime Law: Sixty Years Under Robins Dry Dock*, 18 J. MAR. L. & COMM. 157, 162 (1987).

48. See, e.g., *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 871 n.6 (1986) (leaving open "the issue whether a tort cause of action can ever be stated in admiralty when the only damages sought are economic").

In *Carbone v. Ursich*,⁴⁹ the Ninth Circuit faced a claim similar to that in *Robins*, based upon a third party's negligent interference with a contract. Fishermen employed as crew members on a commercial fishing boat had contracted with the owners of the boat for a *pro rata* share of sixty-one percent of the net proceeds from the sale of the fish caught each day. The fishermen had no proprietary interest in the boat or in the net used to catch the fish, but made profits solely through their contract with the owner. Another boat negligently damaged the net by passing too closely to the fishing boat, resulting in the loss of a substantial amount of fish in the net at the time. The net was unusable during the time of repair, causing the fishermen to lose four additional days of fishing. The fishermen sued the responsible parties to recover the profits lost due to the escape of the fish in the net as well as for the prospective profits foregone during the repair period.

The district court found that "the evidence was sufficient, if recovery was allowed at all, to warrant recovery of damages by [the fishermen] against the [tortfeasors] not only for the loss of the catch enclosed in the net . . . but also for the loss of prospective catches of fish during the period mentioned."⁵⁰ However, a court-appointed special master filed a report which, citing earlier Ninth Circuit precedent,⁵¹ found that economic loss of this type was not recoverable. The court accepted the master's findings and dismissed the case.⁵²

On appeal, the Ninth Circuit confronted both its earlier decision denying recovery under similar circumstances⁵³ and *Robins*, the controlling Supreme Court precedent in maritime cases of this nature. Attempting to circumvent these barriers in favor of the fishermen, the *Carbone* court discussed several cases that had

49. 209 F.2d 178 (9th Cir. 1953).

50. *Id.* at 179.

51. See *Borcich v. Ancich*, 191 F.2d 392, 398 (9th Cir. 1951), *cert. denied*, 342 U.S. 905 (1952) (Where fishermen sued the third-party tortfeasor for the loss of their share of the prospective catch of fish after the third party negligently collided with a fishing boat, the court held that "their loss ar[ose] solely out of their contract with the owners . . . for a share of the catch and under the rule of the *Robins* case," the fishermen failed to state a claim.).

52. See *Carbone*, 209 F.2d at 179.

53. See *Borcich*, 191 F.2d at 398.

allowed owners of negligently damaged fishing vessels to recover an amount, in addition to their own damages, sufficient to cover the lost wages of crew members.⁵⁴ While none of the cases cited granted crew members standing to sue the tortfeasor directly, they did rule that the tortfeasor “was liable for amounts thus lost by the crew and must respond in damages accordingly.”⁵⁵ The court emphasized that this “well-established rule” made “wrongdoer[s] liable not only for the damage done to the fishing vessel, but liable for the loss[] of the fishermen as well.”⁵⁶

Turning to the *Robins* issue, the court reexamined that holding and, upon further analysis, determined that the *Robins* Court “was there dealing with decidedly different principles than those which should attach to the situation of these fishermen.”⁵⁷ The court argued that despite the *Robins* rule, fishermen were entitled to special protection:

[A]lthough dealing with a well established rule of law of torts, [the *Robins* Court] was not thinking of the special situation of the fishermen who . . . had long been recognized as beneficiaries under a special rule which made the wrongdoer liable not only for the damage done to the fishing vessel, but liable for the loss[] of the fishermen as well. This long recognized rule is no doubt a manifestation of the familiar principle that seamen are

54. See *The Mary Steele*, 16 F. Cas. 1003 (D. Mass. 1874) (No. 9226) (members of the crew were allowed to recover jointly with the owners for their shares in mackerel catches which they lost or were prevented from securing through negligent injury to the fishing net); *Taber v. Jenny*, 23 F. Cas. 605 (D. Mass. 1856) (No. 13720) (owners of the fishing vessel were permitted to recover the share belonging to their crew members in addition to their own damages); *United States v. Laflin*, 24 F.2d 683, 685 (9th Cir. 1928) (same).

55. *Carbone*, 209 F.2d at 180.

56. *Id.* at 182.

57. *Id.* at 181. Referring to its view that the right of fishermen to recover lost earnings was “well-established,” the court said of *Robins* that the “case did not operate to establish a rule contrary to the previously recognized doctrine that a respondent in a case of this character, must respond in damages for the loss of the fishermen’s lay share.” *Id.* Rather, “Mr. Justice Holmes . . . was familiar” with the cases establishing that right, and his opinion “contains no internal evidence of an intention to reverse a course of prior decisions relating to the liability of persons in the position of the respondent for loss[] sustained by fishermen such as these appellants.” *Id.*

the favorites of admiralty and their economic interests entitled to the fullest possible legal protection.⁵⁸

The court allowed recovery,⁵⁹ thus creating a "fishermen's exception" to the *Robins* physical injury rule. The *Carbone* court did not intend to overhaul the *Robins* doctrine, but to make it more forgiving to fishermen, "the favorites of admiralty."⁶⁰ The court still considered the *Robins* doctrine to be a "well established rule of law of torts."⁶¹

Twenty-one years later, in *Union Oil Co. v. Oppen*,⁶² the Ninth Circuit faced another claim for economic loss by commercial fishermen, this time arising from a 1969 oil spill in the Santa Barbara Channel. The parties had stipulated that Union Oil was required to compensate the plaintiffs for "all legally compensable damages arising from a legally cognizable injury."⁶³ Union Oil moved for summary judgment, claiming that the plaintiff commercial fishermen could not recover as an element of such damages "profits lost as a result of the reduction in the commercial fishing potential of the Santa Barbara Channel which may have been caused" by the oil spill.⁶⁴ A special master appointed by the district court denied

58. *Id.* at 182.

59. To deny recovery "would mean a withholding from fishermen of all redress for tortious interference with the progress of the voyages which are their livelihood." *Id.* at 183.

60. *Id.* at 182.

61. *Id.*

62. 501 F.2d 558 (9th Cir. 1974).

63. The stipulation stated the facts of the case and the damages which Union Oil had agreed to pay. The third paragraph of the stipulation resolved that:

[i]n order to provide a basis for the disposition of the above referenced claims it is agreed by the undersigned defendants that they will pay . . . all legally compensable damages arising from a legally cognizable injury caused by the aforementioned occurrence . . . provided however, that the payment assumed hereby will not exceed such amount and such claim as said defendants or their contractors would be responsible for in the case of negligence.

Id. at 559-60 (emphasis added by the court).

64. *Id.* at 560.

the motion,⁶⁵ as did the district court itself,⁶⁶ and Union Oil appealed.

The Ninth Circuit's opinion firmly established the fishermen's exception as an enduring aspect of that circuit's jurisprudence and affirmed *Robins'* applicability to all other maritime tort situations.⁶⁷ First, under the standard laid down two years earlier in *Executive Jet Aviation, Inc. v. City of Cleveland*,⁶⁸ the court asserted that the case was to be decided under maritime law⁶⁹ since commercial fishing

65. In a brief order, the special master held that injuries resulting from "an interference by defendants with [plaintiffs'] economic right to fish in public waters" were legally compensable. *Id.*

66. The district judge held that "the loss of a prospective economic advantage occasioned by the alleged diminishment of the quantities of available sea life formed a sufficient basis for recovery under the law of negligence." *Id.*

67. The *Union Oil* decision has, however, been criticized by one commentator:

Nowhere in its analysis . . . did the [*Union Oil*] Court ask who owned the fish. If the fish were owned by the plaintiffs, the case would hardly be complex, either in terms of traditional negligence law or in terms of its modern economic reformulation. "You poisoned my fish," states ownership and causal connection, while the allegations of negligence (assuming they are required) have already been made.

Alternatively, the fish might have been owned by no one, in which event the appropriate precedents are not drawn from tort theory but from cases concerned with the capture of wild animals . . . Such cases have held that a person in hot pursuit of an animal is not entitled to complain if someone else captures it first. Presumably he could not therefore complain if his adversary, having achieved capture, mistreats the animal, neglects it, or simply kills it. And so it is with unowned fish in [*Union Oil*]. The plaintiffs who do not own the fish cannot complain if the Union Oil Company captures them. As they cannot complain of capture, they cannot complain of destruction after capture. As they cannot complain of destruction after capture, they cannot complain of it before capture. No theory of tortious liability can make up the plaintiffs' deficit attributable to their want of ownership.

. . . The result in *Union Oil v. Oppen* may in fact be correct. Yet its method of analysis, spurred on by a commendable distaste for pollution, is fatally flawed.

Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49, 51-52 (1979).

68. 409 U.S. 249 (1972); see *supra* note 22 and accompanying text.

69. While the court did make a sustained analysis regarding whether California law or federal maritime law applied, and appeared to side with maritime law, it finally decided that the result would be the same under either law. *Union Oil Co. v. Oppen*, 501 F.2d 558, 562 (9th Cir. 1974).

bore a significant relationship to traditional maritime activity.⁷⁰ The court followed with an "abridged collection" of citations supporting the "*widely recognized principle* that no cause of action lies against a defendant whose negligence prevents the plaintiff from obtaining a prospective pecuniary advantage."⁷¹ This general rule, the court stated, "operates in a wide variety of settings."⁷²

Despite the vitality of the physical injury rule as a controlling principle of maritime law, however, the court found that the rule contained exceptions permitting the recovery of pure economic loss "in instances in which there exists 'some special relation'"⁷³ between the plaintiff and the third-party tortfeasor. One such special relationship is that between fishermen and other users of the sea, which requires those in the position of the defendants to "refrain from negligent conduct . . . which . . . reasonably and foreseeably could have been anticipated to cause a diminution in the aquatic life in the Santa Barbara Channel area and thus cause injury to the plaintiffs' business."⁷⁴ Because damage to the fishermen's livelihood was a foreseeable consequence of an oil spill, the court held that the defendant had violated a duty to the commercial fishermen "to conduct their drilling and production in a reasonably prudent manner so as to avoid the negligent diminution of aquatic

70. In *Oppen v. Aetna Insurance Co.*, 485 F.2d 252 (9th Cir. 1973), a case arising out of the same oil spill at issue here, the Ninth Circuit had held that physical injury to maritime vessels and an interference with their right of navigation constituted maritime torts subject to maritime law. *Id.* at 257. "In so holding, it was recognized that the 'activity' whose relationship to traditional maritime activity was to be examined was that of the injured party, not that of the tortfeasor." *Union Oil*, 501 F.2d at 561.

71. *Union Oil*, 501 F.2d at 563 (emphasis added). Among the numerous cases and law review articles mentioned, the court cited *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927), and quoted from Justice Holmes' decision. *Id.* at 563-64. Since this was the only United States Supreme Court case cited in the list, it demonstrates the Ninth Circuit's recognition of *Robins* as the controlling authority for cases falling within the "general rule."

72. *Union Oil*, 501 F.2d at 564.

73. *Id.* at 565 (quoting WILLIAM PROSSER, LAW OF TORTS § 130, at 952 (4th ed. 1971)). The court could take notice of these exceptions because "California does not blindly follow the general rule upon which the defendants here rely." *Union Oil*, 501 F.2d at 566.

74. *Union Oil*, 501 F.2d at 568.

life.”⁷⁵ To ensure that its decision remained limited to this exception and that it could not be interpreted as abrogating the *Robins* rule in favor of a traditional tort standard, the court concluded its opinion by reemphasizing the special nature of the exception and, in so doing, implicitly indicated its unavailability as a precedent to other groups seeking recovery for pure economic loss in similar situations. The court stated that commercial fishermen:

[L]awfully and *directly* make use of a resource of the sea, *viz.* its fish, in the ordinary course of their business. This type of use is entitled to protection from negligent conduct by the defendants in their drilling operations. Both the plaintiffs and defendants conduct their business operations away from the land and in, on and under the sea. Both must carry on their commercial enterprises in a reasonably prudent manner. Neither should be permitted negligently to inflict commercial injury on the other. *We decide no more than this.*⁷⁶

In *Carbone*, the Ninth Circuit forged an exception to the rule against recovery for pure economic loss for commercial fishermen who had a contractual stake in the actual and prospective catch of a fishing boat rendered unusable by a tortfeasor. The *Union Oil* court, relying on the special relationship between fishermen and the sea, expanded this exception, allowing fishermen with no legally recognized proprietary interest in the fish prior to a spill to recover damages against a polluter for a diminution in the aquatic life of the

75. *Id.* at 570. The court's use of the traditional tort language of foreseeability has led some to assert that the Ninth Circuit, in its analysis of maritime tort cases, "rel[ies] on a remoteness analysis according to traditional tort principles and may possibly allow recovery for economic loss if the damages are sufficiently direct." See SCHOENBAUM, *supra* note 13, § 13-7, at 472 n.8; Sturla Olsen, Comment, *Recovery for the Lost Use of Water Resources: M/V Testbank on the Rocks?*, 67 TUL. L. REV. 271, 280-81 (1992) (In creating the fishermen exception, the Ninth Circuit "framed its inquiry in terms of duty, proximate cause, and foreseeability . . . [and] endorsed this analysis as appropriate in light of various 'exceptions [and] qualifications to the general rule.'" (footnote omitted) (quoting *Union Oil*, 501 F.2d at 565)). However, this assertion is weakened by several other aspects of the decision: the court's citation to, and quoting of, the opinion in *Robins*; its qualification to the effect that the exception to the general rule did not go beyond commercial fishermen; and, in creating the fishermen exception, its emphasis on the "special relationship" between commercial fishermen and the sea, in that commercial fishermen make "direct" use of the sea's resources, and that water pollution directly harms their livelihood.

76. *Union Oil*, 501 F.2d at 570-71 (emphasis added).

sea.⁷⁷ While this opening might have signalled a willingness to disregard the *Robins* rule for classes of victims otherwise barred from recovery, the *Union Oil* court put that notion to rest. After holding that commercial fishermen could advance a claim for negligent interference with their business, the court stressed that its "holding . . . does not open the door to claims that may be asserted by those, other than commercial fishermen, whose economic or personal affairs were discommoded by the oil spill."⁷⁸ The commercial fishermen's exception to the *Robins* rule thus appears to be the limit for plaintiffs seeking to recover for pure economic loss.

B. Federal Statutory Law — The Trans-Alaska Pipeline Authorization Act

In 1973, Congress passed the Trans-Alaska Pipeline Authorization Act ("TAPAA"),⁷⁹ which was quickly recognized as the strongest of the federal oil spill statutes.⁸⁰ The legislation had two purposes: (1) to authorize the construction of a trans-Alaska pipeline system ("TAPS") to transport oil from Alaska's North Slope to the terminal facilities at Valdez, Alaska;⁸¹ and (2) to

77. While the fishermen no longer needed to have a discrete percentage of the prospective catch to recover, the court did declare that the "reduction of profits [sought to be recovered] must be established with certainty and *must not be remote, speculative or conjectural.*" *Id.* at 570 (emphasis added).

78. *Id.* (emphasis added); see also *In re the Exxon Valdez*, 767 F. Supp. 1509, 1518 (D. Alaska 1991) (The Ninth Circuit in *Union Oil* made an "express disclaimer . . . of any intention to disavow *Robins Dry Dock* except for commercial fishermen.").

79. 43 U.S.C. §§ 1651-1656 (1986 & Supp. 1992).

80. David Ashley Bagwell, *Hazardous and Noxious Substances*, 62 TUL. L. REV. 433, 456 (1988). Other federal oil spill legislation includes: (1) Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (1986 & Supp. 1992); (2) Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (known as CERCLA or the Superfund Act), 42 U.S.C. §§ 9601-9675 (1983 & Supp. 1992); (3) Refuse Act, 33 U.S.C. § 407 (1986); (4) Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356, 1801-1866 (1986 & Supp. 1992); and (5) Deepwater Port Act of 1974, 33 U.S.C. §§ 1501-1524 (1986 & Supp. 1992).

81. The congressional findings that accompanied the Act declared that the "early development and delivery of oil and gas from Alaska's North Slope to domestic markets is in the national interest because of growing domestic shortages and increasing dependence upon insecure foreign sources." 43 U.S.C. § 1651(a) (1986).

create a scheme of strict liability for damages resulting from a spill of TAPS oil.⁸²

In establishing the damages section of TAPAA, Congress sought to ensure that deserving victims of oil spills would receive prompt compensation without having to resort to prolonged litigation,⁸³ while also encouraging the safe operation of the vessels involved in transporting oil. To facilitate these goals, Congress created a \$100 million Trans-Alaska Pipeline Liability Fund ("Fund"), financed through a five cent per barrel tax on all TAPS oil.⁸⁴ Under section 1653(c)(1) of TAPAA, the owner and operator of a vessel and the Fund, "notwithstanding the provisions of any other law," are held strictly liable without regard to fault for any damages resulting from the discharge of TAPS oil from a vessel.⁸⁵

82. The authors of the statute believed that strict liability was necessary because "existing maritime law would not provide adequate compensation to all victims, including residents of Canada, in the event of the kind of catastrophe which might occur" during the transport of the oil. H.R. CONF. REP. NO. 624, 93rd Cong., 1st Sess. 28 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2523, 2530.

83. *Id.*

84. Sections 1653(c)(4) and (5) provide, in relevant part:

(4) The Trans-Alaska Pipeline Liability Fund is hereby established as a non-profit corporate entity that may sue and be sued in its own name.

(5) The operator of the pipeline shall collect from the owner of the oil at the time it is loaded on the vessel a fee of five cents per barrel. The collection shall cease when \$100,000,000 has been accumulated in the Fund, and it shall be resumed when the accumulation in the Fund falls below \$100,000,000.

43 U.S.C. §§ 1653(c)(4)-(5) (Supp. 1992). Thus, the Fund is essentially a form of self-insurance paid for by all those who make use of the pipeline to transport oil.

85. Section 1653(c)(1) provides:

Notwithstanding the provisions of any other law, if oil that has been transported through the trans-Alaska pipeline is loaded on a vessel at the terminal facilities of the pipeline, the owner and operator of the vessel (jointly and severally) and the Trans-Alaska Pipeline Liability Fund established by this subsection, shall be strictly liable without regard to fault in accordance with the provisions of this subsection for all damages, including clean-up costs, sustained by any person or entity, public or private, including residents of Canada, as the result of discharges of oil from such vessel.

43 U.S.C. § 1653(c)(1) (1986). The Act covers all spills arising from the discharge of such oil from any vessel from the time the oil "is loaded on a vessel at the terminal facilities of the pipeline," continuing through the "transportation between the terminal facilities of the pipeline and ports under the jurisdiction of the United States," until the oil is "brought ashore at a port under the jurisdiction of the

The owner and operator are responsible for the first fourteen million dollars in claims relating to any one incident.⁸⁶ The Fund is then strictly liable for all claims beyond that amount, up to a ceiling of \$100 million.⁸⁷ If the total amount of all claims arising from a single incident exceeds \$100 million, then each claim is to be reduced proportionately, and the unpaid portion of any claim may then be asserted and adjudicated under other applicable federal or state law.⁸⁸ In addition, section 1653(c)(8) retains certain rights of subrogation in favor of the owner or the Fund in situations where the discharge of oil results from either negligence or the unseaworthiness of the vessel.⁸⁹ Other sections of TAPAA deal with defenses to the strict liability⁹⁰ and the investment of the Fund monies.⁹¹

Today, nearly twenty years after its passage, TAPAA has engendered much controversy in pending oil spill litigation. The primary area of contention concerns the statute's ambiguous language concerning recoverable damages. The dearth of evidence regarding the drafters' intent exacerbates this ambiguity. In

United States." 43 U.S.C. § 1653(c)(1), (7) (1986 & Supp. 1992).

86. Prior to gaining the right to transport TAPS oil, the owner and operator of the vessel must demonstrate financial responsibility for \$14 million. 43 U.S.C. § 1653(c)(3) (Supp. 1992).

87. The statute provides in relevant part:

Strict liability for all claims arising out of any one incident shall not exceed \$100,000,000. The owner and operator of the vessel shall be jointly and severally liable for the first \$14,000,000 of such claims that are allowed. . . . The Fund shall be liable for the balance of the claims that are allowed up to \$100,000,000. If the total claims allowed exceed \$100,000,000, they shall be reduced proportionately. The unpaid portion of any claim may be asserted and adjudicated under other applicable Federal or state law.

Id. § 1653(c)(3).

88. *Id.*

89. The statute provides in relevant part:

In any case where liability without regard to fault is imposed pursuant to this subsection and the damages involved were caused by the unseaworthiness of the vessel or by negligence, the owner and operator of the vessel, and the Fund, as the case may be shall be subrogated under applicable State and Federal laws to the rights under said laws of any person entitled to recovery hereunder.

Id. § 1653(c)(8).

90. The only statutory defenses are act of war, governmental negligence, or negligence of the injured party. *Id.* § 1653(c)(2).

91. *Id.* § 1653(c)(7).

particular, the statute's directive regarding liability for "all damages," while facially straightforward, becomes ambiguous when viewed in the framework of the general maritime law that TAPAA allegedly displaced. Ascertaining the true meaning of this language is crucial to determining the ultimate liability of oil spill defendants.⁹²

C. State Statutory Law — The Alaska Act

The final body of law implicated in the current litigation is an Alaska statute governing pollution of state waters. The damage and liability provisions of the Alaska Act,⁹³ enacted in 1972, are aimed at holding those responsible for the unpermitted release of a hazardous substance⁹⁴ into state waters strictly liable, jointly and severally, for the resulting damage. The Alaska Act is similar to TAPAA in that it imposes liability without regard to fault for oil spills "notwithstanding any other provision or rule of law,"⁹⁵ and has as its purpose the protection and safety of Alaska citizens, their property, and the state's natural resources.

The primary difference between the Alaska Act and TAPAA relates to the scope of their respective strict liability provisions. While TAPAA provides a \$100 million ceiling for strict liability claims made against the Fund,⁹⁶ strict liability for damages under the Alaska Act is unlimited. Furthermore, contrary to the general rule under federal maritime law, the Alaska Act explicitly allows recovery of pure economic loss.⁹⁷

92. See *infra* part III.B.

93. ALASKA STAT. § 46.03.822 (Supp. 1992).

94. "Hazardous substance" is statutorily defined to include oil. ALASKA STAT. § 46.03.826(5)(B) (1991).

95. The statute provides in relevant part: "Notwithstanding any other provision or rule of law . . . the following persons are strictly liable, jointly and severally, for damages . . . resulting from an unpermitted release of a hazardous substance." ALASKA STAT. § 46.03.822(a) (Supp. 1992).

96. See *supra* note 87.

97. Under Alaska Statutes section 46.03.824, damages are defined as "includ[ing] but . . . not limited to injury to or loss of persons or property, real or personal, loss of income, loss of the means of producing income, or the loss of an economic benefit." ALASKA STAT. § 46.03.824 (1991); see *In re the Glacier Bay*, 746 F. Supp. 1379, 1387-88 (D. Alaska 1990) (The Alaska Act does not impose a physical harm requirement for recovery of damages for economic loss.).

III. FEDERAL MARITIME LAW VS. FEDERAL STATUTORY LAW — THE CONTROLLING LAW FOR “TAPS” OIL SPILLS

The courts involved in the current oil spill litigation have been faced with two important issues: (1) whether Congress intended TAPAA's strict liability scheme to preempt the general maritime law for incidents involving the spill of TAPS oil; and (2) whether TAPAA, if it does preempt maritime law, incorporated the *Robins* physical injury rule into its damages clause. These two inquiries are independent, and a finding of statutory preemption does not preclude the conclusion that the statute incorporated into its scheme a well-known common law principle.

The shipment of oil upon navigable waters bears a significant relationship to traditional maritime activity, and under the *Executive Jet* standard,⁹⁸ oil spills on navigable waters constitute maritime torts.⁹⁹ In the absence of federal oil spill legislation, the federal courts exercise admiralty jurisdiction,¹⁰⁰ and general maritime law applies. When Congress chooses to legislate with respect to oil spills, those laws prevail over maritime law. The issues, then, are: (1) whether Congress intended to cover the field and preempt the general maritime law by passing a statute purporting to govern a maritime activity; and (2) what standard courts should use to make this determination.

The standard for determining the preemptive effect of federal legislation on general maritime law assesses whether the legislative scheme drafted by Congress directly addresses the question, not whether Congress “has affirmatively proscribed the use of federal common law.”¹⁰¹ A federal statute will have preemptive effect if, by applying the maritime law, courts would be abrogating rights and

98. See *supra* notes 24-25 and accompanying text; see also *Sisson v. Ruby*, 497 U.S. 358, 361-62 (1990) (employing the *Executive Jet* standard); *In re Paradise Holdings, Inc.*, 795 F.2d 756, 759 (9th Cir. 1986) (same).

99. See *supra* note 27 and accompanying text.

100. See *Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318, 1320 (11th Cir. 1989); SCHOENBAUM, *supra* note 13, § 3-2, at 61 (“The federal maritime law comes both from statutes passed by the Congress and from judge-made law. The federal judiciary both constitutionally and traditionally plays a much greater role in the development of maritime law than in the development of non-maritime common law.”).

101. *City of Milwaukee v. Illinois*, 451 U.S. 304, 315 (1981); *Gardiner v. Sea-Land Service, Inc.*, 786 F.2d 943, 947 (9th Cir.), *cert. denied*, 479 U.S. 924 (1986).

remedies that Congress has specifically enacted.¹⁰² Where Congress has legislated on a matter, “courts need not pause to evaluate . . . opposing policy arguments . . . [for] Congress has struck the balance.”¹⁰³ Consequently, courts attempting to gauge a federal statute’s preemptive effect on maritime law must limit their analysis to “assess[ing] the scope of the legislation and whether the legislative scheme addresses the problem formerly governed by federal [maritime] law.”¹⁰⁴

A. TAPAA Preempts the General Maritime Law

The starting point for an issue involving statutory construction is the language of the statute itself.¹⁰⁵ TAPAA governs all spills of “oil that has been transported through the trans-Alaska pipeline” from vessels “loaded . . . at the terminal facilities of the pipeline.”¹⁰⁶ Thus, Congress established TAPAA as “a comprehensive [strict] liability scheme applicable to damages resulting from the transportation of trans-Alaska pipeline oil.”¹⁰⁷ By its plain terms, then, TAPAA’s liability scheme would appear to control maritime activity involving the transportation of TAPS oil.

TAPAA’s comprehensive scope is further clarified in the legislative history. The House Conference Committee Report declares that one impetus for the passage of the TAPAA was the conferees’ conclusion “that existing maritime law would not provide adequate compensation to all victims, including residents of Canada, in the event of the kind of catastrophe which might occur” through a spill of TAPS oil.¹⁰⁸ Congress, therefore, imposed strict liability upon users of the pipeline in order to ensure that adequate

102. *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978) (refusing to invoke the general maritime law to provide damages for “loss of society” in death action when not provided for in the Death on the High Seas Act).

103. *Gardiner*, 786 F.2d at 947 (citation omitted).

104. *Id.* at 947 (citation omitted); *see also In re the Glacier Bay*, 746 F. Supp. 1379, 1384 (D. Alaska 1990).

105. *See Watt v. Alaska*, 451 U.S. 259, 265 (1981); *Blackfeet Indian Tribe v. Montana Power Co.*, 838 F.2d 1055, 1058 (9th Cir. 1988).

106. 43 U.S.C. § 1653(c)(1) (1986).

107. *Slaven v. BP America, Inc.*, 973 F.2d 1468, 1470 (9th Cir. 1992) (quoting *Kee Leasing Co. v. McGahan*, 944 F.2d 577, 580-81 (9th Cir. 1991)).

108. H.R. CONF. REP. NO. 624, 93rd Cong., 1st Sess. 28 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2523, 2530.

compensation was available to those injured, and it structured TAPAA with the purpose that it would "become *the* controlling statute with regard to trans-Alaska oil."¹⁰⁹

Courts are in accord with this reading of the statute. For instance, in *Kee Leasing v. McGahan*, the Ninth Circuit rejected the defendants' motion to limit their liability for the *Glacier Bay* oil spill under the terms of the Limitation of Shipowner's Liability Act ("the Limitation Act"),¹¹⁰ ruling that TAPAA controlled.¹¹¹ Focusing on the legislative intent behind the two statutes, the court determined that Congress enacted the Limitation Act to "promote investment in the American shipping industry,"¹¹² while TAPAA's "comprehensive liability scheme" was intended to operate without limitation and was designed to "ensure that trans-Alaska oil spill victims receive prompt compensation without resort to prolonged litigation."¹¹³ The Ninth Circuit concluded that "the Limitation Act is contrary to every aspect of TAPAA" and that the TAPAA scheme "simply cannot work if the Limitation Act is allowed to operate concurrently."¹¹⁴ The court held, therefore, that TAPAA implicitly repealed the Limitation Act.¹¹⁵ Further, since the act's provision for strict liability addresses the problem of compensation,

109. *Kee Leasing v. McGahan*, 944 F.2d 577, 583 (9th Cir. 1991).

110. The Limitation of Shipowner's Liability Act, 46 U.S.C. §§ 181-189 (1986). Enacted in 1851, the Limitation Act permits vessel owners and charterers who meet certain conditions to limit their liability for damage caused by their vessel to the post-accident value of the vessel plus pending freight. Its relevant portion provides:

The liability of the owner of any vessel . . . for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

Id. § 183(a).

111. *Kee Leasing*, 944 F.2d at 583.

112. *Id.* at 580.

113. *Id.* at 582. The Ninth Circuit determined that the language found in section 1653(c)(1) ("notwithstanding the provisions of any other law") alone was not dispositive. *Id.*; but see *In re the Glacier Bay*, 746 F. Supp. 1379, 1384 (D. Alaska 1990) (The "notwithstanding" language "must be read to mean that Section 1653(c) was not to be modified by any preexisting law, whatever its source.").

114. *Kee Leasing*, 944 F.2d at 583.

115. *Id.*; see also *In re the Glacier Bay*, 741 F. Supp 800, 804 (D. Alaska 1990) (holding that TAPAA repealed the Limitation Act), *aff'd*, 944 F.2d 577 (9th Cir. 1991).

which otherwise would be governed by maritime law, TAPAA may be judged under the prevailing standard to have preempted the general maritime law in this area.

1. *Does TAPAA's Damages Provision Incorporate the Robins Rule?* Although TAPAA expressly allows recovery for "all damages" resulting from spills of TAPS oil,¹¹⁶ the general rule is that "statutes which invade the general maritime law are read with a presumption favoring the retention of long established and familiar principles except when a statutory purpose to the contrary is evident."¹¹⁷ Thus, even if TAPAA preempts general maritime law, the question remains whether the "all damages" clause should be interpreted against the background of the *Robins* physical injury rule. Some district courts have incorporated the *Robins* rule into TAPAA, thereby negating the preemption issue; others have opted for a literal reading of the "all damages" clause, allowing recovery for pure economic loss. The Ninth Circuit has yet to resolve this issue.

In *Benefiel v. Exxon Corp.*,¹¹⁸ a case arising from the 1989 *Exxon Valdez* oil spill, the Federal District Court for the Central District of California addressed the incorporation issue. The plaintiffs asserted a class action claim under TAPAA, seeking strict liability recovery for damages incurred due to an alleged increase in gasoline prices resulting from the spill.¹¹⁹ The defendants¹²⁰ filed a motion for summary judgment, claiming that the damages sought were in the form of pure economic loss and thus were barred by the *Robins* rule.¹²¹

In a five-paragraph order, Judge Gadbois of the Central District granted the defendants' motion. Invoking maritime jurisdiction,¹²²

116. 43 U.S.C. § 1653(c)(1) (1986).

117. *Glacier Bay*, 746 F. Supp. at 1384 (citing *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952)).

118. 1991 Am. Mar. Cases 769 (C.D. Cal. 1990).

119. See *Benefiel v. Exxon Corp.*, 959 F.2d 805, 806 (9th Cir. 1992).

120. The defendant group included Exxon Corporation, Exxon Shipping Company, Alyeska Pipeline Service Company and the Trans-Alaska Pipeline Liability Fund. *Id.*

121. *Id.*

122. Maritime jurisdiction was warranted "inasmuch as [this case] arises out of the grounding of the ship *Exxon Valdez* in Prince William Sound, Alaska, and the

the court held that *Robins* applied and that "there can be no recovery for a maritime tort where the plaintiff has sustained economic loss without compensable physical injury to person or property."¹²³ Although the plaintiffs asserted their claims for economic loss under TAPAA's strict liability provisions, the court interpreted the phrase "all damages" as *not* encompassing pure economic loss.¹²⁴ Congress, Judge Gadbois stated, had "enacted [section 1653(c)] against a background of well-established maritime law, and under settled principles of statutory construction Congress must be deemed to have incorporated in [section 1653(c)] the maritime rule of *Robins Dry Dock* that there can be no recovery for economic loss absent physical injury."¹²⁵

The Federal District Court for the District of Alaska, in cases arising from the *Glacier Bay* and *Exxon Valdez* spills, has reached

response to the grounding, events that 'occurred on the high seas or navigable waters' and that have a 'maritime nexus' evidenced by 'a significant relationship to traditional maritime activity.'" *Benefiel v. Exxon Corp.*, 1991 Am. Mar. Cases 769, 769-70 (C.D. Cal. 1990) (quoting *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864 (1986); *Sisson v. Ruby*, 497 U.S. 358 (1990); *In re Oswego Barge Corp.*, 664 F.2d 327, 334 (2d Cir. 1981)).

123. *Benefiel*, 1991 Am. Mar. Cases at 770 (citation omitted).

124. *Id.*

125. *Id.* Because neither TAPAA nor its legislative history makes any mention of the *Robins* rule, and since TAPAA and *Robins* can be construed harmoniously, it followed, the court believed, that TAPAA incorporated *Robins*. Judge Gadbois cited four cases as authority for his assertion that a finding of incorporation was mandated. See *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 270 (1979) (since nothing in the Longshoremen's and Harbor Workers' Compensation Act expressly indicates that Congress intended to modify existing maritime law, the court would read the statute so as to be in harmony with the existing law); *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952) ("Statutes which invade the common law or the general maritime law are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident."); *United States v. Mead*, 426 F.2d 118 (9th Cir. 1970) (It is "a familiar principle of construction that no statute is to be construed as altering the common law further than its words import." (footnote omitted)); *United States v. Tilleraas*, 709 F.2d 1088, 1092 (6th Cir. 1983) ("Changes in or abrogation of the common law must be clearly expressed by the legislature [and] [e]ven where such an intention is explicit, the scope of the common law will be altered no further than is necessary to give effect to the language of the statute.").

a contrary conclusion.¹²⁶ In *Glacier Bay*, the court denied the defendants' motion to dismiss all claims that sought recovery for pure economic loss, including those of commercial fishermen and non-fishermen such as tenders, fish buyers, fish spotters, fish processors, and other shoreside businesses.¹²⁷

Writing for the court, Judge Holland found that the legislative history, although silent as to *Robins*¹²⁸ and the scope of the "all damages" provision, supported an inference that Congress intended to provide compensation for all victims of an oil spill.¹²⁹ He argued that the language and purpose of TAPAA mandated the conclusion that "Congress meant to provide adequate compensation by departing from maritime common law."¹³⁰ He also reasoned that the implementing regulations for TAPAA defined damages in a way that was "consistent with a literal reading of the term 'all damages' in the statute."¹³¹ Thus, "all provable damages sustained

126. See *In re the Glacier Bay*, 746 F. Supp. 1379 (D. Alaska 1990); *In re the Exxon Valdez*, 767 F. Supp. 1509 (D. Alaska 1991); see *infra* note 133.

127. *Glacier Bay*, 746 F. Supp. at 1388.

128. Chief Judge Holland defined the *Robins* rule as establishing that "in those situations where negligence does not result in any physical harm, thereby providing no basis for an independent tort, and only pecuniary loss is suffered, a plaintiff may not recover for the loss of the financial benefits of a contract or prospective trade." *Id.* at 1383.

129. *Id.* at 1386. The court cited the conference committee report statement that the "Conferees concluded that existing maritime law would not provide adequate compensation to all victims . . . in the event of the kind of catastrophe which might occur." H.R. CONF. REP. NO. 624, 93rd Cong., 1st Sess. 28 (1973), reprinted in 1973 U.S.C.C.A.N. 2523, 2530.

130. *Glacier Bay*, 746 F. Supp. at 1386 (emphasis added).

131. *Id.* at 1385-86. Sections 29.1 through 29.14 of the Code of Federal Regulations contain the implementing regulations for the Trans-Alaska Pipeline Authorization Act. 43 C.F.R. §§ 29.1-14 (1989). Section 29.1(e) defines the term "damage(s)" in TAPAA to mean:

[A]ny economic loss, arising out of or directly resulting from an incident, including but not limited to:

- (1) Removal costs;
- (2) Injury to, or destruction of, real or personal property;
- (3) Loss of use of real or personal property;
- (4) Injury to, or destruction of natural resources;
- (5) Loss of use of natural resources; or
- (6) Loss of profits or impairment of earning capacity due to injury or destruction of real or personal property or natural resources, including loss of subsistence hunting, fishing and gathering opportunities.

by any person as a result of a TAPS oil spill are compensable and are not limited by established [common] law."¹³² The Alaska court therefore allowed the non-fishermen plaintiffs to proceed with their claims for pure economic loss.¹³³

In *Slaven v. BP America, Inc.*,¹³⁴ a case arising from the *American Trader* spill off the coast of California, Judge Kelleher of the Central District of California disagreed with his colleague Judge Gadbois, and adopted the position that TAPAA repealed *Robins*. Emphasizing the "remedial, beneficial, and amendatory" purpose of TAPAA and declaring that the "notwithstanding" phrase precluded the application of any law which served to "alter the liability provided for therein," the court held that TAPAA overrode *Robins* as to any claims for damages falling within the \$100 million limit of the Fund.¹³⁵ In so holding, the court rejected the defendants' argument that since Congress failed to specify any proximate cause requirement in TAPAA, it implicitly adopted *Robins* as the

Id. § 29.1(e).

132. *Glacier Bay*, 746 F. Supp. at 1386. In deciding that pure economic loss may be recovered under TAPAA, Judge Holland did refer to the decision of Judge Gadbois in *Benefiel*. *Id.*; see *Benefiel v. Exxon Corp.*, 1991 Am. Mar. Cases 769 (C.D. Cal. 1990). Judge Holland acknowledged Judge Gadbois' conclusion that Congress, by remaining silent in the face of well-established maritime law, must have incorporated the *Robins* rule into the statutory scheme. *Glacier Bay*, 746 F. Supp. at 1386. However, Judge Holland felt that the California court had overlooked the "notwithstanding" language in section 1653(c)(1) and had failed to divine the congressional purpose behind TAPAA, as determined through an analysis of the legislative history. *Id.* The lack of analysis in Judge Gadbois' short decision kept the Alaska court from assigning much persuasive authority to it.

133. In *In re the Exxon Valdez*, 767 F. Supp. 1509 (D. Alaska 1991), Judge Holland, relying on his ruling in *Glacier Bay*, again concluded that TAPAA, as specific federal maritime legislation, preempted the maritime law for claims based on strict liability, at least to the extent of its \$100 million coverage:

When Congress enacted TAPAA, Congress spoke directly to the issue of TAPS oil spills. TAPAA imposes strict liability "notwithstanding the provisions of any other law" to the extent of \$100 million. Therefore, to the extent of its coverage, TAPAA, as specific federal maritime legislation, displaces the general maritime law, including the rule of *Robins Dry Dock*, regarding strict liability.

Id. at 1515 (citation omitted). Since *Robins* can be applied in harmony with a strict liability scheme, however, this holding sidesteps the issue of economic loss.

134. 786 F. Supp. 853 (C.D. Cal. 1992).

135. *Id.* at 860.

applicable proximate cause standard.¹³⁶ Judge Kelleher argued that “[i]t is true that the principle behind *Robins* is that economic damages . . . are too remote to be considered proximately caused by the defendant’s actions. Yet, the bright-line rule of *Robins* is not a necessary component of the proximate cause concept.”¹³⁷ Thus, the court allowed the plaintiffs to proceed with their claims under TAPAA for pure economic loss.

2. *The Latest Clues From the Ninth Circuit.* In its most recent case involving TAPAA liability provisions, *Benefiel v. Exxon Corp.*,¹³⁸ the Ninth Circuit ruled on the appeal of Judge Gadbois’ finding that TAPAA had incorporated the *Robins* rule.¹³⁹ In a short opinion affirming the district court’s grant of summary judgment, the Ninth Circuit avoided a direct discussion of “whether the physical damage limitation applicable in admiralty applies in this case after passage of TAPAA”¹⁴⁰ by deciding the case on the narrow proximate cause ground alluded to by Judge Kelleher in *Slaven*.¹⁴¹ The court reasoned “that Congress in enacting TAPAA did not intend to abrogate all principles of proximate cause.”¹⁴² Rather, “Congress envisioned damages arising out of the *physical effects* of oil discharges.”¹⁴³ The plaintiffs’ economic loss, the court

136. *Id.* at 858.

137. *Id.* at 858-59.

138. 959 F.2d 805 (9th Cir. 1992).

139. See *supra* note 118 and accompanying text. *Benefiel* is the Ninth Circuit’s first and, to date, only decision addressing TAPAA’s damages provisions. The Ninth Circuit opinion discussed earlier, *Kee Leasing Co. v. McGahan*, 944 F.2d 577 (9th Cir. 1991), dealt with TAPAA’s implicit repeal of the Limitation of Shipowner’s Liability Act. While the opinion did discuss TAPAA, it did not focus on the scope of the damages recoverable under the statute.

140. *Benefiel*, 959 F.2d at 807.

141. *Slaven v. BP America, Inc.*, 786 F. Supp. 853 (C.D. Cal. 1992); see *supra* note 134 and accompanying text.

142. *Benefiel*, 959 F.2d at 807. The conference committee report suggests that Congress intended to benefit those who suffer direct damage. In debating the merits of strict liability recovery, Congress noted that spills of TAPS oil “could result in extremely high damages to property and natural resources, including fisheries and amenities, especially if the mishap occurred close to a populated shoreline area.” H.R. CONF. REP. NO. 624, 93rd Cong., 1st Sess. 28 (1973), reprinted in 1973 U.S.C.C.A.N. 2523, 2530.

143. *Benefiel*, 959 F.2d at 807 (emphasis added). The court’s subsequent

concluded, was too “remote and derivative” and “[fell] outside the zone of dangers against which Congress intended to protect when it passed TAPAA.”¹⁴⁴

Given the very remote nature of the claim in *Benefiel*, it was easy for the Ninth Circuit to deny the claim using traditional principles of proximate cause. Yet the remoteness of the claim in *Benefiel* is also characteristic of the unending sequence of liability which the *Robins* bright-line rule seeks to limit. Thus, *Benefiel* would have been an ideal case for the Ninth Circuit to articulate its approval of the *Robins* doctrine. That the Ninth Circuit declined this opportunity may suggest that it is not ready to address the more difficult *Robins* issue whether to deny claims for pure economic loss that are proximately caused by a defendant’s conduct.

B. TAPAA Should Be Read to Incorporate the *Robins* Rule

By side-stepping *Robins*, the Ninth Circuit left unresolved the district courts’ disagreement over the scope of the “all damages” clause of TAPAA.¹⁴⁵ Nevertheless, the proper conclusion is that offered by Judge Gadbois in *Benefiel*, incorporating the *Robins* rule

discussion of the plaintiffs’ claim is instructive:

In this case, the [*Exxon Valdez*] spill itself did not directly cause any injury to the appellants. Rather, plaintiffs alleged the spill triggered a series of intervening events, including the decision of the United States Coast Guard to close the Port of Valdez to facilitate clean-up efforts; the alleged decision by refineries in the western United States to raise prices rather than to use their own oil reserves to make up any shortage; and the decision of wholesalers, distributors and retailers to pass on these price increases.

Indeed, the plaintiffs’ own complaint alleged that “Exxon and the other oil companies with refineries in California” maintain sufficient reserves of crude oil such that the closure occasioned by the spill from the Exxon Valdez “should not have caused gasoline prices to increase in California.” Thus, plaintiffs themselves alleged *the existence of at least one intervening act* causing the price hike: the alleged decision of California oil refiners to exploit the supposed shortage.

Id. at 807-08 (emphasis added). The court thus placed great importance on the existence of intervening actions which, together with the spill, caused an economic loss somewhere down the line. In the case of shoreside businesses in Alaska, such reasoning could conceivably propel the court to invoke *Robins* and cut off liability for pure economic loss, as any number of actions could be pointed to as contributing factors, or even primary factors, in causing the alleged economic loss.

144. *Id.* at 807.

145. 43 U.S.C. § 1653(c)(1) (1986); *see supra* note 116 and accompanying text.

into TAPAA. This conclusion finds support in both the legislative history of the Act and subsequent case law. The greatest obstacle to Judge Gadbois' position is the "plain meaning" rule of statutory interpretation which Judge Holland and Judge Kelleher found persuasive in rejecting the incorporation of *Robins* into TAPAA.¹⁴⁶

Under the "plain meaning" rule, a court interpreting a statute should begin by examining the language of the statute itself.¹⁴⁷ The Ninth Circuit has interpreted recent Supreme Court opinions, however, as indicating "that the plain meaning rule is no longer considered an absolute prohibition [against examining other sources for insight into the meaning of a statute], but a flexible principle for ascertaining the intent of Congress."¹⁴⁸ As the Supreme Court stated in *Watt v. Alaska*:

[A]scertainment of the meaning apparent on the face of a single statute need not end the inquiry. . . . This is because the plain-meaning rule is "rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists." The circumstances of the enactment of particular legislation may persuade a court that Congress did not intend words of common meaning to have their literal effect.¹⁴⁹

146. See *In re the Glacier Bay*, 746 F. Supp. 1379, 1386 (D. Alaska 1990) (Holland, J.) ("[T]he plain language of Section 1653(c) is that all provable damages sustained by any person as a result of a TAPS oil spill are compensable and are not limited by established maritime law."); *Slaven v. BP America, Inc.*, 786 F. Supp. 853, 859 (C.D. Cal. 1992) (Kelleher, J.) ("[T]he Court is of the opinion that the meaning of the statute can be ascertained from the text alone.")

147. *International Bhd. of Teamsters v. Daniel*, 439 U.S. 551, 558 (1979).

148. *Heppner v. Alyeska Pipeline Service Co.*, 665 F.2d 868, 870 (9th Cir. 1981).

149. 451 U.S. 259, 266 (1981) (citations omitted). The Court also stated:

Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.

Id. at 266 n.9 (citations omitted); see, e.g., *Train v. Colorado Pub. Interest Research Group*, 426 U.S. 1, 10 (1976) ("When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" (quoting *United States v. Am. Trucking Ass'n*, 310 U.S. 534, 543-44 (1940))); see also Arthur W. Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and*

The scope of TAPAA's liability provision, therefore, should not be determined simply by looking at its language, but by referencing other sources such as the legislative history and the common law background against which the statute was enacted. The following discussion will examine these sources while remaining true to the rule that the interpretation selected should avoid unjust results.¹⁵⁰

1. *Legislative History.* Although somewhat ambiguous, the legislative history of TAPAA suggests that Congress intended to incorporate the *Robins* rule into the statute. As justification for TAPAA, the conference committee report mentions the inability of "existing maritime law . . . [to] provide adequate compensation" to victims of catastrophic oil spills.¹⁵¹ The report then discusses the deficiencies in the liability provisions of the Limitation Act¹⁵² and the Water Quality Improvement Act of 1970.¹⁵³ The *Robins* rule,

Statutory Interpretation in the "Modern" Federal Courts, 75 COLUM. L. REV. 1299 (1975) (discussing the Supreme Court's abandonment of the plain meaning rule in favor of examining legislative history to determine congressional intent).

150. See *Esta Later Charters, Inc. v. Ignacio*, 875 F.2d 234, 239 (9th Cir. 1989).

151. H.R. CONF. REP. NO. 624, 93rd Cong., 1st Sess. 28 (1973), reprinted in 1973 U.S.C.C.A.N. 2523, 2530.

152. The Limitation of Shipowner's Liability Act, 46 U.S.C. §§ 181-189 (1986); see also *supra* note 110.

153. H.R. CONF. REP. NO. 624, 93rd Cong., 1st Sess. 28 (1973), reprinted in 1973 U.S.C.C.A.N. 2523, 2530; see The Water Quality Improvement Act of 1970, 33 U.S.C. §§ 1151, 1152, 1155, 1156, 1158, 1160-1175 (1970), superceded by The Clean Water Act, 33 U.S.C. §§ 1251-1387 (1986 & Supp. 1992). The pertinent portion of the conference committee report is as follows:

Under the Limitation of Liability Act of 1851 (46 U.S.C. § 183), the owner of a vessel is entitled to limit his liability for property damage caused by the vessel to the value of the vessel and its cargo. The value determination is made *after* the incident causing the damage. It is therefore quite possible for injured parties to go uncompensated if a vessel and its cargo are totally lost. [While the Water Quality Improvement Act of 1970 imposed strict liability on owners and operators to cover federal government cleanup costs necessitated by an oil spill], [s]tate governments and private parties are still obliged to proceed under maritime law, subject to the limits of liability contained in that body of law.

H.R. CONF. REP. NO. 624, 93rd Cong., 1st Sess. 28 (1973), reprinted in 1973 U.S.C.C.A.N. 2523, 2530. The reference to the "limits of liability" contained in the body of maritime law thus appears to relate back to the preceding discussion of the Limitation Act, and not to any other unmentioned limits.

however, was never mentioned.¹⁵⁴ If intentional, this omission would suggest that Congress's criticism of existing maritime law applied only to the *statutory* maritime law and that Congress adopted the *Robins* concept of recoverable damages in TAPAA.

Such a reading of the conference committee report is plausible given the disparate methods by which the Limitation Act and *Robins* limit liability. The Limitation Act establishes a ceiling on the owner/operator's liability at the post-accident value of the vessel and its cargo, such that liability could be reduced to zero if the vessel and cargo are totally lost.¹⁵⁵ *Robins*, on the other hand, while barring all recovery for pure economic loss, places no ceiling on an owner/operator's liability for physical damages or economic damages arising from a physical injury. The availability of compensation under the *Robins* doctrine is far more extensive than that under the Limitation Act. Unlike the Limitations Act, therefore, *Robins* is not antithetical to a comprehensive strict liability scheme like TAPAA. Given the fact that (1) the *Robins* rule was not expressly criticized in the House Conference Committee Report, and (2) the *Robins* definition of the term "damages" in the context of maritime torts had, at the time TAPAA was enacted, been in effect for more than forty-five years, it is likely that Congress intended to incorporate *Robins* into TAPAA.¹⁵⁶

154. H.R. CONF. REP. NO. 624, 93rd Cong., 1st Sess. 28 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2523, 2530.

155. *See supra* note 110.

156. *Union Oil Co. v. Oppen*, 501 F.2d 558, 564 (9th Cir. 1974) (recognizing that allowing commercial fishermen to recover their pure economic loss caused by an oil spill was an exception to the general rule). Indeed, numerous cases not subject to the TAPAA, but decided after its passage, have invoked the *Robins* rule to deny claims for pure economic loss in maritime tort cases, demonstrating the continuing vitality of the rule. *See Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1027 (5th Cir. 1985) (en banc) ("[T]he decisions of courts in other circuits convince us that *Robins Dry Dock* is both a widely used and necessary limitation on recovery for economic loss[.]", *cert. denied*, 477 U.S. 903 (1986); *Kingston Shipping Co. v. Roberts*, 667 F.2d 34, 35 (11th Cir. 1982) (denying recovery for economic loss to owners of vessels delayed when ship channel was blocked due to a maritime collision); *Marine Navigation Sulphur Carriers, Inc. v. Lone Star Indus., Inc.*, 638 F.2d 700, 702 (4th Cir. 1981) (disallowing claims for pure economic loss suffered when the defendant's vessel collided with a bridge).

2. *The Underlying Debate — Bright-Line Rule or Case-by-Case Adjudication.* Many courts and commentators have debated the policy aspects of the *Robins* rule. The rule has come under attack by those who would judge liability for pure economic loss under the traditional proximate cause standards,¹⁵⁷ while others have supported the rule as a necessary limitation on potentially endless liability. A brief discussion of the competing frameworks is helpful in understanding the debate.

Most courts and commentators agree that there is some point at which liability for economic loss must be limited in order to prevent extraordinary impositions of liability.¹⁵⁸ For example, consider the case of a local bait-and-tackle shop that suffers economic loss resulting from a spill that fouls the surrounding water and causes people to fish elsewhere. The shop's claim against the oil company could be that such loss was proximately caused by the spill's detrimental effect on ocean life and that the consequences of an ocean spill were foreseeable. Using the same rationale, the shop's supplier could seek recovery since the loss it suffers due to the bait-and-tackle shop's decreased business meets the same tests of proximate cause and foreseeability. This scenario could be extended to every tangentially affected business. The specter of limitless liability could, in this situation, become a reality. Following the logic of *Robins*, some courts have concluded that "the chain of causation must be cut at a relatively early link in order to avoid burdening society and the courts with the domino effect" leading to enormous liability exposure to remote plaintiffs.¹⁵⁹ Other courts try to limit liability using principles of proximate cause.¹⁶⁰ Regardless of the approach, all courts agree that if the chain is not severed at some point, the consequence would be "liability in an indetermi-

157. See *Testbank*, 752 F.2d at 1035 (Wisdom, J., dissenting).

158. Owen, *supra* note 47, at 163 ("There is rather general agreement that policy considerations require some rationale or formula which limits liability for economic loss.").

159. *Id.*

160. See, e.g., *Benefiel v. Exxon Corp.*, 959 F.2d 805, 808-09 (9th Cir. 1992) (finding that "a series of intervening events" occurred between the oil spill and subsequent rise in gasoline prices); *Slaven v. BP America, Inc.*, 786 F. Supp. 853, 858-59 (C.D. Cal. 1992) ("[E]conomic damages . . . are too remote to be considered proximately caused . . .").

nate amount for an indeterminate time to an indeterminate class."¹⁶¹ The fundamental question, therefore, is which approach most fairly limits liability exposure.

a. *The Practical Appeal of Robins.* Part of the appeal of the *Robins* doctrine lies in its resilience and vitality throughout a period when courts generally expanded the scope of tort liability. Justice Holmes' opinion in *Robins* was written ten years after *MacPherson v. Buick Motor Co.*,¹⁶² the seminal case in which Judge Cardozo put an end to the doctrine of privity in products liability.¹⁶³ *Robins* survived over the ensuing decades despite attempts to expand liability for pure economic loss so as to make such recovery consistent with loss for physical injury.¹⁶⁴ The push

161. *Ultramares Corp. v. Touche*, 174 N.E. 441, 444 (N.Y. 1931).

162. 111 N.E. 1050 (N.Y. 1916).

163. The common law doctrine of privity in products liability held that "the original seller of goods was not liable for damages caused by their defects to anyone except his immediate buyer, or one in privity with him." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 96, at 681 (5th ed. 1984). In *MacPherson*, Cardozo found the manufacturer of a defective automobile liable to the ultimate purchaser, even though the purchaser bought the car from an intermediate dealer. 111 N.E. at 1053.

164. James, *supra* note 30, at 46. James further notes that:

[t]his failure of the movement to gain momentum takes on added significance when it is put into context. It coincided with a veritable ground swell in the law of negligence that pushed liability for physical injuries toward the full extent of what was foreseeable and shattered ancient barriers to recovery based on limitations associated with privity of contract and similar restrictive concepts.

Id. at 47. See also *Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1023 (5th Cir. 1985) (en banc) ("Retention of this conspicuous bright-line rule in the face of the reforms brought by the increased influence of the school of legal realism is strong testament both to the rule's utility and to the absence of a more 'conceptually pure' substitute."), *cert. denied*, 477 U.S. 903 (1986); Owen, *supra* note 47, at 163 (The rule's "vitality is underscored by the fact that it developed during a period of great expansion in tort liability, maritime and otherwise."). Owen also notes that "two of our most distinguished state court judges [Judge Traynor in California and Judge Cardozo in New York], renowned for their liberal philosophy in the tort field, clamped down hard on recovery for indirect economic loss." *Id.* at 164. The leading article promoting the call for change in this area, Charles E. Carpenter's *Interference with Contract Relations*, 41 HARV. L. REV. 728 (1928), was published three months after the *Robins* opinion. But "[w]hat is relevant here is that the courts did not follow Professor Carpenter's call to abandon the physical injury requirement." *Testbank*, 752 F.2d at 1023 n.4.

to extend liability in this direction, however, had failed by the early 1940's, leaving the *Robins* rule as an accepted doctrine of maritime law. While the mere longevity of a particular legal doctrine is not by itself indicative of its utility or strength, the fact that the *Robins* rule has survived attack and continues to be applied does "suggest that the restrictive rule may represent good sense."¹⁶⁵

Another aspect that lends appeal to the *Robins* doctrine is its use as a "bright-line" rule, invoking an absolute bar on all recovery of pure economic loss.¹⁶⁶ By cutting off liability at an easily distinguishable point, the *Robins* rule makes recovery quicker and more complete for those victims who fall within its scope. In this light, the *Robins* doctrine is consistent with the legislative intent underlying TAPAA. The conference committee report states that the purpose of section 1653(c) is to compensate victims of catastrophic oil spills adequately.¹⁶⁷ While TAPAA holds owners and operators responsible for the first fourteen million dollars in claims relating to one accident, all claims exceeding that amount, up to \$100 million, are paid out of the Trans-Alaska Pipeline Liability Fund.¹⁶⁸ Given the size of the Fund, it can virtually guarantee full

165. James, *supra* note 30, at 48.

166. *E.g.*, Barber Lines A/S v. M/V Donau Maru, 764 F.2d 50 (1st Cir. 1985); Getty Ref. and Mktg. Co. v. MT Fadi B, 766 F.2d 829 (3d Cir. 1985); *Testbank*, 752 F.2d at 1029.

167. H.R. CONF. REP. NO. 624, 93rd Cong., 1st Sess. 28 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2523, 2530.

168. 43 U.S.C. § 1653(c)(3) (Supp. 1992). While there are no indications as to why Congress chose to settle on a \$100 million limit, the legislative history is quite specific about why Congress chose to limit the strict liability exposure of owners and operators to \$14 million. The conference committee report states:

Strict liability is primarily a question of insurance. The fundamental reason for the limits placed on liability in the Federal Water Quality Improvement Act stemmed from the availability, or non-availability, of marine insurance. Without a readily available commercial source of insurance, *liability without a dollar limitation would be meaningless* and many independent owners could not operate their vessels. Since the world-wide maritime industry claimed \$14 million was the limit of the risk they would assume, this was the limit provided for in the Federal Water Quality Improvement Act. *There has been no indication that this level has since increased.*

H.R. CONF. REP. NO. 624, 93rd Cong., 1st Sess. 28 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2523, 2530 (emphasis added). Thus, the liability plan called for owner and operator strict liability for the first \$14 million in damages, while the Fund was potentially responsible for an additional \$86 million. The Fund also retained subrogation rights such that it could proceed against the responsible parties

recovery, provided the number of possible claimants is appropriately limited.

The goal of providing adequate compensation, however, might be frustrated if *all* spill victims could seek recovery under the Fund. Those plaintiffs whose only injury consists of pure economic loss would race against those with claims related to physical damage to file a claim with the Fund. As the number of claims increased and the dollar amount of the claims exceeded \$100 million, the *pro rata* share of each would decrease. Those with physical damage claims that did not receive full compensation would be forced to litigate outside of the Fund, thereby losing the intended benefit of TAPAA — quick and adequate compensation.¹⁶⁹

for the amount of claims which it had already paid.

The possibility of holding owners and operators strictly liable for pure economic loss would undercut Congress's express concern for the fate of independent owners facing oil spill liability. It may be assumed that when the world-wide maritime insurance industry concluded that \$14 million in coverage was the most it would extend, it had in mind the maritime concept of damages: those connected with a physical injury. If pure economic loss was recoverable under the Act, "the potential breadth [of such liability] . . . taken together with the uncertainty about the extent of each plaintiff's injury, undoubtedly [would] have an adverse effect upon the feasibility of insuring against liability of this nature." James, *supra* note 30, at 51. Had the industry known that pure economic loss would be recoverable, it is conceivable that the maritime insurers, realizing how quickly the \$14 million ceiling could be reached, would have lowered their exposure even further, making it more difficult for independents to operate. *See id.* at 53 ("From an insurer's point of view it is not practical to cover, without limit, a liability that may reach catastrophic proportions, or to fix a reasonable premium on a risk that does not lend itself to actuarial measurement."). Although providing quick, efficient compensation to victims was the main purpose behind TAPAA's liability scheme, Congress intended to accomplish this purpose without creating insurmountable barriers to independents wishing to operate in the oil industry. The fact that the maritime insurance industry would not expose itself above a certain limit, a limit that Congress expressly accepted, is a good indication that it alerted Congress to these concerns and that Congress took such considerations into account when drafting TAPAA's liability provisions.

169. Those with unsatisfied pure economic loss claims would be barred by *Robins* from seeking recovery outside the Fund. *See Slaven v. BP America, Inc.*, 786 F. Supp. 853 (C.D. Cal. 1992), where the court also foresaw this "race to the Fund" problem:

If recovery under TAPAA is non*Robins* and recovery beyond TAPAA is limited by *Robins* then in a spill with damages that exceed \$100 million, the ability to recover for economic damages and the extent of the liability

The potential effect of limitless liability on those in the oil industry became apparent in the days leading up to the passage of the Oil Pollution Act of 1990 ("OPA"),¹⁷⁰ Congress's response to the *Exxon Valdez* disaster. On June 11, 1990, in anticipation of OPA's passage and its provisions for potentially unlimited liability,¹⁷¹ Shell Oil announced a policy by which it would use only chartered vessels to carry its oil to the United States mainland, using

for those damages will depend upon tactical maneuvering. Since parties with solely economic damages can recover only under TAPAA, they will want to persuade plaintiffs who could alternatively recover under other laws, to use those other laws and save the TAPAA \$100 million for their solely economic damages. Thus, two identical spills could result in vastly different recovery and liability depending upon how the claims were arranged.

Id. at 864. In *Slaven*, the defendants argued that the purpose of TAPAA was to provide a greater degree of compensation to victims of spills by creating a fund to pay those *already* entitled to relief under existing law. Increasing the classes of people who could claim under the Fund, they argued, would defeat this purpose by diluting the pool. *Id.* at 859. The court disagreed, stating that Congress's purpose was to provide better relief to all victims. *Id.*

170. 33 U.S.C. §§ 2701-2761 (Supp. 1992). With the passage of the Oil Pollution Act of 1990, Congress sought to supersede TAPAA's liability provisions with a comprehensive reform of oil pollution legislation. This Act included amendments to TAPAA as well as new substantive legislation. In the amendments to TAPAA, known as the Trans-Alaska Pipeline System Reform Act of 1990, Congress added subsections (13) and (14) to section 1653(c). Subsection (13) defines damages in this way:

For any claims against the Fund, the term "damages" shall include, but not be limited to —

(A) the net loss of taxes, revenues, fees, royalties, rents, or other revenues incurred by a State or a political subdivision of a State due to injury, destruction, or loss of real property, personal property, or natural resources, or diminished economic activity due to a discharge of oil; and

(B) the net cost of providing increased or additional public services during or after removal activities due to a discharge of oil, including protection from fire, safety, or health hazards, incurred by a State or political subdivision of a State.

43 U.S.C. § 1653(c)(13) (Supp. 1992). Subsection (14) mandates that subsections (c)(1)-(13) shall apply only to claims arising from incidents occurring before August 18, 1990. *Id.* § 1653(c)(14). As is apparent, however, these new sections refer only to damages incurred by governmental entities and have no bearing on the issue at hand.

171. The statute does set limits on liability, but these limits do not apply to accidents caused by gross negligence or those that occur in violation of federal safety regulations. 33 U.S.C. § 2704(c)(1) (Supp. 1992).

its own tankers only for transport to the Louisiana Offshore Oil Port.¹⁷² The reason for this change in policy, Shell explained, was that the risks of unlimited liability in the United States outweighed the commercial rewards.¹⁷³ Other domestic coastal traders also announced that they would discontinue business in states with onerous oil spill liability statutes.¹⁷⁴ Intertanko, the oil tanker owners' organization, warned that vast increases in the potential liability of those involved in oil spills, such as provided in the OPA,¹⁷⁵ would increase the risk of a spill by encouraging large companies with good tankers and deep pockets to abandon the oil transportation business, leaving only single-vessel companies unrelated to the oil company whose oil it is carrying to ship oil to the United States. Limitless liability, some felt, "would mean American oil would be imported in tankers by dubious one-ship companies that will walk away from the ship in the event of spill," leaving spill victims without compensation.¹⁷⁶

b. *Duty, Proximate Cause and the Economics of Economic Loss.* *Robins'* pragmatic, bright-line limitation on liability, however, has been criticized as arbitrary, illogical, and violative of traditional tort principles.¹⁷⁷ In contrast to the application of a per se bar to recovery, critics of *Robins* advocate a case-by-case approach by which courts analyze each situation under conventional tort concepts of duty¹⁷⁸ and proximate cause.¹⁷⁹ They argue that

172. Antonio J. Rodriguez & Paul A.C. Jaffe, *The Oil Pollution Act of 1990*, 15 TUL. MAR. L.J. 1, 25 n.157 (1990) (citing Smith, *Shell Halts Calls at US Mainland*, Lloyd's List, June 12, 1990, at 1, col. 2).

173. *Id.*

174. Texaco, Amerada Hess, and Maritrans Operating Partners announced their intention to cease doing business at Maine ports. *Id.* at 26 n.164 (citing Wall Street Journal, July 26, 1990, at B4, col. 3).

175. 33 U.S.C. § 2704(c) (Supp. 1992).

176. Rodriguez and Jaffe, *supra* note 172, at 26 n.163 (citing *U.S. Congress Ends 16-Year Stalemate on Oil Spill Legislation*, 13 Oil Spill Intelligence Rep. 1, 3 (1990)).

177. *But see infra* text accompanying notes 184-188.

178. The existence of duty is a question of law reserved for the court. E. Wayne Thode, *Tort Analysis: Duty-Risk v. Proximate Cause and the Rational Allocation of Functions Between Judge and Jury*, 1977 UTAH L. REV. 1, 26. In determining the existence of duty,

since the transport of oil over navigable waterways involves many risks, oil carriers owe a duty to the public to conduct their activities with reasonable care. The foreseeable consequence of breaching this duty is an oil spill that causes vast damage to natural resources and property, and leads to diminished business activity in the affected area. Under traditional tort principles, therefore, a plaintiff suffering pure economic loss in connection with a spill could conceivably show both a breach of duty and proximate cause and should be allowed to recover.

The advantage of the case-by-case approach is that it provides courts with the flexibility to make judgments as to liability on the particular facts of each case. Recognizing the existence of a duty to use reasonable care when transporting oil, courts can grant recovery

[t]he court must balance the following factors in each particular case: (1) the foreseeability of harm to plaintiff; (2) degree of certainty that plaintiff suffered injury; (3) closeness of connection between defendant's conduct and injury suffered; (4) moral blame attached to defendant's conduct; (5) policy of preventing future harm; (6) extent of burden to defendant and the consequences to the community of imposing a duty to exercise care with resulting liability for breach; (7) availability, cost, and prevalence of insurance for the risk involved.'

PROSSER & KEETON, *supra* note 163, § 53, at 359 n.24 (quoting *Vu v. Singer Co.*, 538 F. Supp. 26, 29 (N.D. Cal. 1981)). Generally, "courts will find a duty where . . . reasonable persons would recognize it and agree that it exists." *Id.* at 359.

179. The concept of proximate cause is used to link the defendant's wrongful conduct to the harm suffered by the plaintiff through the analysis of "two distinct issues . . . cause in fact and proximate cause." RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS* 363 (5th ed. 1990). Cause-in-fact denotes the "empirical questions of causal connection [between the defendant's actions and the plaintiff's injury] that have to be resolved in any tort suit." *Id.* Once this connection is established, the "conceptual" issue of proximate cause arises. *Id.* at 364. At this level, two inquiries are made: whether, from the point of view of the defendant at the time he acted, the ensuing chain of events resulting in the plaintiff's injury was foreseeable; and whether, looking back from the time of injury to the defendant's actions, "any act of a third party or the plaintiff, or any natural event, severed the causal connection between the harm and the defendant's wrongful conduct." *Id.* If the resulting injury was foreseeable, and no intervening causes disrupted the natural chain of events, then the defendant's actions are the proximate cause of the injury. *Id.* Proximate cause "normally presents an issue for the trier of fact to resolve, but [state] and federal law recognize that where causation cannot be reasonably established under the facts alleged by the plaintiff, the question of proximate cause is one for the court." *Benefiel v. Exxon Corp.*, 959 F.2d 805, 808 (9th Cir. 1992).

for pure economic loss to spill victims who demonstrate proximate cause. Yet courts can also deny recovery when intervening causes render an injury too remote from the defendant's actions to justify saddling the defendant with liability.¹⁸⁰

There are, however, administrative and theoretical difficulties inherent in a case-by-case approach to adjudication. Proponents of the *Robins* rule note that in the context of pure economic loss, where each succeeding claimant's direct connection to the tortious conduct is more attenuated than the last, the point at which a court decides that one plaintiff may recover while another is too remote is often *more* arbitrary and illogical than a bright-line rule that cuts off liability at a readily distinguishable point. As the majority in *Louisiana ex rel. Guste v. M/V Testbank* argued, "the line drawing [under a case-by-case approach] is no less arbitrary [than under the *Robins* rule] because the line drawing appears in the outcome — as one claimant is found too remote and another is allowed to recover."¹⁸¹ Furthermore, bright-line rules, unlike a case-by-case approach, allow courts to perform their proper adjudicative function rather than expend scarce judicial resources overseeing mass, speculative litigation.¹⁸² As Judge Gee stated in his *Testbank* concurrence, "the dispute-resolution systems of courts are poorly equipped to manage disasters of such magnitude and [the courts] should be wary of adopting rules of decision which . . . encourage the drawing of their broader aspects before us."¹⁸³

180. In *Benefiel*, the Ninth Circuit denied the plaintiffs' pure economic loss claims on the ground that "a series of intervening events" occurred between the oil spill and the subsequent rise in gasoline prices, including "the decision of the United States Coast Guard to close the Port of Valdez to facilitate clean-up efforts; the alleged decision by refineries in the western United States to raise prices rather than to use their own oil reserves to make up any shortage; and the decisions of wholesalers, distributors and retailers to pass on these price increases." 959 F.2d at 807-08. The court ruled as a matter of law that proximate cause could not be established under these facts. *Id.* at 808.

181. 752 F.2d 1019, 1029 (5th Cir. 1985) (en banc), cert. denied, 477 U.S. 903 (1986).

182. "The point is not that such a process cannot be administered but rather that its judgments would be much less the products of a determinable rule of law." *Id.* at 1023.

183. *Id.* at 1032 (Gee, J., concurring).

The *Robins* rule, moreover, is consistent with tort principles in that it is a judicially-imposed limit on the duty owed by maritime tortfeasors. Duty is a fundamental element of a negligence claim, and is distinct from proximate cause:¹⁸⁴

The determination of the issue of duty and whether it includes the particular risk imposed on the victim ultimately rests upon broad policies which underlie the law. These policies may be characterized generally as morality, the economic good of the group, practical administration of the law, justice as between the parties and other considerations relative to the environment out of which the case arose.¹⁸⁵

In traditional tort law, the threat of liability is used to influence human behavior and deter people from acting in detriment to the interests of others. Generally, the existence of a duty is conceded and litigants dispute only proximate cause.¹⁸⁶ In the era of mass torts, however, courts often begin with a duty analysis, first determining whether "the plaintiff's interests are entitled to legal protection from the defendant's conduct."¹⁸⁷ Thus, courts may reject some actions before even reaching the proximate cause issue in the belief that "[r]easonable limits on a tortfeasor's responsibility are necessary both to facilitate the judicial administration of compensation for claims and to avoid stretching the third party system of liability insurance to the breaking point."¹⁸⁸

The *Testbank* court discussed the issue of efficient cost administration in maritime disasters, observing that placing the full costs of accidents upon the maritime industry would *at first* provide an incentive for safety. However, at some level, "[a]s the costs of an accident become increasing multiples of its utility . . . there is a point at which greater accident costs lose meaning, and the incentive curve flattens . . . [and] the value of the exercise is diminished."¹⁸⁹

184. See *supra* note 178. In *Palsgraff v. Long Island R. Co.*, 162 N.E. 99 (N.Y. 1928), the court, finding as a matter of law that no duty was owed to the plaintiff, concluded that "[t]he law of causation, remote or proximate" need not be addressed "in the case before us." *Id.* at 101.

185. Thode, *supra* note 178, at 28 (quoting Leon Green, *Duties, Risks, Causation Doctrines*, 41 TEX. L. REV. 42, 45 (1962)).

186. *Id.* at 26.

187. PROSSER & KEETON, *supra* note 163, § 53, at 357.

188. SCHOENBAUM, *supra* note 13, § 13-7, at 471.

189. *Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1029 (5th Cir. 1985) (en banc), cert. denied, 477 U.S. 903 (1986).

Because liability insurance may not be obtainable for pure economic loss, the court believed that such loss was better protected through first-party loss insurance. The court argued that:

[w]ith a disaster inflicting large and reverberating injuries through the economy, as here, we believe the more important economic inquiry is that of relative cost of administration, and in maritime matters administration quickly involves insurance. Those economic losses not recoverable under the [*Robins*] rule for lack of physical damage to a proprietary interest are the subject of first party or loss insurance. . . . Each businessman who might be affected by a disruption of river traffic or by a halt in fishing activities can protect against that eventuality at a relatively low cost since his own potential losses are finite and readily discernible.¹⁹⁰

The court concluded that "to the extent economic analysis informs our decision here, we think that it favors retention of the [*Robins*] rule."¹⁹¹

Economic consequences are a driving force behind courts' decisions to draw bright-line rules. Under Learned Hand's influential formula for duty, a duty to take precautions exists where the burden of such precautions is less than the expected cost of the accident.¹⁹² The burden of precautions includes the "extent of burden to [the] defendant and the consequences to the community of imposing a duty to exercise care with resulting liability for breach."¹⁹³

Under a pure economic analysis, an oil spill may at first glance seem to satisfy the Hand formula and require imposition of liability on the tortfeasors. The probability of such a spill is low, but the potential magnitude of the resulting harm is so great that the

190. *Id.*

191. *Id.*

192. In *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947), a barge left unattended for several hours in a busy harbor broke away from its moorings and collided with another vessel. Judge Hand pronounced his influential BPL test for determining whether the alleged tortfeasor had breached a duty:

[T]he owner's duty . . . to provide against resulting injuries is a function of three variables: (1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether . . . $B < PL$.

Id. at 173.

193. See PROSSER & KEETON, *supra* note 163, § 53, at 359 n.24.

product of "BP" would appear to be greater than the burden of taking adequate precautions. This result is correct with regard to physical injury to persons or property, but not with regard to pure economic loss. The magnitude of resulting harm for economic loss is in fact low, for the diminished business activity in the spill area is offset by gains elsewhere as consumers shift their spending to other locales. Holding the defendant liable for such damages "would result in a damage award greater than the net harm inflicted and could therefore result in over-deterrence of negligent conduct."¹⁹⁴

In some instances, application of the *Robins* rule will result in inequity. In many others, however, invoking the rule to cut off liability at an easily distinguishable point will not only speed disposition of valid claims and prevent judicial gridlock, but also prevent easily targeted defendants from being singled out for punishment disproportionate to their fault. The vitality of the rule over the years, coupled with its omission from the House Conference Committee's criticism of other long-standing maritime laws, as well as Congress's apparent recognition of the practical limitations of oil carrier liability, suggests that Congress did take into account the policy considerations underlying the *Robins* rule when drafting TAPAA. In addition, Congress's failure to overrule *Robins* after the *Exxon Valdez* incident, in the face of continuing controversy over the rule in the circuit courts, further evidences congressional recognition of the rule's utility and a continuing intent to be bound by it.

194. See Richard A. Posner, *Law and the Theory of Finance: Some Intersections*, 54 GEO. WASH. L. REV. 159, 169 (1986). Discussing the case of *Rickards v. Sun Oil Co.*, 41 A.2d 267 (N.J. 1945) (ruling that economic loss caused to island merchants when the defendant's ship collided with the bridge connecting the island to the mainland was unrecoverable), Judge Posner explained the court's holding in the following manner:

The economist explains this result by noting that most and perhaps all of the plaintiffs' loss was balanced by gain to others, namely the mainland merchants whose businesses picked up when their competitors on the island were put out of the reach of consumers. . . . [M]aking the defendant liable for the loss it inflicted on the island merchants would result in a damage award greater than the net harm inflicted and could therefore result in overdeterrence of negligent conduct.

Id.; see generally RICHARD A. POSNER, TORT LAW: CASES AND ECONOMIC ANALYSIS (1982).

IV. STATE STATUTORY LAW VS. FEDERAL STATUTORY LAW — THE EFFECT OF THE ALASKA ACT

The State of Alaska passed the Alaska Act in order to punish those responsible for the discharge of hazardous substances as well as to protect the health, safety and welfare of its citizens, their property, and the natural resources of the state.¹⁹⁵ So defined, it is a legitimate exercise of Alaska's police power.¹⁹⁶ Pursuant to the exercise of that power, a state and its instrumentalities "may act, in many areas of interstate commerce and maritime activities, concurrently with the federal government."¹⁹⁷ As long as the state action in the maritime area supplements the federal legislation, it is permissible; only when the state action comes into conflict with the federal action or has unduly burdensome effects on maritime activities may it be limited.¹⁹⁸

In determining whether federal legislation has, in fact, preempted state action in a particular area, courts must look beyond the fact that Congress has chosen to legislate in that area. The intent of Congress:

[T]o supersede the exercise by the state of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other

195. ALASKA STAT. § 46.03.822 (Supp. 1992).

196. See *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442 (1960) (Air pollution legislation "clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power.").

197. *Id.* (citations omitted).

198. The United States Supreme Court has stated that:

The basic limitations upon local legislative power in [the maritime area] are clear enough. The controlling principles have been reiterated over the years in a host of this Court's decisions. Evenhanded local regulation to effectuate a legitimate local public interest is valid unless preempted by federal action or unduly burdensome on maritime activities or interstate commerce.

Huron Portland Cement, 362 U.S. at 443 (citations omitted); see *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146 (1963) (A state statute will not be preempted unless it is in "irreconcilable conflict with the federal regulation" or unless preemption was the clear intent of Congress.); *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 772 (1947) (noting that "exclusion of state action may be implied from the nature of the legislation and the subject matter although express declaration of such result is wanting").

words, such intent is not to be implied *unless the act of Congress, fairly interpreted, is in actual conflict with the law of the state.*¹⁹⁹

Thus, if TAPAA's strict liability scheme provides for actions or remedies in "actual conflict" with those mandated in the Alaska Act, it will be judged to have preempted the Alaska Act and suits brought under the Alaska Act for TAPS oil spills will fail to state a claim for damages adequately.

The Federal District Court for the District of Alaska determined that TAPAA and the Alaska Act were not in conflict. In *In re the Exxon Valdez*,²⁰⁰ the plaintiffs brought claims under TAPAA and the Alaska Act seeking recovery for pure economic loss, and the defendants moved for judgment on the pleadings, asserting that the damages sought were barred by the *Robins* rule. The case required the court to determine which law governed the economic loss claims.

Applying the literal interpretation of TAPAA's "damages" clause, the court found that the statutes could be construed harmoniously, as both purported to impose liability without regard to fault upon the responsible parties for all damages, including pure economic loss.²⁰¹ Though the Alaska Act's strict liability is unlimited and TAPAA's is capped at \$100 million, in "the limited situation . . . where the oil spill was of TAPS oil, the Alaska Act and TAPAA do not conflict to the extent of \$100 million."²⁰² Thus, "[f]or the first \$100 million of damage resulting from a TAPS oil spill, the remedy would be uniform whether the claims were brought under TAPAA or the Alaska Act."²⁰³ If state and federal statutes governing the same area apply a uniform remedy, they are

199. *Huron Portland Cement*, 362 U.S. at 443 (emphasis added); see also *Askew v. Am. Waterways Operators, Inc.*, 411 U.S. 325, 341 (1973) (recognizing that where "Congress has acted in the admiralty area, state regulation is permissible, absent a clear conflict with the federal law"); *Kelly v. Washington ex rel. Foss Co.*, 302 U.S. 1, 10 (1937) (establishing that the conflict between the state and federal regulation be so clear "that the two acts (state and federal) cannot 'be reconciled or consistently stand together'").

200. *In re the Exxon Valdez*, 767 F. Supp. 1509 (D. Alaska 1991).

201. *Id.* at 1517.

202. *Id.* at 1515.

203. *Id.*; see also *In re the Glacier Bay*, 746 F. Supp. 1379, 1387 (D. Alaska 1990) ("To the extent that Alaska imposes strict liability in excess of \$100 million, there is no conflict between TAPAA and the Alaska Act.").

not in "actual conflict," so claims under each can proceed in harmony.

However, if TAPAA contains a physical injury requirement, as argued by both Judge Gadbois in *Benefiel v. Exxon Corp.*²⁰⁴ and above, it would conflict with the Alaska Act on the issue of recovery for pure economic loss. In this regard, for damage claims up to \$100 million, TAPAA would preempt the Alaska Act, and those seeking recovery for economic loss would be denied recourse to the Fund.²⁰⁵ However, claims for damages related to physical or

204. 1991 Am. Mar. Cases 769 (C.D. Cal. 1990).

205. While negating the economic loss provision in the Alaska Act will work to the detriment of a large class of plaintiffs, in actuality, this would bring the Alaska Act into harmony with Alaska law on the recovery of economic loss in other areas of tort. In a long line of product liability cases, the Alaska Supreme Court has denied relief to plaintiffs seeking strict liability recovery for economic loss unconnected to a physical or proprietary injury. See *Kodiak Elec. Ass'n, Inc. v. Delaval Turbine, Inc.*, 694 P.2d 150, 153 (Alaska 1984) ("In order to prevail on a claim of strict liability in tort . . . when no personal injury has occurred, the plaintiff must show 'property damage' as opposed to economic loss."); *State ex rel. Smith v. Tyonek Timber, Inc.*, 680 P.2d 1148, 1152 (Alaska 1984) ("For the purpose of strict liability, recovery for economic loss is limited to contractual remedies."); *Northern Power & Eng'g Corp. v. Caterpillar Tractor Co.*, 623 P.2d 324, 326-27 (Alaska 1981) ("[W]here the injury involves only economic loss, as where the product itself fails to function, the purchaser has merely lost the benefit of his bargain . . . [and h]is recovery must therefore rest on warranty, not strict liability in tort."); see also *Cloud v. Kit Mfg. Co.*, 563 P.2d 248, 251 n.7 (Alaska 1977) (Alaska does "not recognize a cause of action in strict liability for economic loss."). The vast majority of jurisdictions "have not permitted recovery of purely economic loss[]" because "permitting recovery under strict liability in tort for economic loss would jeopardize rights granted a manufacturer by the legislature under the Uniform Commercial Code." *Tyonek Timber*, 680 P.2d at 1151. The court's reasoning in *Morrow v. New Moon Homes, Inc.*, is instructive:

[T]his strict liability remedy would be completely unrestrained by disclaimer, liability limitation and notice provisions. Further, manufacturers could no longer look to the Uniform Commercial Code provisions to provide a predictable definition of potential liability for direct economic loss. In short, adoption of the doctrine of strict liability for economic loss would be contrary to the legislature's intent . . . and would vitiate clearly articulated statutory rights. This we decline to do.

548 P.2d 279, 286 (Alaska 1976) (emphasis added). The Alaska Supreme Court's clear concern with potentially open-ended liability for economic loss meshes with those concerns underlying the *Robins* rule. In the end, interpreting TAPAA so as to negate the economic loss clause in the Alaska Act merely serves to bring that statute into line with state tort doctrine generally.

proprietary injury could still be brought under the Alaska Act if the plaintiff preferred a state forum.

V. STATE STATUTORY LAW VS. FEDERAL MARITIME LAW —
THE APPLICATION OF THE *ROBBINS* RULE TO CLAIMS FALLING
OUTSIDE THE SCOPE OF TAPAA

Denying recovery for economic loss under the Alaska Act for the first \$100 million in damages does not entirely negate that statute's scheme. TAPAA encourages state action in the area of oil spill legislation, and specifically provides that section 1653(c) as a whole "shall not be interpreted to preempt the field of strict liability or to preclude any State from imposing additional requirements."²⁰⁶ In addition, the legislative history accompanying the statute explains that "[t]he States are expressly not precluded from setting higher limits or from legislating in any manner not inconsistent with the provisions of this Act."²⁰⁷ The congressional intent, therefore, was to impose strict federal liability up to a certain point, while leaving the states free to impose even stricter regulations if they saw fit to do so.²⁰⁸ The State of Alaska did so choose. Thus, another issue in this litigation, apart from the question of the proper definition of damages to apply to claims made under TAPAA, is the choice of law to apply to those claims which exceed the \$100 million limit of TAPAA.

Section 1653(c)(3) of TAPAA states that "[i]f the total claims allowed exceed \$100 million, they shall be reduced proportionately" and the "unpaid portion of any claim may be asserted and adjudicated under other applicable Federal or state law."²⁰⁹ Although *Robins* would deny recovery to all pure economic loss claims litigated outside the Fund, the Alaska Act's provision for unlimited strict liability does encompass economic loss. In determining the preemptive effect of state law on general maritime law, the courts

206. 43 U.S.C. § 1653(c)(9) (1986).

207. H.R. CONF. REP. NO. 624, 93rd Cong., 1st Sess. 29 (1973), reprinted in 1973 U.S.C.C.A.N. 2523, 2531.

208. *Slaven v. BP America, Inc.*, 786 F. Supp. 853, 862 (C.D. Cal. 1992) ("[I]t is clear that Congress intended to allow recovery of damages beyond those provided for under TAPAA under either federal or state laws or both.").

209. 43 U.S.C. § 1653(c)(3) (Supp. 1992).

involved in the current litigation have again come to differing conclusions.

In *Askew v. American Waterways Operators, Inc.*,²¹⁰ the United States Supreme Court enunciated the standard by which to determine whether general maritime law preempted a state statute:

[A] state may modify or supplement maritime law . . . provided that the state action "does not contravene any acts of Congress, nor work any prejudice to the characteristic features of the maritime law, nor interfere with its proper harmony and uniformity in its international and interstate relations."²¹¹

Any state regulation that seeks to supplement the general maritime law, therefore, must be directed toward an issue of local concern, and its operation must not disrupt the uniformity of the maritime legal system.²¹² Thus, for the Alaska Act to overcome the *Robins* rule, its provisions must be seen as governing a matter of great local concern such that the state's interest overcomes the federal interest in uniformity and its operation must not disrupt rights available to parties under general maritime law.

In the *Exxon Valdez* case,²¹³ the Alaska court found that when claims exceeded \$100 million and TAPAA ceased to apply, the Alaska Act's provision for unlimited strict liability for all damages, including economic loss, conflicted with the *Robins* rule. While "[s]tate law may supplement federal maritime law . . . state law may not conflict with federal maritime law, as it would be redefining the requirements or limits of a remedy available at admiralty."²¹⁴

Section 1653(c)(9) of TAPAA did reserve the right of states to impose strict liability or other requirements on the responsible parties, but this right exists only if the state impositions are

210. 411 U.S. 325 (1973).

211. *Id.* at 338-39 (citations omitted) (quoting *Just v. Chambers*, 312 U.S. 383, 389-90 (1941)).

212. *Pac. Merchant Shipping Ass'n v. Aubry*, 918 F.2d 1409, 1422 (9th Cir. 1990) ("[T]he general rule on preemption in admiralty is that states may supplement federal admiralty law as applied to matters of local concern, so long as state law does not *actually conflict* with federal law or *interfere* with the *uniform working* of the maritime legal system.").

213. *In re the Exxon Valdez*, 767 F. Supp. 1509 (D. Alaska 1991).

214. *Id.* at 1515; *see also* *Continental Oil Co. v. Bonanza Corp.*, 677 F.2d 455, 461 n.7 (5th Cir. 1982) ("When admiralty law speaks to a question, state law cannot override it . . ."), *vacated on other grounds*, 706 F.2d 1365 (5th Cir. 1983).

consistent with the applicable federal law.²¹⁵ Imposing unlimited strict liability for economic loss above the TAPAA limits would directly conflict with a characteristic feature of the federal maritime law: the *Robins* rule barring recovery for pure economic loss absent physical or proprietary injury. Therefore, "*Robins Dry Dock* applies to limit the damages recoverable under the Alaska Act in excess of the \$100 million recoverable under TAPAA."²¹⁶ Although not mentioned by the court, the obvious conclusion to be drawn regarding the Alaska Act's provision for recovery of pure economic loss is that, for spills involving TAPS oil, it is substantively ineffective. Under \$100 million, the Alaska Act provisions must be applied consistently with TAPAA provisions. Over \$100 million, the Alaska Act is preempted by federal maritime law. Thus, the Alaska Act is only useful in this class of cases as a vehicle for those plaintiffs who seek a state forum.

VI. THE FUTURE OF OIL SPILL LIABILITY — THE OIL POLLUTION ACT OF 1990

Following the *Exxon Valdez* spill, Congress sought to consolidate the liability provisions of the federal pollution statutes. While the subsequent legislation affects only spills occurring after 1990, and is thus irrelevant to the pending litigation, a discussion of that statute is helpful in gauging the prospective effect of the *Robins* doctrine on future oil spill disasters.

215. See *Exxon Valdez*, 767 F. Supp. at 1515 ("Congress' power to legislate concerning rights and liabilities within the maritime jurisdiction and remedies for their enforcement arises from the Constitution and is non-delegable.").

216. *Id.* The court further noted that while "Congress may have intended for the states to be able to simply extend the strict liability provisions of TAPAA to higher limits without subjecting those higher limits to *Robins Dry Dock*, . . . Congress did not specifically do so, nor did it have the authority to grant the states permission to do so." *Id.* (footnote omitted); *contra* *Slaven v. BP America, Inc.*, 786 F. Supp. 853, 864 (C.D. Cal. 1992) (holding that the state's compelling interest in regulating pollution within its borders overrode the federal interest in uniformity; thus, a state law providing for unlimited strict liability was not preempted by *Robins*); *In re the Glacier Bay*, 746 F. Supp. 1379, 1387 (D. Alaska 1990) (TAPAA allows for the recovery of pure economic loss, and, since the Act "clearly encouraged state legislation regarding liability for . . . oil spills . . . it would be inconsistent to impose the *Robins Dry Dock* rule from maritime law on state claims when that rule does not apply to TAPAA claims.").

On August 18, 1990, President Bush signed into law the Oil Pollution Act of 1990 ("OPA"),²¹⁷ a new legal scheme governing the discharge or threat of discharge of oil in navigable waters, on adjoining shorelines, and within the exclusive economic zone²¹⁸ of the United States. Congress designed OPA both to prevent oil spills and, in the case of spills that do occur, to provide quick compensation to those injured, as well as to ensure safe and comprehensive clean-up.²¹⁹ OPA includes a comprehensive liability scheme that provides for the recovery from responsible parties of removal costs and other damages, including for injury or destruction of natural resources, real or personal property, and lost profits resulting from such injury or destruction.²²⁰ OPA specifically preserves the ability of states to impose even greater penalties or more stringent standards than OPA itself provides,²²¹ and preexisting federal legislation, including TAPAA, remains in effect except with respect to liability, which OPA now governs.²²² The general effect of OPA is to "substantially alter[] and increase[] the pollution liabilities imposed on those engaged in the exploration, production, and transportation of oil within the territorial seas and the exclusive economic zone of the United States in the event of a discharge of oil."²²³

217. 33 U.S.C. §§ 2701-2761 (1990); *see supra* note 170 and accompanying text.

218. Under international law, a coastal state has the right to establish an "exclusive economic zone" over which it has sovereignty for the purpose of exploring, exploiting, conserving, and managing the natural resources up to 200 nautical miles from its coast. MARK W. JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* 154 (1988) (footnote omitted).

219. The Honorable George J. Mitchell, *Preservation of State and Federal Authority Under the Oil Pollution Act of 1990*, 21 ENVTL. L. 237, 238 (1991). Senator Mitchell, the majority leader of the United States Senate, was a former federal district court judge and United States Attorney for the District of Maine. He spearheaded the passage of this legislation. *Id.*

220. 33 U.S.C. § 2702(a)-(b) (Supp. 1992).

221. *Id.* § 2718. "As most states now have unlimited liability statutes, the [statutory] limits of . . . [OPA] are largely theoretical with respect to the actual exposure to which a vessel owner may be subject." Rodriguez & Jaffe, *supra* note 172, at 18.

222. Rodriguez & Jaffe, *supra* note 172, at 1.

223. *Id.* at 11-12 (footnote omitted). "[T]he exclusive economic zone extends seaward two-hundred miles from the coastline of the United States." *Id.* at 12 n.69.

The OPA liability scheme imposes liability for removal costs²²⁴ and damages upon “each responsible party for a vessel or facility²²⁵ from which oil is discharged.”²²⁶ Unlike TAPAA, OPA specifically defines the types of damages for which recovery may be had under the Act.²²⁷ In particular, section 2702(b)(2)(E) allows recovery for damages “equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources.”²²⁸ This section has been interpreted by one of its congressional sponsors as allowing compensation to “people who have sustained economic loss[]” and to those who have sustained “lost profits resulting from such injury or destruction” of property or natural resources.²²⁹ In addition, not only are the liability limits significantly higher,²³⁰ but liability may be unlimited where a mishap is the result of gross negligence or willful misconduct, or occurs in violation of an applicable federal safety, construction or operating regulation.²³¹ OPA, therefore, at least on its face, appears to enlarge the scope of recoverable damages over that permitted under the *Robins* doctrine,²³² and has the virtue of at least attempting to define in advance whether or not pure economic loss is recoverable.

Ambiguity remains, however, because although OPA “allows recovery for lost profits or impairment of earning capacity, the

224. Removal costs “means the costs of removal that are incurred after a discharge of oil has occurred or, in any case in which there is a substantial threat of a discharge of oil, the costs to prevent, minimize, or mitigate oil pollution from such an incident.” 33 U.S.C. § 2701(31) (Supp. 1992).

225. OPA excludes from its coverage any discharge from an onshore facility subject to TAPAA. *Id.* § 2702(c)(3).

226. *Id.* § 2702.

227. *Id.* § 2702(b)(2)(A)-(F).

228. *Id.* § 2702(b)(2)(E).

229. Mitchell, *supra* note 219, at 238.

230. 33 U.S.C. § 2704 (Supp. 1992). Although considerably higher, the new limits remain much less than the two billion dollars reportedly spent by Exxon following the *Exxon Valdez* spill. Rodriguez & Jaffe, *supra* note 172, at 16.

231. 33 U.S.C. § 2704(c)(1) (Supp. 1992). Liability may also be unlimited where the responsible party does not report the incident or fails to cooperate or abide by the orders of the officials concerned with removal activities. *Id.* § 2704(c)(2).

232. “[T]he statutory language clearly mandates a more generous standard for recovery of economic loss than that recognized under prior statutes and case law.” Olsen, *supra* note 75, at 287.

classes of claimants who may recover is unclear.”²³³ Once again, in attempting to deal with the issue of recovery of pure economic loss, the statute and its legislative history fail to mention the *Robins* rule, which remains the prevailing law in most federal circuits. The conference committee report does little to clarify the issue, as the only example it provides of the type of claimant who may recover under subsection 2702(b)(2)(E) is that of commercial fishermen, who have always been allowed recovery under the long-standing *Robins* exception.²³⁴ Even Senate Majority Leader George Mitchell, a major proponent of OPA and a former federal district court judge, in an article discussing the impact of OPA, omits any mention of *Robins* or the dispute in the circuits regarding its continued viability.²³⁵ In fact, while a final congressional statement on the matter would be the best possible course of action, “Congress has repeatedly contemplated, and rejected, a federal cause of action” for the types of pure economic loss claimed in pollution cases by shoreside businesses.²³⁶

OPA’s failure to directly address the *Robins* issue and its impact on oil spill liability has lead to continued confusion as to whether OPA and other pollution statutes are intended to overrule or incorporate it. In the *Cleveland Tankers* case,²³⁷ the only case yet to construe OPA’s liability provisions, a federal district court faced claims for economic loss arising out of a boat collision and subsequent gasoline spill in the Saginaw River in Michigan. After

233. Rodriguez & Jaffe, *supra* note 172, at 15.

234. H.R. CONF. REP. NO. 653, 101st Cong., 2d Sess. 103 (1990), *reprinted in* 1990 U.S.C.C.A.N. 779, 781. The conference committee report states:

Subsection [2702(b)(2)(E)] provides that any claimant may recover for loss of profits or impairment of earning capacity resulting from injury to property or natural resources. The claimant need not be the owner of the damaged property or resources to recover for lost profits or income. For example, a fisherman may recover lost income due to damaged fisheries resources, even though the fisherman does not own those resources.

Id. However, “[t]his example is hardly illuminating, since even prior case law allowed commercial fishermen to recover . . . [and] [w]hether commercial ventures — for example, seafood wholesalers or tackle and bait shops, and the employees of such commercial ventures — can recover remains unclear.” Olsen, *supra* note 75, at 286-87.

235. See Mitchell, *supra* note 219.

236. Olsen, *supra* note 75, at 300.

237. *In re Cleveland Tankers, Inc.*, 791 F. Supp. 669 (E.D. Mich. 1992).

endorsing the *Robins* rule, the court denied the plaintiffs' assertion that their economic loss claims were cognizable under OPA.²³⁸ The court held that although section 2702(b)(2)(E) allows damages for "loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources," the claimants failed to "allege physical injury to a proprietary interest" and hence fell outside the scope of OPA.²³⁹ Although the court did not assess how OPA affects *Robins*, the court's strong endorsement of the bright-line approach to maritime economic loss liability demonstrates that the issue is still open and that OPA may not have solved it.

VII. CONCLUSION

The law is ambiguous about whether Alaska oil spill victims may recover for pure economic loss. The most sound result, however, is for courts addressing the issue to incorporate the *Robins* physical injury rule into TAPAA's liability provisions. While TAPAA does impose strict liability on defendants for "all damages" arising from the spill of TAPS oil, Congress enacted this provision against a backdrop of well-established maritime law prohibiting the recovery of pure economic loss. In this context, then, the language of the statute is unclear. Similarly, the legislative history fails to clarify the intended scope of the "all damages" clause. Congress did omit any mention of the *Robins* doctrine; this fact, in conjunction with Congress's explicit denunciation of several statutory maritime laws, suggests that Congress did not intend to upset *Robins* as the prevailing standard for recovery. Thus, TAPAA should be read to allow recovery, up to the \$100 million limit of the Fund, for only those damages which arise from an injury to person or property.

Interpreting TAPAA to incorporate the *Robins* rule would also serve several underlying policy functions. First, it would ensure that plaintiffs suing within the scope of the Fund were subject to the same standard of recovery as those litigating outside the Fund. This, in turn, would avoid the "race for the Fund" that would result if those claiming against the Fund could recover pure economic loss while others could not. Second, interpreting TAPAA to include a

238. *See id.* at 679.

239. *Id.* (quoting 33 U.S.C. § 2702(b)(2)(E) (Supp. 1992)).

physical injury requirement avoids saddling defendants with potentially limitless liability. By providing a “bright-line” beyond which liability will be cut off, claims for pure economic loss may be dismissed before beginning litigation, thus conserving valuable judicial resources. In this era of mass torts, allowing *Robins* to maintain its vitality provides a much-needed degree of certainty.

The ultimate problem in this situation is that Congress has repeatedly failed to speak with a clear voice on the issue of pure economic loss. Not only is its intent regarding the TAPAA ambiguous, but at least one court has also determined that *Robins* operates to cut off liability under the OPA. Such a rule demonstrates that Congress, by avoiding the *Robins* issue, has only confused the issue. Nevertheless, the fact that OPA does not itself resolve the issue also supports an interpretation that allows *Robins* and the TAPAA to operate in harmony — providing strict liability for damages related only to physical or proprietary use.

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