

Pure economic loss: how far should the net be cast?

Dayalan Kisten, Manager (Claims Technical) at AON South Africa



A compelling time for an Insured to assess their liability risks

There have been a number of Supreme Court of Appeal decisions that have featured prominently with regards to claims for pure economic loss.

The position in our law is that, where an interest of an aggrieved party interfered with is purely financial and unconnected with damage to person or property, our law has traditionally displayed reluctance to provide any redress. Particularly where the facts demonstrate a situation of indeterminate liability, our courts are loathe to make such an award.

However, our courts will award a claim for pure economic loss if policy considerations dictate that the aggrieved party is entitled to be compensated for wrongful conduct and that such conduct attracts a legal liability. The existence of a legal duty for the purposes of wrongfulness is determined according to the *boni mores* or legal convictions of the community. A court will take into account the following factual circumstances, though not exhaustive, that indicate a duty not to cause harm. These include the proportionality of risk of harm and the cost of prevention, control over the dangerous object or situation, awareness of danger, prior conduct creating danger, a relationship imposing responsibility, and professional knowledge.

Particularly in the arena of products liability exposures where there is no consequent injury or damage, there is an emphasis of increased risk for a claim for pure economic loss, given that

there is a general duty on a supplier to ensure that a defective product does not enter the market. This is despite an Insured being of the view that any such claim will be contractually resisted.

Broadform liability insurance policies would provide cover for pure financial loss by way of an extension and the understanding of the cover is brokered on the basis that it covers for financial loss which does not occur out of injury or damage. This policy position remains.

This understanding of the cover in the insurance market is in accordance with the judicial understanding of the terms "pure economic loss" which was pronounced by Harms JA in the Supreme Court of Appeal in **Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA** as "loss that does not arise directly from damage to the plaintiff's person or property but rather in consequence of the negligent act itself, such as a loss of profit, being put to extra expenses or the diminution in value of the property."

One would have thought that there always has been a universal understanding, or at least a degree of consensus of the understanding, of pure economic loss in our common law until the same court in **Vivs Tippers (Edms) Bpk v Pha Phama Staff Services (Edms) Bpk h/a Pha Phama Security** regarded the theft of a vehicle as falling into the category of pure economic loss. That decision has appeared to be salvaged by the same court in a later decision by the obiter statement of Judge Ponnann in **Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd** in remarking that pure economic loss "does not, I daresay, encompass within its scope the

loss, through theft, of a tangible asset such as a motor vehicle..."

To illustrate its meaning by way of an example is to take a farmer that breeds a special breed of horses. These horses die as a result of receiving contaminated horse feed from a supplier. There are a number of possible claims that can arise against the supplier, including a possible claim for loss of expected progeny which could have been realised had the horses not died. This claim for expected progeny would constitute a claim for pure economic loss as it does not arise directly from the damage. In other words, it arises out of the consequences of the act of supplying contaminated horse feed.

Any claim from the farmer is likely in addition to whatever contract that may exist be pursued under the common law or applying the strict liability provisions of the Consumer Protection Act. Notably, while the Consumer Protection Act envisages a claim for a claim for economic loss that is limited to resulting from death or illness to person or loss or damage to property, an aggrieved party would rely upon the common law to pursue a claim for pure economic loss.

The position is that an Insured is vulnerable to such a claim for pure economic loss if it plays a critical role in the supply of products. While each case is determined on its own facts, it is important to unpack the scope of an Insured's duties so as to understand the potential liability for such a claim. There is a case to be made out that places emphasis on the need for pure economic cover, given the development of our common law on pure economic loss.