A Well-Plead Complaint - The Key to Recovery of Economic Damages for Delay in Admiralty

Chuck Talley

Follow this and additional works at: https://ir.law.fsu.edu/lr

Part of the Admiralty Commons, and the Civil Procedure Commons

Recommended Citation
https://ir.law.fsu.edu/lr/vol9/iss2/4

This Comment is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Law Review by an authorized editor of Scholarship Repository. For more information, please contact efarrell@law.fsu.edu.
A WELL-PLEAD COMPLAINT—THE KEY TO RECOVERY OF ECONOMIC DAMAGES FOR DELAY IN ADMIRALTY

Chuck Talley

I. INTRODUCTION

The scenario is simple. Your six-hundred foot freighter has been in port being loaded with goods destined for Central and South America; her fuel tanks are full; the crew and supplies are on board; the engines start as helper tugs position themselves for the vessel’s departure; and a crew of seventy-three seamen stand by to assist in the maneuver. Word comes across the freighter’s VHF radio that a five-hundred foot tanker has negligently collided with the bridge which spans the entrance to the port. As a result, the Coast Guard has closed the channel leading from the port and estimates that it will be at least three weeks before it is reopened.

Have you suffered any damage? Of course! Your vessel must remain in port for at least three weeks when it should be on the high seas. You incur additional expenses as a result of the delay, such as salary and supplies for an idle crew and wharfage fees. Since you have been injured, you can surely sue the negligent party and collect for all of these damages, right? Not necessarily.

Two divergent groups of cases address the issue of the recovery of damages due to delay:¹ one group disallowing delay damages and the other allowing them. No judicial opinion has yet reconciled these views so as to provide a definitive answer to the issue of delay damages.

This comment will review these two groups of cases, highlighting the various courts, causes of action, plaintiffs, manners of pleading damages, and other factors that might aid in determining why some actions for delay damages succeed while others do not. These factors will then be summarized to aid an attorney in making a more accurate prediction of the outcome of a delay damages claim.

II. CASES SUPPORTING THE DENIAL OF RECOVERY

The Supreme Court decision of Robins Dry Dock & Repair Co.

v. Flint\textsuperscript{2} is the leading case denying recovery of delay damages. In Robins, the time charterer of a vessel sought to recover damages resulting from a delay in the return of the vessel from the dry dock.\textsuperscript{3} In drydocking the vessel, the employees of Robins Dry Dock had damaged the propeller and the replacement of the part caused the delay.\textsuperscript{4} The time charterer argued that as the intended beneficiary of the contract between the owner and Robins, it should recover the profits it could have earned had the vessel been ready on time.\textsuperscript{5}

In rejecting this argument, the Supreme Court held that the third party charterers could not recover for the negligent interference with the charter agreement on tort or breach of contract principles.\textsuperscript{6} The Court noted, however, that where a primary party knows of the contract with the third party and adjusts its conduct so as to intentionally interfere with that contract, the third party then has a cause of action.\textsuperscript{7} The Court further noted that without this intent:

\begin{quote}
[A]s a general rule, . . . a tort to the person or property of one man does not make the tort-feasor 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.\textsuperscript{8}
\end{quote}

An underlying factor which appears to have influenced the Court's decision was the charterer's attempt to recover pure economic loss without an accompanying proprietary loss.\textsuperscript{9} This attempted recovery contradicts the theory that a party cannot recover economic losses unless proprietary damage has also been

\textsuperscript{2} 275 U.S. 303 (1927).
\textsuperscript{3} Id. at 307. In a time charter arrangement, the owner of the vessel remains in control of and responsible for the vessel while the charterer directs what, where, and how goods are to be loaded and delivered. The time charter should be compared with the demise or bareboat charter which shifts possession and control of the vessel to the charterer. G. Gilmore & C. Black, Jr., The Law of Admiralty 230, 239 (2d ed. 1975). The latter arrangement would appear to give the charterer more of a property interest in the vessel. See 275 U.S. at 308. The importance of this distinction will arise later. See notes 27, 37 infra, and accompanying text. See also Louisville & Nashville R.R. v. M/V Bayou Lacombe, 597 F.2d 469 (5th Cir. 1979).
\textsuperscript{4} 275 U.S. at 307.
\textsuperscript{5} Id.
\textsuperscript{6} Id. at 307-09.
\textsuperscript{7} Id. at 308-09.
\textsuperscript{8} Id. at 309 (citation omitted).
\textsuperscript{9} Id. at 308-09.
sustained. Some of the rationales often given for the existence of this rule are: (1) the defendant would be subject to claims based upon remote, speculative, and unforeseeable injuries, and therefore, the defendant owes no duty to the plaintiff to guard against these injuries; (2) the doctrine of proximate cause prevents a recovery of these damages; and (3) the allowance of recovery would make the defendant liable for an excessive or unduly oppressive amount of damages. This general requirement of proprietary damages has been applied to a variety of situations, including the destruction of a bridge, the severing of a power line to a printing business, and the injury of a person to whom a third person owed life-care medical services.

Although the importance of some factors can only be implied from the Robins decision, the holding by the Supreme Court is clear; third parties cannot recover damages, especially lost profits, due to the negligent interference with a contract.

The next significant decision disallowing recovery of delay damages is In re Kinsman Transit Co., in which a vessel broke loose from its moorings, drifted down Buffalo River, collided with another vessel, and continued downriver until both vessels crashed into the Michigan Avenue Bridge. The debris from the accident caused the river to dam, thereby obstructing traffic for approximately two months. As a consequence of the collision, Cargill Inc., was unable to transport its grain. The company incurred additional expenses when it was forced to buy substitute grain at a higher price while storing the untransported wheat. Additionally, Cargo Carriers, Inc., was temporarily prevented from unloading its cargo in the customary manner and sought to recover the expenses.

10. See James, Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal, 25 Vand. L. Rev. 43, 43 (1972). This theory may explain in part the charterer's efforts to connect itself with the damage caused to the vessel's propeller. 275 U.S. at 308.

11. See Union Oil Co. v. Oppen, 501 F.2d 558, 563 (9th Cir. 1974). For specific cases involving these theories see id. at 563 notes 4, 5 & 6.


13. See 501 F.2d at 563-64. See also Note, supra note 12, at 665.


15. 388 F.2d 821 (2d Cir. 1968).

16. Id. at 822. The first case to adjudicate the negligence issues was In re Kinsman Transit Co., 338 F.2d 708 (2d Cir. 1964) (Kinsman I), which held that if any harm to the plaintiff was foreseeable, the defendant was also liable for the unforeseeable consequences to him. The subsequent Kinsman decision which determined the issue of damages is known as Kinsman II, 388 F.2d 821 (2d Cir. 1968).

17. 388 F.2d at 823, 823 n.3.
it incurred as a result of having to rent special equipment.\textsuperscript{18}

The lower court refused to allow these claims since they involved the negligent interference with contractual relations. A recovery in tort on this basis was barred by \textit{Robins} in the absence of either intentional interference or knowledge of the contract.\textsuperscript{19} The Second Circuit, however, chose not to rely on \textit{Robins}, finding there was no satisfactory reason to differentiate between contract rights and other legally protected interests. The court resorted to more familiar "tort terrain," noting that the claims of Cargill and Cargo Carriers were alleged to have resulted from the ship owner's negligence.\textsuperscript{20} Concluding that the connection between the defendants' negligence and the claimants' damages was too tenuous and remote, the appellate court refused to permit recovery.\textsuperscript{21} Thus, as a result of \textit{Kinsman}, even if a claim for delay damages is not dismissed as involving the negligent interference with contract, it may still be denied under tort theory if the damages appear too tenuous or remote.\textsuperscript{22}

Regardless of the opinion in \textit{Kinsman}, the \textit{Robins} decision has generally been followed by the courts. In \textit{In re S. C. Loveland Co.},\textsuperscript{23} the owner of a barge which sank while docked at a wharf was seeking exoneration from or limitation of his liability in a claim by a shipper for lost earnings. The loss to the shipper was caused by his inability to use the wharf to unload deliveries of coke pursuant to contracts entered into before the accident.\textsuperscript{24} Relying partially on \textit{Robins}, the United States District Court for the Eastern District of Pennsylvania determined that the shipper's claim was based on the negligent interference with a contract and denied recovery.\textsuperscript{25}

A similar result was reached by the Southern District Court of

\begin{flushleft}
\textsuperscript{18} \textit{Id.} at 823.
\textsuperscript{19} \textit{Id.}
\textsuperscript{20} \textit{Id.} at 823-24.
\textsuperscript{21} \textit{Id.} at 825. Professor Prosser has attempted to clarify the \textit{Kinsman} cases in his hornbook on torts. Prosser notes that the "scope of the foreseeable risk" is becoming the most prominent test of proximate cause, due primarily to its vagueness. As a result there is little predictability as to what is or is not foreseeable. Most decisions are solely a result of the trier of facts' intuition as to what the phrase "natural and probable consequences" actually entails. See W. \textit{Prosser}, supra note 14, § 43, at 267-70. \textit{See also} Gregory, \textit{Proximate Cause in Negligence—A Retreat from "Rationalization,"} 6 U. Chi. L. Rev. 36, 50 (1938).
\textsuperscript{22} This analysis appears to open a loophole. If counsel can present his or her complaint in a pure tort context without reference to interference with contractual rights, the effect of \textit{Robins} might be avoided.
\textsuperscript{24} \textit{Id.} at 787-88.
\textsuperscript{25} \textit{Id.} at 792.
\end{flushleft}
New York in *Federal Commerce & Navigation Co. v. M/V Marathonian*. In this case, a time charterer of a vessel involved in a collision with another ship, sued the negligent party for its damages, including loss of use of the chartered vessel. The court applied the *Robins* rationale and concluded that “[a] time charterer (who is without any property right in the vessel) cannot recover pecuniary losses sustained as the result of a third-party’s negligent interference with the performance of the contract between the charterer and the vessel’s owner.”

Several cases from the Fifth Circuit Court of Appeals have followed the theory that delay damages should not be awarded. The first was *Kaiser Aluminum & Chemical Corp. v. Marshland Dredging Co.* In *Kaiser*, the recipients of gas from a pipeline, owned and operated by the Sugar Bowl Gas Company, brought suit against a barge owner whose employees dropped a heavy anchor on the pipeline, causing service to be interrupted, and thereby forcing Kaiser to shut down its production operations. Both the trial court and the Fifth Circuit relied on *Robins* to conclude that, since the employees of Marshland did not intentionally interfere with Kaiser’s contract rights and no evidence existed that those working for Marshland had any knowledge of the contract between Kaiser and Sugar Bowl Gas, this action was merely for the negligent interference with contract rights and thus lacked merit.

The Fifth Circuit delivered a similar opinion in *Dick Meyers Towing Service, Inc. v. United States*, in which a tugboat operator sued the United States and a private construction company for profits it could have made if a lock had not failed, thereby blocking river traffic for five months. In an effort to avoid the “time charter-third party-negligent interference with contract” language from *Robins* and *Kaiser*, the plaintiff argued that the defendants in

27. *Id.* at 910 (footnote omitted). One might consider whether by depriving the time charterer of this action, the negligent party has been exonerated from all liability for loss of use of the vessel. This depends on whether the charterer is relieved of its contract with the vessel owner, allowing the owner to maintain such an action. But if the charterer is bound to the contract, or if the vessel is unique and a replacement is not available, the negligent party seems to have come upon a windfall. Once again the reader should question the importance of time charterer status and whether a property right is really essential to maintain a cause of action. See James, *supra* note 10, at 55-57.
28. 455 F.2d 957 (5th Cir. 1972).
29. *Id.* at 958.
31. 577 F.2d at 1024.
Dick Meyers were under the ordinary rules of tort liability and owed a duty directly to those dependent upon the continued operation of the locks and dams on the river. Furthermore, the plaintiff contended that his position was more analogous to the vessel owner in Robins and the pipeline owner in Kaiser, than to the plaintiffs in those cases, because he was not merely "incidently injured" by the defendants' conduct.33

Citing Robins and Kaiser as authority, the court stated that, "[t]he law has traditionally been reluctant to recognize claims based solely on harm to the interest in contractual relations or business expectancy. The critical factor is the character of the interest harmed and not the number of parties involved."33 Although the Fifth Circuit noted that the wisdom underlying the rule of negligent interference with contracts was open to debate, the court concluded that Robins still controlled and that the panel of judges deciding the case was in no position to overturn the well-settled rule of that decision.34

In the last of the cases from the Fifth Circuit, Louisville & Nashville Railroad v. M/V Bayou Lacombe,35 a railroad company was denied recovery for the loss of use of a bridge damaged by a vessel.36 The court stated that recovery might have been possible under Robins if the time-charterer had been a demise-charterer with a property right in the vessel. The court concluded, however, that the plaintiff suffered "the loss of an economic expectancy and not a proprietary loss."37 Thus, Robins appears to control in the Fifth Circuit if a plaintiff's claim even resembles an action for the negligent interference with a contract, irrespective of the actual form of the pleading.

Other courts have also followed the precedent established by the Supreme Court and have denied recovery for economic losses. The United States District Court for the District of Maryland in Gen-

32. Id. at 1025.
33. Id. The court seems to be of the opinion that past concerns as to time charterers and third parties are no longer of any importance. This would seem to imply that a vessel owner, whose ship was involved in a collision due to the negligence of the other vessel, could not recover for lost profits. This conclusion, however, is clearly against the established weight of authority. See, e.g., The Conqueror, 166 U.S. 110 (1897); Delta Marine Drilling Co. v. M/V Baroid Ranger, 454 F.2d 128 (5th Cir. 1972); Barger v. Hanson, 426 F.2d 640 (9th Cir. 1970); Oil Transport Co. v. The Lunga Point, 182 F. Supp. 357 (E.D. La. 1959).
34. 577 F.2d at 1025.
35. 597 F.2d 469 (5th Cir. 1979).
36. Id. at 470, 472.
37. Id. at 473-74. In this discussion the court noted that demise charterers may have sufficient proprietary interests in vessels to give them standing to sue for loss of use. Id.
eral Foods Corp. v. United States,\textsuperscript{38} used the principles of both Robins and Kinsman to conclude that the user of a bridge could not sue for loss of use of that bridge when it was damaged by a vessel. The court found that the plaintiff had not suffered a compensable property loss and furthermore, that its damages were remote and tenuous.\textsuperscript{39}

The plaintiffs in General Foods argued that, unlike Robins, there was no contract with the defendant, that they were foreseeable plaintiffs, and that there was some "special relationship" between the parties that should allow recovery.\textsuperscript{40} The court rejected these arguments stating first that Robins implied that in the absence of a contract, the loss would be placed under the general rule against recovery of damages and, therefore, the nonproprietary loss was not compensable.\textsuperscript{41} Furthermore, although foreseeability is one factor in assessing liability, the court was concerned that the liability for negligence should be limited. In this instance the connection was too remote and tenuous.\textsuperscript{42} Finally, the "special relationship" that was alleged by the plaintiff with the defendant was not the type that was traditionally recognized by the courts to justify recovery for pure economic loss.\textsuperscript{43}

In Complaint of Bethlehem Steel Corp.,\textsuperscript{44} the district court in Ohio, basing its opinion on Canadian law, dismissed twenty-two separate claims for economic loss due to delay,\textsuperscript{45} which arose when a vessel struck a bridge, blocking traffic for several days.\textsuperscript{46}

Thus, the general rule derived from these cases which follow the Robins rationale is that one cannot recover for economic losses caused by a delay unless there is also a direct, compensable, proprietary loss.

\textsuperscript{38} 448 F. Supp. 111 (D. Md. 1978).
\textsuperscript{39} Id. at 112-15. The court then proceeded to explain that the right to recover pure economic loss in negligence had been allowed in select instances, but that this was not such an instance. Id. at 115. Finally, the court cited In re Lyra Shipping Co., 360 F. Supp. 1188 (E.D. La. 1973), and In re China Union Lines, Ltd., 285 F. Supp. 426 (S.D. Tex. 1967), two key cases allowing recovery of economic losses due to delay and noted that they were not indicative of the great weight of authority. 448 F. Supp. at 116.
\textsuperscript{40} 448 F. Supp. at 114-15.
\textsuperscript{41} Id. at 114.
\textsuperscript{42} Id. at 114-15.
\textsuperscript{43} Id. at 115.
\textsuperscript{44} 449 F. Supp. 681 (N.D. Ohio 1977).
\textsuperscript{45} Id. at 689.
\textsuperscript{46} Id. at 682. The impact of allowing the cause of action requested by the claimants can clearly be seen here as the several days of delay produced claims totaling approximately two million dollars. Id. at 683-84.
III. CASES SUPPORTING THE RECOVERY OF DELAY DAMAGES

The recovery of economic losses due to a delay has been allowed by some courts in the United States. The emergence of this second line of cases is particularly noteworthy when it occurs within circuits which have traditionally dismissed complaints of this type. Three district court decisions from the Fifth Circuit are evidence of the trend towards allowing awards for delay damages.

In re China Union Lines, Ltd., was the first of the district court decisions to support the recovery of these damages. In China Union Lines, the petitioner was sued for delay damages caused when petitioner's vessel, the Union Reliance, negligently collided with another vessel in the Houston Ship Channel and blocked marine traffic for two days. While the claimants presented a novel argument of public nuisance, the court determined this argument to be unnecessary. Instead, the court determined that the case merely involved the maritime tort of negligence, thus making the petitioner liable for all damages proximately caused by its negligence. The court stated:

Certainly, the [Union Reliance] owed a duty to all those using or seeking to use the ship channel not to obstruct their passage. Further, it was clearly foreseeable that a negligent collision in the narrow channel would effectively delay all traffic for at least some substantial period of time. When the negligence of the Union Reliance caused the collision, the duty was breached and the foreseeable was made fact. Consequently, such damages as these claimants may prove were incurred because denied normal access to the channel are . . . recoverable.

Without any reference to Robins, the court ordered the parties to reach an agreement as to the amount of economic damages to be paid.

Two other cases within the Fifth Circuit, In re Lyra Shipping Co. and Micmar Motorship Corp. v. Cabaneli Naviera, S.A., also allowed the recovery of economic losses.

In Lyra, the petitioner's vessel was involved in a collision which

48. Id. at 426-27.
49. Id. at 427 (emphasis added).
50. Id.
52. 477 F. Supp. 45 (E.D. La. 1979), vacated, 620 F.2d 298 (5th Cir. 1980) (vacated and remanded without opinion).
obstructed the Inner Harbor Navigational Canal Locks. Two of the claimants, Tex-Barge, Inc., and Marine Tow, Inc., were traversing the canal when the collision occurred. As a result, both claimants were forced to reroute their trip and subsequently sued for damages "consisting of delay and detention of the claimants' vessel . . ., loss of profits, additional fuel and other supplies consumed, additional crew hire paid, and other substantial expenses necessarily incurred."3

The defendant relied on Robins, Kaiser, and Kinsman in an effort to prove that a third party could not recover damages for losses which were both tenuous and attributable to a tort committed on another.8 The claimants, in an attempt to distinguish these cases, maintained that they owned the revenue-producing property, unlike the time-charterer in Robins. The claimants did admit that had their customers brought suit for damages, Robins would indeed have applied, but since this was not the case, the owners of the vessel contended that they were entitled to recover.55

The second argument advanced by the claimants was that through the Rivers and Harbors Appropriation Act of 1899, Congress had placed an affirmative duty on all persons to keep navigable waterways in the United States free from obstructions.56 The regulation prohibits the "creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States,"57 and makes it unlawful "to voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels."58 While not technically providing a theory of recovery, the federal navigation statute implies a civil liability.59 This statutory liability has been extended to cases involving recovery of economic losses and in maritime actions

53. 360 F. Supp. at 1189.
54. Id. at 1190.
55. Id.
56. Id. at 1190-91. 33 U.S.C. §§ 401-15 (1976). More important, yet not mentioned by the court in Lyra, is § 409 which states that, "It shall not be lawful to . . . voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels." Statutes such as these have been used in cases to establish civil liability. See, e.g., Lauritzen v. Chesapeake Bay Bridge & Tunnel Dist., 259 F. Supp. 633, 638 (E.D. Va. 1966), modified, 404 F.2d 1001 (4th Cir. 1968); Gulf Atlantic Transp. Co. v. Becker County Sand & Gravel Co., 122 F. Supp. 13, 17 (E.D.N.C. 1954); Maier v. Publicker Commercial Alcohol Co., 62 F. Supp. 161, 164 (E.D. Pa. 1945), aff'd, 154 F.2d 1020 (3d Cir. 1946).
58. Id. at § 409.
where injured private parties are seeking damages. The court in *Lyra* agreed with the claimants that both the "statutory 'nuisance' doctrine and ordinary maritime tort law" provided a basis for recovery. The court found that a violation of the Rivers and Harbors Appropriation Act made the negligent party liable to the United States and private parties. The claimants stated that under the statutory theory of public nuisance, they were "not merely third parties damaged incidentally by harms inflicted on others, but instead [were] persons directly aggrieved and possessing a cause of action in their own right." The court, after a discussion of the compatibility of *China Union Lines* with the instant case and the public nuisance concepts therein, concluded that Tex-Barge, Inc., and Marine Tow, Inc., could statutorily recover the additional expenses incurred by the delay. Furthermore, the court accepted the contention of the vessel owners that traditional maritime tort principles would also allow recovery. The court recognized, however, that actions for the impairment of contracts with more remote parties would still not be permitted under *Robins*.

In *Micmar Motorship Corp. v. Cabaneli Naviera, S.A.*, the owner of a merchant vessel sued a tanker and her owner for damages due to a delay caused by the tanker's obstruction of the pas-

---


61. 360 F. Supp. at 1190-91. Instrumental in the court's decision was the case of *Lauritzen v. Chesapeake Bay Bridge & Tunnel Dist.*, 259 F. Supp. 633 (E.D. Va. 1966), modified, 404 F.2d 1001 (4th Cir. 1968), which allowed a private party to sue the state when a vessel struck an underwater obstruction which the defendant had allegedly permitted to remain in a navigable channel in violation of the Act.

62. 360 F. Supp. at 1191.

63. *Id.*

64. *Id.* at 1191, 1192. While the claimants had sought damages for such items as delay, detention and lost profits, the court never explicitly denied recovery of these damages. The court did conclude, however, that upon proper proof, claimants could recover such additional expenses as "extra fuel costs, wages, and the like." *Id.* at 1191. Since the court never stated which damages were finally recovered by the claimants, the reader should be curious as to what happened to the claimants' request of delay damages, detention damages, and lost profits, especially since the court later stated that another claimant sought the same type of damages as the first claimants and did not attempt to recover for the impairment of contractual obligations. *Id.* at 1192. Could it be that the first claimants phrased their damages in such a way so as not to appear to involve any negligent interference with contracts?

65. 477 F. Supp. 45 (E.D. La. 1979), vacated, 620 F.2d 298 (5th Cir. 1980) (vacated and remanded without opinion).
sage of the plaintiff’s vessel. The obstruction was caused when the tanker, while heading up the Mississippi River, suffered a complete loss of power and came to rest in front of the plaintiff’s anchored vessel. The plaintiff’s merchant vessel was unable to move into a nearby unloading berth when it became available because those onboard plaintiff’s vessel believed the anchor line of the tanker had crossed those of the merchant vessel.

Relying on Lyra and China Union Lines, the court noted that “under some circumstances a vessel creating an obstruction will be held liable not because another vessel collided with it, but because the other vessel could not pass and suffered damages as a result.” In this case, the plaintiff was seeking only damages due to the delay plus some associated damages. The court agreed that a “foreseeable consequence” of negligence which causes a power failure would be the obstruction of another ship’s passage. Nevertheless, the court denied recovery, holding that the plaintiff had failed to establish that those in charge of the vessel reasonably considered it to be obstructed by defendant’s vessel.

Courts in other circuits have also allowed the recovery of damages due to delay, as in the 1898 case of Piscataqua Navigation Co. v. New York, N.H. & H.R. Co. In Piscataqua, the defendant railroad failed to comply with its statutory duty to operate its drawbridge in a manner so as to accommodate vessels passing through the channel, and as a result, the plaintiffs could not traverse the channel. The plaintiffs argued that this situation created a public nuisance since the public right to navigate had been obstructed. The United States District Court for the District of Massachusetts accepted this theory and concluded that the plaintiffs were entitled to recover damages:

[I]n the present case, the plaintiffs were in the actual use of the way, and were subjected to actual obstruction, and to actual loss additional to that which, by presumption of law, attaches to each

66. Id. at 48.
67. Id. at 47-48.
68. Id. at 48.
69. Id. at 49 (emphasis added).
70. Id. at 51.
71. 89 F. 362 (D. Mass. 1898), modified, 108 F. 92 (1st Cir. 1901). This case was decided before Robins and it could be distinguished on that factor alone. Yet, this case is different in that the cause of action is based solely on the theory of public nuisance. 89 F. at 362-63.
72. Id. at 362.
73. Id. at 363.
74. Id. at 365.
member of the public. This actual loss, proved as a matter of fact, is the gist of the private action.  

Thus, as a result of the *Piscataqua* and *Lyra* decisions, public nuisance appears to be a sound theory on which to base a claim for delay damages.

Negligence principles have also served as a basis for recovery in some courts. In *The Jamaica*, a vessel sank while moored to a pier, thereby preventing another vessel from leaving its slip during the two months it took to remove the ship. The court referred to a duty imposed on navigators to "prevent mischief to others" and concluded that, based on the common law principles of negligence, the defendants were liable to the plaintiffs for all provable damages directly attributable to the sinking of *The Jamaica*.

Finally, in *Union Oil Co. v. Oppen*, the plaintiffs sued for the loss of a business expectancy (lost profits) resulting from an oil spill caused by defendant's negligence. The Ninth Circuit held that an oil company owes a duty to commercial fishermen not to diminish the aquatic life by polluting the water. The fishermen were allowed to recover for a purely economic loss because of the breach of this duty, and the resulting lost profits.

Although the *Oppen* decision is contrary to the rule expressed in *Robins*, an exception to the *Robins* rule has emerged which is premised on the existence of a special relationship between the parties. Thus, recovery for economic losses has been allowed in cases where a telegraph company failed to deliver a message that would have resulted in the plaintiff obtaining a lucrative contract; where a volunteer failed to continue performance on his gratuitous promise to obtain insurance for the plaintiff; where an insurance com-

---

75. *Id.* at 363.
76. 51 F.2d 858 (W.D.N.Y. 1931).
77. *Id.* at 859.
78. *Id.* at 860, 861.
79. 501 F.2d 558 (9th Cir. 1974).
80. *Id.* at 559-60.
81. *Id.* at 570-71. While clearly limiting its decision to the specific facts of the case, the court noted that recovery of purely economic losses are usually allowed only in instances where a special relationship exists between the parties. *Id.* at 565; see W. Prosser, *supra* note 14, § 130, at 952.

In another action, Oppen v. Aetna Ins. Co., 485 F.2d 252 (9th Cir. 1973), which involved the same oil spill as *Union Oil Co. v. Oppen*, the Ninth Circuit noted that the doctrine of public nuisance could be used under California law to recover for an interference with the public's right of navigation if the plaintiff has suffered special injury. Plaintiffs were not allowed to recover in the 1973 case as they failed to prove special damages. *Id.* at 259-60.
82. See W. Prosser, *supra* note 14, § 129, at 935-36; § 130, at 952
pany delayed in acting upon an insurance application; and where a lawyer negligently prepared a will to the detriment of the intended beneficiaries. Furthermore, courts have extended this exception to allow recovery from defendants involved in various professions, businesses, and trades where the alleged economic losses were the result of the negligent performance of tasks associated with the defendant's callings.

The holding in Oppen seems to indicate that the Ninth Circuit found that a special relationship existed between the plaintiff fishermen and the defendant oil company since, "[b]oth . . . conduct their business operations away from land and in, on and under the sea[;] [b]oth must carry on their commercial enterprises in a reasonably prudent manner[;] [and] [n]either should be permitted negligently to inflict commercial injury on the other." The court recognized that the right of a fisherman to recover his portion of a catch was a "special right" similar to that of an employer's right to sue for the loss of services from an employee.

From these relationships the court found a duty on the part of the oil company to refrain from negligent conduct which reasonably and foreseeably could have caused injury to the fisherman's business. The court concluded that the defendant breached his duty and that the fisherman incurred reasonably foreseeable damages which were recoverable.

While allowing recovery for a purely economic loss, the Oppen court did limit the effect of its decision to the specific facts of the case: "[I]t must be understood that our holding in this case does not open the door to claims that may be asserted by those, other than commercial fishermen." The court also noted that it had previously refused to apply Robins in a proceeding where a fisherman had suffered economic loss unaccompanied by physical

83. Id. at § 130, at 952. See 501 F.2d at 565.
84. 501 F.2d at 566. Some of those held liable include "pension consultants, accountants, architects, attorneys, notaries public, test hold drillers, title abstractors, termite inspectors, soil engineers, surveyors, real estate brokers, drawers of checks, directors of corporations, trustees, bailies and public weighers." Id. For a list of cases involving these professions, businesses, and trades see id. at 566 n.9.
85. Id. at 570-71.
86. Id. at 567 (quoting Carbone v. Ursich, the Del Rio, 209 F.2d 178, 182 (9th Cir. 1953)).
87. Id. at 568. In addition, the Ninth Circuit also examined the work of Guido Calabresi in G. CALABRESI, THE COST OF ACCIDENTS (1970), and came to the conclusion that the defendant oil company was the best and cheapest cost avoider—the entity best situated to prevent the problem of oil pollution in this case. 501 F.2d at 569-70.
88. Id. at 570.
injury.\textsuperscript{89}

Other courts, however, have not been reluctant to extend recovery for economic losses to various other situations.\textsuperscript{90} Two examples of the extension of this principle are \textit{In re Canal Barge Co.}\textsuperscript{91} and \textit{Chicago & W.I.R.R. v. Buko Maru},\textsuperscript{92} in which railroads suffered delay damages as a result of a maritime collision.

In \textit{In re Canal Barge Co.}, a towboat collided with a bridge which was leased to and operated by the Terminal Railroad Association of St. Louis (Terminal). As a result of the collision, Terminal was forced to discontinue rail traffic over the bridge, resulting in a loss of revenues and an increase in expenses.\textsuperscript{93} Despite the fact that Terminal did not own the bridge, the United States District Court for the Northern District of Mississippi allowed Terminal to recover its damages in admiralty, as well as the expenses of its customer railroads.\textsuperscript{94}

In \textit{Chicago & W.I.R.R. v. Buko Maru}, the tenant railroads sued for damages caused when a bridge which the railroads had contracted to use was damaged by the defendant's vessel. A federal district court in Illinois noted that there was no reason to deny plaintiffs' recovery merely because they did not own the bridge; there was a contractual right to use the bridge pursuant to federal law.\textsuperscript{95} The court also found that the interruption of the plaintiff's business was a foreseeable consequence of the defendant's negligence. More important, the court concluded that its decision did not conflict with \textit{Robins} because that decision relied heavily on the fact that the defendant did not know of the charter agreement until after the damage occurred.\textsuperscript{96}

Commentators have also advanced the notion that economic losses should be allowed. As Professor Prosser has noted, "No very satisfactory reason has been given for this refusal of a remedy in

\textsuperscript{89} Id. at 567 (citing Carbone, 209 F.2d 178).
\textsuperscript{91} 323 F. Supp. 805 (N.D. Miss. 1971), aff'd, 480 F.2d 11 (5th Cir. 1973), aff'd on re-hearing, 513 F.2d 911 (5th Cir. 1975), cert. denied, 423 U.S. 840 (1975).
\textsuperscript{92} 1974 A.M.C. 2287 (N.D. Ill. 1973).
\textsuperscript{93} 323 F. Supp. at 808, 815.
\textsuperscript{94} Id. at 818, 823.
\textsuperscript{95} 1974 A.M.C. at 2288.
\textsuperscript{96} Id. at 2289. The question the court seemed to find emerging from \textit{Robins} was whether the claimant possessed a legally protected interest that had been damaged. See id.
negligence cases." Professor James, agreeing with Prosser's basic conclusion, urges that there is no reason to deny the recovery of damages for a limited number of plaintiffs. Thus, there appears to be support from cases and commentators upon which courts can rely in order to grant the recovery of purely economic losses. The sole remaining question is whether the supporting arguments can be adapted to allow for the recovery of delay damages.

IV. The Well-Plea Complaint

The continuing vitality of decisions which deny recovery to persons seeking delay damages creates a precarious situation for an attorney who represents such a claimant. Some direction can, however, be provided by the group of cases allowing recovery which may increase the possibility of receiving these economic losses in an admiralty proceeding. The initial step in obtaining a favorable judgment is the drafting of a complaint which conforms with one of the successful cases; thus the call for a "well-plead complaint."

In developing the complaint, attention should be paid to the distinguishing elements between the two divergent groups of cases: the cause of action, the vocabulary, and the scope of liability.

Many successful actions have been based upon either a traditional action for negligence or an action in public nuisance. Causes of action which claim a negligent interference with a contract have traditionally been dismissed by the courts. When pleading a cause of action in negligence, the emphasis should be on the notions of duty, breach of duty, proximate cause, and damages, thereby keeping the argument in its simplest form. This analysis was employed by the court in Kinsman after it concluded that the doctrine of negligent interference with a contract was inapplicable. There is one caveat when employing the Kinsman analysis: the damages must be plead so they are not deemed to be too remote or tenuous.

Another theory that will enhance the chances of recovery is an action in public nuisance. This theory may be preferable to the traditional negligence action because it avoids the use of the word "negligence," thus making it difficult for the court to construe the case as involving the negligent interference of a contract. The Lyra

100. Id. at 824, 825.
and Piscataqua decisions are examples of how effective this argument can be.\footnote{101}{Lyra, 360 F. Supp. 1188; Piscataqua, 89 F. 362. See 88 Harv. L. Rev., supra note 90, at 451:}

In addition, the practitioner's choice of vocabulary appears to be as important as the cause of action. Avoiding the use of the word "negligence," especially in a context which might allow the action to be related to the negligent interference of a contract, will diminish the possibility of the court employing the non-recovery rationale of Robins. The request for damages should also be worded carefully. If damages are plead in a manner similar to Robins, then a similar result may be expected—no recovery for the losses.

An attorney should also be cognizant that many courts have denied recovery of purely economic losses when such recovery would expose the defendant to unlimited liability.\footnote{102}{James, supra note 10, at 47-48.} Therefore, the number of plaintiffs claiming damages in the action should be kept to a minimum. Most of the cases which allowed recovery involved a limited number of plaintiffs who could recover because of the defendant's negligence.\footnote{103}{See, e.g., Micmar Motorship Corp. v. Cabaneli Naviera, S.A., 477 F. Supp. 45 (E.D. La. 1979); In re Lyra Shipping Co., 360 F. Supp. 1188 (E.D. La. 1973); Chicago & W.I.R.R. v. Buko Maru, 1974 A.M.C. 2287 (N.D. Ill. 1973); In re Canal Barge Co., 323 F. Supp. 805 (N.D. Miss. 1971), aff'd, 480 F.2d 11 (1973), aff'd on rehearing, 513 F.2d 911 (5th Cir. 1975), cert. denied, 423 U.S. 840 (1975); The Jamaica, 51 F.2d 858 (W.D.N.Y. 1931); Piscataqua Nav. Co. v. New York, N.H. & H.R. Co., 89 F. 362 (D. Mass. 1898), modified, 108 F. 92 (1st Cir. 1901). See also General Foods Corp. v. United States, 448 F. Supp. at 116 (D. Md. 1978), where the court, in distinguishing China Union Lines and Lyra, noted that neither case imposed far-reaching liability.} Thus, by reducing the number of potential plaintiffs the court is prevented from using the unlimited liability argument to the detriment of a client.

The abovementioned suggestions demonstrate the problems which confront an attorney because of the continued existence of the Robins rule of non-recovery. Although some courts have allowed recovery of economic losses, and commentators have called for the demise of the Robins rule, the Fifth Circuit has been persistent in its refusal to allow any claim which appears to fit into the

\[\text{Footnotes omitted.}\]
Robins rationale.\textsuperscript{104}

There is a possibility that the standard for recovery of economic loss due to delay will be relaxed and the need to play this game of "hide and seek" in many courts will be eliminated in the future. As stated by one commentator, "Admittedly there is a point beyond which liability should not be carried, but that point is located best by a balancing of social interests, not by a flat rule of nonliability."\textsuperscript{105} A change in the law is beginning to evolve which is evidenced by the number of exceptions that already exist to the rule of nonliability.\textsuperscript{106}

The Second Circuit in \textit{Kinsman}, while denying recovery, expressed a strong disapproval of the Robins rationale when it stated:

[W]e hesitate to accept the "negligent interference with contract" doctrine in the absence of satisfactory reasons for differentiating contractual rights from other interests which the law protects. The argument [is] frequently heard, that to allow recovery in such instances would impose a penalty far out of proportion to the defendant's fault or open the field to collusive claims and increased litigation . . . . Here, as elsewhere, the answer must be that courts have some expertise in performing their almost daily task of distinguishing the honest from the collusive or fraudulent claim. And, "[i]f the result is out of all proportion to the defendant's fault, it can be no less out of proportion to the plaintiff's entire innocence." . . . Moreover, several cases often cited as illustrations of the application of the "negligent interference with contract" doctrine have been convincingly explained in terms of other, more common tort principles . . . . Indeed, Professors Harper and James suggest that the application of the doctrine is wholly artificial in most instances.\textsuperscript{107}

The argument that the defendants will be exposed to unlimited liability is a concern of the courts in any action for the recovery of

\textsuperscript{104} See Dick Meyers, 577 F.2d at 1024, 1025 n.4. The Fifth Circuit did note, however, that:

[t]he law has traditionally been reluctant to recognize claims based solely on harm to the interest in contractual relations or business expectancy . . . . While the wisdom of that traditional reluctance is open to debate, the rule . . . . is too well-settled to be overturned by a panel of this court.

\textit{Id.} at 1025 (footnotes omitted) (emphasis added).

\textsuperscript{105} Note, supra note 12, at 681, 693-94. See, e.g., James, supra note 10, at 55-58; 88 Harv. L. Rev., supra note 90, at 450-53.

\textsuperscript{106} See note 84 supra and accompanying text.

\textsuperscript{107} 388 F.2d at 823-24 (citations omitted).
pure economic loss. This concern should be diminished in admiralty actions since Congress has provided that vessel owners can limit their liability to the value of the vessel.\textsuperscript{108} This appears to be a persuasive factor for allowing recovery of pure economic loss in admiralty before allowing it in other areas.

Throughout the cases discussed, many courts seemed to prefer a traditional test for negligence or public nuisance, rather than the strict rule of nonliability laid out in \textit{Robins}.\textsuperscript{109} In fact, the court in \textit{Buko Maru} concluded that a decision which had relied on \textit{Robins} was unsound "in view of the rather dramatic advances in tort liability which have occurred since Justice [Holmes] found no liability for the negligent interference with unforeseen contractual relationships."\textsuperscript{110} Thus, as the trend continues and more exceptions to the rule of nonliability arise, the impact of \textit{Robins} should continue to weaken until the admiralty courts resort to a case-by-case analysis of suits for delay damages.

V. Conclusion

In light of the two divergent groups of cases, obvious obstacles confront the practitioner. Yet, the decisions of \textit{China Union Lines}, \textit{Lyra}, and other cases allowing recovery demonstrate that these obstacles are not insurmountable. These decisions must be examined in light of the \textit{Robins} rule of nonliability, which is still followed by many courts. For this reason, the need for artful pleading has developed—the practitioner must strive to remove his or her case from the context of \textit{Robins} and place it in "safe harbor" by the use of arguments from cases which have allowed recovery. The cases which are contrary to \textit{Robins} exemplify the unwillingness of the courts to allow a rule of nonliability to endure when it deserves little merit. There still remains, however, the precedent for refusing delay damages, and until the Supreme Court limits the scope of \textit{Robins}, word games will have to continue if a shipper is to be rightfully compensated for a very real and undeserved injury.


\textsuperscript{110} 1974 A.M.C. at 2289-90.